

ARB: SOX Whistleblower Provision Does Not Apply Extraterritorially

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In a pair of recently issued decisions, the Department of Labor's Administrative Review Board (ARB) held that Sarbanes Oxley's anti-retaliation provision does not apply extraterritorially. [Hu v. PTC, Inc.](#), ARB Case No. 2017-0068 (Sept. 18, 2019); [Perez v. Citigroup, Inc.](#), ARB Case No. 2017-0031 (Sept. 30, 2019).

Hu Decision

In *Hu*, the complainant worked entirely in China for a foreign subsidiary of a U.S. company. He claimed that his employment was terminated in violation of SOX after he reported alleged misconduct relating to the U.S. parent company's financial statements. The sole issue before the ARB was whether SOX's anti-retaliation provision (Section 806) covered the complainant's claim of retaliatory discharge in China. The ARB held that it did not, following the two-step framework for analyzing extraterritoriality set forth by the Supreme Court in *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010).

At the first step of the *Morrison* analysis—assessing whether the statute at issue extends beyond the U.S.—the ARB held that Section 806 is not extraterritorial, observing that there is no indication that Congress intended for it to apply extraterritorially.

At the second step of the *Morrison* analysis—evaluating the primary focus of the statute and where the activity comprising that focus occurred—the ARB held that Section 806's primary focus is on retaliatory employment actions. The ARB reasoned that Section 806's focus on the terms and conditions of employment is distinct from the overarching purpose of SOX as a whole (to protect markets) and, therefore, the location of the employee's principal workplace is the key factor to consider when deciding whether the employee is seeking to invoke Section 806 extraterritorially. The ARB rejected the complainant's argument that his Section 806 claim was domestic because his reports allegedly affected the U.S. securities market and because the termination decision may have been made in the U.S. Ultimately, the Board affirmed the dismissal of the whistleblower claim because the complainant's principal place of work was in China.

Perez Decision

In *Perez*, the complainant worked solely in Mexico for a subsidiary of a U.S. corporation. He alleged that he was retaliated against for reporting concerns about activity in a U.S.-based account. Relying heavily on its decision in *Hu*, the ARB again held that Section 806 did not apply extraterritorially and affirmed the ALJ's dismissal of the whistleblower claim because the complainant exclusively worked in Mexico, and not the U.S.

Implications

Prior to the *Hu* and *Perez* decisions, the ARB in *Blanchard v. Exelis Systems Corp./Vectrus Systems Corp.*, ARB Case No. 15-031 (August 29, 2017) (which we previously blogged about [here](#)) signaled in *dicta* that Section 806 could potentially apply extraterritorially. The *Hu* and *Perez* decisions seemingly close that door and harmonize the Board's position with numerous court decisions (see [here](#) and [here](#)) rejecting the extraterritorial application of SOX's anti-retaliation provision.

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