



Issue Date: 13 February 2020

CASE NO.: 2017-SOX-00030
OSHA CASE No.: 2-4173-16-190

In the Matter of:

CHRISTOPHER GARVEY,
Complainant

v.

MORGAN STANLEY,
Respondent

ORDER DISMISSING COMPLAINT

This matter arises from a claim under Section 806, the anti-retaliation provision of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (“SOX Act”), as amended, 18 U.S.C. § 1514A (“Section 806”), and the implementing regulations at 29 C.F.R. Part 1980. In accordance with 29 C.F.R. § 1980.107(a), all proceedings must be held in a manner consistent with the rules of practice and procedure set forth at 29 C.F.R. Part 18.

On April 17, 2017, the Office of Administrative Law Judges (“OALJ”) docketed this case. On August 15, 2019, the case was reassigned to me, and I issued a Notice of Reassignment on October 8, 2019.

On November 21, 2019, Morgan Stanley (“Respondent”) filed its Motion for Dispositive Action Pursuant to New Controlling Authority (“Motion”). In the Motion, the Respondent argued that the Administrative Review Board’s (“ARB”) recent decisions in *Hu v. PTC, Inc.*, ARB Case No. 2017-0068, ALJ Case No. 2017-SOX-00019 (Sept. 18, 2019) and *Perez v. Citigroup, Inc.*, ARB Case No. 2017-0031, ALJ Case No. 2015-SOX-00014 (Sept. 30, 2019) mandate the dismissal of Christopher Garvey’s (“the Complainant”) claims against themselves as a matter of law. (Motion at pgs. 2-10). The Respondent argued that the ARB holdings in *Hu* and *Perez* that Section 806 cannot be applied on an extraterritorial basis prevented the Complainant from filing this claim. (*Id.* at 2). Specifically, the Respondent argued that because the Complainant’s permanent or principal worksite was outside of the United States during the time he alleges the Section 806 violations took place, any application of Section 806 would be extraterritorial and therefore, impermissible. (*Id.* at 7-8).

On December 11, 2019, the Complainant filed his Response to Respondent Morgan Stanley's Motion for Dispositive Action ("Response"). In the Response, the Complainant argued that "*Hu* and *Perez* did not change the law, much less so in the way that Morgan Stanley's submissions seek to convince the Court." (Response at pg. 3). Further, the Complainant argued that the ARB's *Hu* and *Perez* decisions instead concluded that Section 806 "was not intended to have an extra-territorial effect but did not decide that Section 806 cannot apply domestically to an employee located outside of the United States." (*Id.*) To support this conclusion, the Complainant cited that the ARB's decision in *Hu* specifically approved the decision in *Blanchard* regarding a domestic application of Section 806 to an employee located on a U.S. military base in Afghanistan. (*Id.*)¹

In addition, the Complainant argued that various "contextually relevant factors, activity and effects" conferred domestic application to his Section 806 claims. (*Id.* at pgs. 4-15). These factors, activities, and effects included, *inter alia*, that the Respondent has its headquarters in New York, that his workstation in Hong Kong was incidental to the work he performed, that the decisions regarding the response to his protected activity were made in New York, that the Respondent violated U.S. law, that the Respondent's activity harmed U.S. investors and shareholders, that he is a U.S. citizen, and that the enforcement of his rights under Section 806 would not conflict with any foreign law or proceeding.² *Id.*

On December 12, 2019, the Respondent filed its Motion for Leave to Reply in Support of its Motion for Dispositive Action Pursuant to New Controlling Authority ("Motion for Leave"). On December 17, 2019, I issued an order granting Respondent's Motion for Leave ("December 17 Order") and additionally ordered the Respondent to produce:

all employment contracts that existed at any time between Respondent and/or any of its subsidiaries and the Complainant and any other documents related to and/or describing the terms and conditions of Complainant's employment with Respondent and/or any of its subsidiaries, regardless of whether these contracts or documents have already been submitted in this matter.

¹ The Complainant mischaracterizes the ARB's treatment of *Blanchard v. Exelis Sys. Corp.*, ARB No. 15-031, ALJ No. 2014-SOX-00020 (ARB Aug. 26, 2017) in *Hu*. In *Hu*, the ARB quoted with approval the concurring opinion of Chief Judge Igasaki in *Blanchard* which stated that, "a U.S. base [] is [a] U.S. territory for purposes of the law." *Hu*, slip op. at 8. The *Hu* court agreed that *Blanchard* was properly understood as a domestic application of the SOX Act because, although the permanent or principal worksite was technically in Afghanistan, the U.S. military base was considered a U.S. territory under the law, and therefore, Section 806 applied domestically to the complainant's claims. This guidance illustrates how Section 806 could have domestic application in U.S. territories under the law, but outside of the United States. However, this approval of Judge Igasaki's reasoning does not conflict with the ARB's general rule that when considering whether Section 806 applies, the key factor to consider is the complainant's permanent or principal worksite.

² The Complainant also argued that the Occupational Safety and Health Administration ("OSHA") "already opined on the question of extraterritoriality in this case . . . and Morgan Stanley chose not to contest OSHA's determination that both the Complainant and the Respondent are covered by SOX in this matter. . . [and therefore,] the Department of Labor has already issued a binding decision on this matter that is not subject to further challenge." *Id.* at 15. However, Respondent has effectively preserved that matter for this appeal and I find the Complainant's argument on this issue unpersuasive.

(December 17 Order).

On January 2, 2020, the Respondent filed its Reply in Support of its Motion for Dispositive Action pursuant to New and Controlling Authority (“Reply”). Respondent provided 43 exhibits in response to the Court’s December 17 Order, including employment contracts and related documents, performance reviews and compensation documents, policies and handbooks, and organizational charts. *Id.* at pgs. 12-19 and Exhibits 1-43. On January 7, 2020, the Complainant filed a response to Respondent’s Motion for Leave. On January 23, 2020, the Complainant filed his Motion for Leave to File a Surreply Brief in Response to Morgan Stanley’s Reply in Support of Its Motion for Dispositive Action Pursuant to New Controlling Authority and in Response to Morgan Stanley’s Response to the Court’s Order Compelling Production of Certain Materials and Documents. Thereafter both the Respondent and the Complainant filed additional responses.

After reviewing and considering all of the relevant evidence and law, the following decision and order is issued.

RELEVANT FACTS

On December 6, 2006, the Complainant began working for Morgan Stanley Japan Group Co., Ltd., a foreign subsidiary of the Respondent, in Tokyo, Japan. The Complainant continued to work for Morgan Stanley Japan Group Co., Ltd. in Tokyo until the Fukushima earthquake and nuclear disaster in 2011. After the disaster, the Complainant transferred to another foreign subsidiary of the Respondent, Morgan Stanley Asia Limited, in Hong Kong. Hong Kong was the Complainant’s permanent or principal worksite from his transfer in 2011 until he tendered his resignation on February 5, 2016. The Complainant worked in Hong Kong during the time that he alleges that the Respondent took retaliatory, adverse employment actions against him in response to his alleged protected activity under the SOX Act.

LEGAL STANDARD

Under this Court’s Rules of Procedure, any party may move for disposition of the pending proceeding. 29 C.F.R. § 18.70(a). If the judge determines at any time that jurisdiction is lacking, the judge must dismiss the matter. *Id.*

DISCUSSION

The uncontroverted evidence of record shows that the Complainant was a Hong Kong-based employee of a foreign subsidiary of the Respondent, who worked entirely outside of the United States. These facts align largely with the facts of the *Hu* decision. *Hu* was a Shanghai-based employee of a Chinese subsidiary of a U.S. company. *Hu*, ARB Case No. 2017-0068 slip op. at 4. Under these facts, Administrative Law Judge Daniel F. Solomon found that *Hu*’s claim was extraterritorial in nature and therefore, dismissed the case for lack of jurisdiction. *Id.* at 11. On appeal, the ARB affirmed Judge Solomon’s decision and reaffirmed that Section 806 does

not apply extraterritorially.³

The primary focus of Section 806 of the SOX Act is the terms and conditions of employment. *Hu*, ARB Case No. 2017-0068 slip. op. at 10. Accordingly, the location of the employee's permanent or principal worksite is the key factor to consider when deciding whether a claim is a domestic or extraterritorial application of Section 806. *Id.* at 11. Other factors, such as the employee's U.S. citizenship or the location of other conduct, even potentially illegal conduct that could tangentially affect the United States, its laws, or other individuals located in the United States, is "less critical, if not irrelevant" to an analysis of whether Section 806 applies. *Id.*

The Complainant's permanent or principal worksite was in Hong Kong. Since Section 806 is not extraterritorial in application, it does not apply to the Complainant's claims. Therefore, this Court does not have jurisdiction over the Complainant's claims.

ORDER

In light of the foregoing discussion, I **HEREBY GRANT** Respondent's Motion for Dispositive Action Pursuant to New Controlling Authority. Accordingly, the complaint is **HEREBY DISMISSED**.

SO ORDERED.

FRANCINE L. APPLEWHITE
Administrative Law Judge
Washington, D.C.

³ *Hu*, slip op. at 11. The *Hu* decision discussed the issue of whether Section 806 applies extraterritorially at length. The ARB included a thorough discussion of the *Blanchard*, ARB No. 15-031 decision. In *Hu*, the ARB took great effort to state the errors of the *Blanchard* decision in footnote 9. The Complainant's argument about why this Court should find domestic application of Section 806 in this case included factors the ARB found relevant in *Blanchard* and later disavowed in *Hu*.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (“EFSR”) system. The EFSR for electronic filing (“eFile”) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (“eService”), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original

and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).