



In the Matter of:

ANTONIO JOSE JIMENEZ  
PEREZ,

COMPLAINANT,

v.

CITIGROUP, INC.,

RESPONDENT.

ARB CASE NO. 2017-0031

ALJ CASE NO. 2015-SOX-00014

DATE: **SEP 30 2019**

Appearances:

*For the Complainant:*

Kathleen M. Kunder, Esq.; Amit Shertzer, Esq.; *Fox Horan & Camerini LLP*; New York, New York

*For the Respondent:*

A. Michael Weber, Esq.; Meredith Kaufman, Esq.; *Little Mendelson, P.C.*; New York, New York

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Thomas H. Burrell, *Administrative Appeals Judges*.

### FINAL DECISION AND ORDER

PER CURIAM. This case arises under the whistleblower provision of the Sarbanes-Oxley Act of 2002 (Section 806 or SOX), 18 U.S.C. § 1514A (2010), as amended, and its implementing regulations at 29 C.F.R. Part 1980 (2019). At the time in question, Antonio Perez was an employee of Servicios Ejectivos, a foreign subsidiary of Citigroup, Inc., a publicly traded U.S. company. Perez filed a complaint alleging that his employer began taking adverse actions against him in violation of the whistleblower provisions of Section 806 because he made SOX-

protected reports. Citigroup, Inc., filed a motion for summary decision in which it argued that the complaint should be dismissed because it presents an impermissible extraterritorial application of Section 806.<sup>1</sup> The Administrative Law Judge (ALJ) granted the motion, concluding that the complaint required an extraterritorial application of Section 806 of the SOX such that it had to be dismissed. We affirm.

## BACKGROUND<sup>2</sup>

Complainant was an employee of Servicios Ejectivos, which is a subsidiary of Respondent and a company incorporated in Mexico. D. & O. at 32. Respondent is a Delaware corporation headquartered in New York City, and is registered under Section 12 of the Securities and Exchange Act of 1934, 15 U.S.C. 78l.

It is undisputed that Complainant worked entirely in Mexico. *Id.* at 44. Complainant asserts that although he worked for and was paid by Servicios Ejectivos, he reported SOX-protected activities in May to July 2014, including a report concerning large amounts of money going through a “concentration account” that Banamex USA, a Servicios Ejectivos parent company (and also a subsidiary of Respondent), maintained in the U.S. and managed in U.S. dollars. *Id.* at 33. He also asserts that Respondent’s U.S. shareholders were affected by the activity he reported. *Id.* at 31.

On August 6, 2014, Complainant met with his supervisor in Mexico City to discuss the outstanding balance on Complainant’s corporate credit card. *Id.* at 35. In exchange for severance, Complainant resigned from his position. *Id.* He signed a settlement agreement dated August 6, 2014. *Id.*

Complainant filed a SOX complaint with the Occupational Safety and Health Administration (OSHA) on or about January 20, 2015. OSHA dismissed the case on March 9, 2015, because there was no protected activity as the adverse action took place in Mexico and there was no indication that a U.S. parent company was

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<sup>1</sup> Respondent also argued in its summary decision motion that it was not a proper respondent because it was not Complainant’s employer and took no adverse action against him and that Complainant was unable to establish a prima facie case. D. & O. at 22.

<sup>2</sup> We restate facts taken from the ALJ’s Decision and Order. We make no independent findings of fact on appeal.

involved. Complainant filed objections on or about April 15, 2015, with the Office of Administrative Law Judges.

Before the assigned ALJ, Respondent filed a motion for summary decision asserting that SOX does not apply to employees working outside of the U.S., citing *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247 (2010). Complainant filed an opposition, Respondent filed a reply, and Complainant filed a surreply brief.

On March 8, 2017, the ALJ granted Respondent's motion for summary decision. The ALJ noted that the uncontroverted evidence of record was that Complainant was a Mexico-based employee of a Mexican subsidiary of Respondent, and worked entirely in Mexico. Complainant was interviewed, hired, and effectively terminated in Mexico, and his job included no business travel to the United States. D. & O. at 47, 48. Further, the protected activity and adverse action all occurred in Mexico. The ALJ reasoned that although the alleged fraudulent misconduct Complainant reported involved an account located in the U.S., this fact did not confer jurisdiction or authorize application of Section 806 of SOX to Complainant's case. *Id.* at 49. Thus, the ALJ dismissed the complaint. Complainant appealed the ALJ's decision to the Administrative Review Board (ARB or Board).

### JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's decision under Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019); 29 C.F.R. Part 1980. The ARB reviews an ALJ's grant of summary decision de novo. *Siemaszko v. First Energy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012). Under 29 C.F.R. § 18.72 (2019), an ALJ may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that based on the law a party is entitled to summary decision.

To avoid summary decision, the non-moving party must rebut the motion and evidence presented by the moving party with contrary evidence sufficient to create a genuine issue of material fact. That rebuttal, or answer, "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (citing Federal Rule of Civil Procedure 56(e)). In assessing this, or any,

summary decision, both the ARB and the ALJ must view the evidence, along with all reasonable inferences, in the light most favorable to the non-moving party.

## DISCUSSION

Section 806's employee-protection provision generally prohibits covered employers and individuals from retaliating against employees because they provide information or assist in investigations related to the categories listed in the SOX whistleblower statute.

To state a claim under Section 806, a complainant must allege that his employer took an unfavorable action against him and that protected activity by the Complainant was a contributing factor in the adverse action. *See Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 10-060, ALJ No. 2010-SOX-003, slip op. at 5 (ARB Nov. 9, 2011). Under 18 U.S.C. § 1514A(b)(2)(C), SOX complaints are decided using the legal burdens of proof set forth in the employee-protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121.

It is undisputed that Complainant is a foreign citizen who worked for Servicios Ejectivos during all relevant periods in Mexico. It is likewise undisputed that Servicios Ejectivos is a foreign subsidiary of Respondent, a U.S. company registered under Section 12 of the Securities Exchange Act of 1934. Complainant alleges that he reported misconduct to his Mexican supervisors, and that the wrongdoing he reported concerned a U.S. account and fraud against Respondent's shareholders. *Id.* at 31, 42.

We have recently held that Section 806 is not extraterritorial in *Hu v. PTC, Inc.*, ARB No. 2017-0068, ALJ No. 2017-SOX-00019, slip op. at 7-9 (ARB Sept. 18, 2019). In *Hu*, we concluded that the primary focus of Section 806 was to deter and punish retaliation against an employee's terms conditions and privileges of employment. This interpretation is consonant with the actual language of Section 806, although we recognize that SOX, as an entire legislative enactment, has a number of goals. It is clear that an attempt to apply the terms and remedies of Section 806 outside the United States could lead to frequent conflict with the laws of foreign nations and potentially inconsistent results for employees. Therefore, to allow the adjudication of the complaint before us, it must be a domestic application

of Section 806.<sup>3</sup> *Id.* at 10. When deciding the question, we have held that “the location of the employee’s permanent or principal worksite is the key factor to consider.” *Id.*

Applying this analytical framework to this Section 806 complaint, we conclude that it does not represent a domestic application of Section 806. It is undisputed that Complainant’s only place of work was Mexico and never the United States. The only domestic contacts in this matter are that the fraud Complainant allegedly reported concerned an account in the U.S. and that U.S. shareholders were potentially affected by Complainant’s allegations. These facts, without more, do not create a domestic application of Section 806.

#### CONCLUSION

For the reasons explained above, we **AFFIRM** the ALJ’s decision as correct. Accordingly, the complaint is hereby **DENIED**.

**SO ORDERED.**

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<sup>3</sup> The two-step framework in *Morrison* requires analysis of (1) whether the statute at issue extends extraterritorially and, if not, (2) whether the activity comprising the focus of the statute occurred within the United States or outside of it. If the activity occurred within the U.S., then there is a permissible domestic application of the statute. If the activity occurred outside the U.S., then there is an impermissible extraterritorial application and the complaint must be dismissed. *Hu*, ARB No. 2017-0068, slip op. at 6, 10; *Morrison*, 561 U.S. 266-70.