



Issue Date: 11 January 2013

Case Number: 2012-AIR-00020

In the Matter of:

**JOSE DOS SANTOS,
Complainant,**

v.

**DELTA AIRLINES, INC.,
Respondent.**

Before: Stephen L. Purcell
Chief Administrative Law Judge

ORDER DENYING RESPONDENT’S MOTION TO DIMISS

This case arises under the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”), 49 U.S.C. §42121 (“Section 42121”), and applicable regulations issued at 29 C.F.R. Part 1979 (2003).

On July 13, 2012, Jose Dos Santos (“Dos Santos” or “Complainant”), a U.S. citizen working for Delta Airlines (“Delta” or “Respondent”) as an aircraft maintenance technician at Charles de Gaulle (“CDG”) airport in Paris, France, filed his original whistleblower complaint with the Occupational Safety and Health Administration (“OSHA”) under AIR21. Complainant subsequently filed an amended complaint on August 2, 2012, to “amend and clarify the claims described in his original complaint.” Complainant alleged that he suffered a hostile work environment and was denied numerous promotions in retaliation for reporting to his employer and the Federal Aviation Administration (“FAA”) that his supervisor had falsified FAA aircraft safety clearance documents. OSHA dismissed the complaint on the grounds that AIR21’s whistleblower provision does not apply extraterritorially, and that enforcement of Dos Santos’ complaint would require impermissible extraterritorial application of the statute.

On August 22, 2012, Complainant filed timely objections to OSHA’s dismissal of his complaint and requested a hearing before an administrative law judge. On August 27, 2012, I issued a Notice of Docketing and Order to Meet and Confer. The parties thereafter agreed that

Respondent would first file a motion to dismiss the complaint as extraterritorial and unenforceable under the statute, and Complainant would follow with his reply in opposition forty-five days later. Respondent filed its Motion to Dismiss (“Resp. Mot.”) on November 5, 2012, and Complainant filed his Reply in Opposition to Respondent’s Motion to Dismiss (“Comp. Opp.”) on December 17, 2012.

Respondent’s Motion to Dismiss is now before me. For the reasons set forth below, I find that Respondent’s Motion should be denied.

FACTS ALLEGED

The following facts are derived from Complainant’s original complaint to OSHA (“OC”), his amended complaint to OSHA (“AC”), and the Objections (“Obj.”) that he filed in this case. For purposes of ruling on this Motion to Dismiss, I will accept as true all of the facts alleged by Complainant, and draw all reasonable inferences in his favor.

RELATIONSHIP OF THE PARTIES

Complainant, a U.S. citizen, was hired by Delta Airlines on September 14, 1998 as a Certified Aircraft Maintenance Technician (“AMT”). OC, ¶ 2; Obj., ¶ A(2), A(4). In July 2006, Complainant accepted an AMT position at CDG, and began work at CDG in September 2006 as the “Technician in Charge” (“TIC”). OC, ¶¶ 5-6; Obj., ¶ A.(1). Complainant’s primary supervisor at CDG was Greg Crandall, the Line Maintenance Manager. OC, ¶ 8. Mr. Crandall employed a provocative management style, as he would intentionally “pit the mechanics against each other” in order to assert greater control over his subordinates. OC, ¶ 9. For example, upon Complainant’s arrival at CDG, Mr. Crandall told his fellow mechanics that Complainant had accepted the transfer to CDG because he had ambitions of becoming a manager, and if Complainant did ascend to the managerial ranks, he would fire them. OC, ¶ 10.

ALLEGED FAA VIOLATIONS AND PROTECTED ACTIVITY

In late August 2010, Complainant overheard colleagues discussing their belief that Mr. Crandall had falsified FAA documents in order to release aircraft as airworthy without a proper inspection. OC, ¶ 11. Complainant harbored his own suspicions that AMT clearances were being falsified because, although CDG’s AMT team was understaffed, planes always managed to be cleared and released on schedule. OC, ¶ 15. After reviewing pages of aircraft logbooks that Complainant’s colleagues had obtained, Complainant found that Mr. Crandall had signed-off on an Airbus A330 on July 31, 2010, that – according to the ID number entered on the extended operations pre-departure check (“ETOPS PDC”) and Airworthiness Release – was cleared by AMT Manuel Da Silva. OC, ¶¶ 12-13. However, Complainant knew that Mr. Da Silva had been on vacation on July 31, 2010, and therefore could not have checked and cleared the plane as the

form indicated. OC, ¶ 13. Mr. Crandall is not a certified AMT, and therefore is not qualified to inspect, repair or clear aircraft for operation on his own. OC, ¶ 14. Complainant believes that the July 31, 2010 log entry proves that Mr. Crandall falsified FAA documents in order to release aircraft without FAA-mandated safety checks, thereby violating FAA regulations.¹ AC, 2-3.

Complainant first reported this misconduct to his direct supervisor, Daniel Garcia, who relayed his allegations to John O'Donnell, Delta's Regional Manager for Europe. OC, ¶ 16. When no corrective action followed, Complainant emailed the FAA's Aviation Safety Hotline – which is operated in the United States – on August 29, 2010. OC, ¶ 19. Also on August 29, 2010, Complainant called Delta's Safety and Compliance Department – also located in the United States – and left an anonymous message reporting Mr. Crandall's activities. OC, ¶ 20. After two weeks passed and still no remedial action was taken against Mr. Crandall, Complainant sent an anonymous email to Mr. O'Donnell on September 14, 2010, which complained about Mr. Crandall's behavior. OC, ¶ 21. Although sent anonymously, Mr. O'Donnell asked Complainant the next day if he had authored the message, and while he did not admit to sending the email, Complainant is certain that Mr. O'Donnell knew that he was the source of the complaint. OC, ¶ 22.

HARASSMENT AND DENIED APPLICATIONS FOR PROMOTION

Complainant alleges that Mr. Crandall knew that Complainant was the source of the complaints, and as a result, Mr. Crandall harassed him and subjected him to a hostile work environment. OC, ¶ 22. For example, while Mr. Crandall was on leave pending Delta's investigation into his conduct, Mr. Crandall removed Complainant from the company email list to harass him, and Complainant reported this action to Mr. O'Donnell on September 27, 2010. OC, ¶ 29. Mr. Crandall was forced to resign from his position at the end of September 2010, but before his departure, he threatened Complainant, promising Complainant that there would be retaliation for reporting his conduct to management. OC, ¶¶ 31-32.

Additionally, Complainant alleges that he was passed over for numerous promotional opportunities because he reported Mr. Crandall's fraudulent behavior. AC, 1. In September 2010, for example, Complainant applied for a managerial position in Brazil for which Complainant felt he was uniquely qualified. OC, ¶ 24. Although he was the Regional Manager for Europe, Respondent gave Mr. O'Donnell final decision-making authority for filling the Brazil position, and Mr. O'Donnell ultimately did not choose Complainant for the position. OC, ¶ 24. Complainant's failed application for the Brazil position is one of eighteen unsuccessful

¹ Specifically, Complainant's amended complaint asserts that Mr. Crandall violated 14 C.F.R. § 135.429(a), which requires that air craft be inspected by personnel that are "appropriately certified, properly trained, qualified, and authorized to do so," and 14 C.F.R. §43.12(a)(1), which prohibits falsification of FAA compliance records or reports. AC, 2-3. Additionally, Mr. Crandall's violations put Delta Airlines in violation of 14 C.F.R §135.413(b)(2) by operating aircraft without proper certificates of airworthiness.

applications for promotion that Complainant submitted after reporting Mr. Crandall to Delta and the FAA, most of which were for managerial positions located in the United States. OC, ¶ 58.

On October 26, 2010, Complainant emailed Tony Charaf, Delta's President of Technical Operations, to complain that he had suffered retaliation after reporting Mr. Crandall's misconduct, and specifically mentioned that he had been passed over for the Brazil job. Additionally, he expressed concern that Mr. O'Donnell was helping Mr. Crandall obtain a new position with an aircraft maintenance contract company that routinely did business with Delta. OC, ¶¶ 33-35.

HARASSMENT BY NEW SUPERVISOR AND COMPLAINT TO HUMAN RESOURCES

In early 2011, Fabrice VanClef took over Mr. Crandall's former position as CDG's Line Maintenance Manager. OC, ¶ 36. Upon arriving at CDG, Mr. VanClef interviewed several of the AMTs at CDG and asked each of them for their opinion of Complainant. OC, ¶ 37. Mr. VanClef also removed Dos Santos from his responsibilities as the TIC. OC, ¶ 38. Complainant was eventually reassigned as the TIC in July 2011, but Mr. VanClef continued to suggest to Complainant that he apply for jobs away from CDG. OC, ¶ 40.

On March 19, 2011, Complainant emailed Delta's Human Resources Office ("HR") to complain of the retaliation that he had suffered since reporting Mr. Crandall's fraudulent actions, but Delta's HR representative (Rosa Maria Azanedolopez) told Complainant that he was just being paranoid. OC, ¶¶ 40, 43.

REPORTING COWORKER MISCONDUCT AND SUBSEQUENT HARASSMENT

While serving as the TIC on July 2, 2011, Dos Santos assigned a fellow AMT, Clement Audeguy, to shut down the Auxiliary Power Unit ("APU") on an aircraft, but Mr. Audeguy refused. OC, ¶ 44. The supervisor at Delta's Customer Service Department (Bruno Navarro) inquired as to the cause of the delay in shutting down the APU, and Complainant reported that Mr. Audeguy had refused his orders, and Complainant therefore had to shut down the APU himself. OC, ¶ 46. Following this incident, Mr. Audeguy sent Complainant harassing text messages that called him names, but when Complainant reported the harassment to Mr. O'Donnell, Ms. Azanedolopez, and Mr. VanClef, his complaints were not taken seriously. OC, ¶ 48. In fact, Mr. O'Donnell initially accused Complainant of falsely reporting Mr. Audeguy, and only later assured Complainant that Mr. Audeguy would be disciplined for his behavior. OC, ¶¶ 48-49.

After reporting Mr. Audeguy, Complainant alleges that he has suffered continued harassment from his supervisor and coworkers. OC, ¶ 50. For example, several of his coworkers

derided him at staff meetings, calling him a liar and a troublemaker, and Mr. VanClef did nothing to dissuade them. OC, ¶ 51. Additionally, in September 2011, Mr. VanClef issued Complainant a “journal entry” (a form of discipline) because Complainant signed-off on the same aircraft multiple times, even though other AMTs have made this mistake and did not receive discipline for it. OC, ¶ 55.

Legal Standard

Dismissal Standard

The parties have jointly asked me to resolve, before they expend the time and money associated with conducting discovery and a trial on the merits, the issue of whether Dos Santos may avail himself of the protections afforded by 49 U.S.C. § 42121 in light of the fact that he was living and working in a foreign country at all times relevant to his alleged protected activity. However, as Complainant correctly notes in his opposition to Respondent’s motion, Respondent has neglected to cite the express statutory provision or other authority on which it relies for dismissal of the instant complaint. Comp. Opp., 2.

Dismissal of whistleblower complaints without a hearing may be appropriate under the summary disposition provisions of OALJ’s rules, 29 C.F.R. §§ 18.40 and 18.41, or, less frequently, under Rule 12 of the Federal Rules of Civil Procedure. See 29 C.F.R. 18.1(a) (“The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.”)

Given the early stages of this litigation, I find that the summary disposition procedures of §§ 18.40 and 18.41 are wholly inappropriate with respect to the issue raised by the parties. I further find, however, that review of the issue at this juncture is warranted inasmuch as it does not appear to have been considered or decided in any prior case and a ruling in favor of Respondent would obviate the need for a hearing. I will therefore determine whether Dos Santos’ complaint should be dismissed under Fed. R. Civ. P. 12.

Dos Santos suggests that, to the extent Delta is seeking dismissal based on lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1), subject-matter jurisdiction clearly exists here inasmuch as such jurisdiction is established “when the parties are properly before it, the proceeding is of a kind or class which the court is authorized to adjudicate, and the claim set forth in the paper writing invoking the court’s action is not obviously frivolous.” *Ibid.* citing *Sasse v. U.S. Dept. of Justice*, ARB No. 99-053, ALJ No. 1998-CAA-007, slip op. at 3 (ARB Aug 31, 2000). I agree. Delta does not dispute that it is properly before me as a party, this AIR21 whistleblower proceeding is a type of case which I am authorized to adjudicate, and the claim set forth in the complaint invoking jurisdiction “is not obviously frivolous.” *Sasse v. U.S. Dept. of Justice, supra*, slip op. at 3. Dismissal under Rule 12(b)(1) is thus not appropriate.

Citing the ARB’s decision in *Sylvester v. Parexel Int’l LLC*, ARB No.07-123, ALJ No. 2007-SOX-00039 (ARB May 25, 2011), Complainant also notes that the heightened pleading standards in Federal courts do not apply here, and motions to dismiss whistleblower complaints

under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted are highly disfavored. In that case, brought under the whistleblower provisions of Section 806 of the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A, the Board stated that “SOX claims are rarely suited for Rule 12 dismissals” inasmuch as they “involve inherently factual issues such as ‘reasonable belief’ and issues of ‘motive.’” *Id.*, slip op. at 13. However, the Board clearly recognized that “ALJs are entitled to manage their caseloads and decide whether a particular case is so meritless on its face that it should be dismissed in the interests of justice,” *ibid.*, leaving open the application of Fed. R. Civ. P. 12(b)(6) as a vehicle for dismissing complaints.

In considering dismissal under Rule 12(b)(6), I note that the initial pleading requirements for AIR21 whistleblower complaints are relatively minimal. Applicable regulations state: “No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.” 29 C.F.R. § 1979.103(b). The allegations raised in the complaint are sufficient to establish a prima facie case of retaliation “if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing” 29 C.F.R. § 1979.103(b)(2). If a complainant subsequently seeks review of an unfavorable decision by OSHA, he must file written objections and a request for hearing with OALJ, 29 C.F.R. § 1979.106(a), and ALJs are thereafter obligated to “freely grant parties the opportunity to amend their initial filings to provide more information about their complaint” *Sylvester, supra*, slip op. at 13. Dismissal of a whistleblower complaint for failure to state a claim may then be granted only as “a last resort.” *Ibid.*

Prima Facie Case under § 42121

Section 42121 prohibits air carriers, contractors, and their subcontractors from discharging or otherwise discriminating against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee:

provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle [subtitle VII of title 49 of the United States Code] or any other law of the United States . . .

49 U.S.C. § 42121(a)(1). To state a claim under Section 42121, a complainant must allege the existence of facts and evidence to make a prima facie showing that: (1) he engaged in protected activity; (2) his employer knew that he engaged in the protected activity; (3) he suffered an unfavorable (“adverse”) personnel action; and (4) the protected activity was a contributing factor in the unfavorable personnel action. *Clemmons v. Ameristar Airways, Inc.*, ARB Nos. 05-048, 05-096, ALJ No. 2004-AIR-11, slip op. at 6 (ARB June 29, 2007) (citing 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.104(b)(1)).

As the Administrative Review Board (“ARB” or “the Board”) clarified in *Williams v. American Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-4, slip op. at 15 (ARB Dec. 29, 2010), AIR21’s whistleblower protection provision protects against more than just “tangible” employment actions, and covers all “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” While Section 42121’s protections ordinarily do not cover isolated trivial employment actions that cause only *de minimis* harm, “an employer should never be permitted to deliberately single out an employee for unfavorable employment action as retaliation for protected whistleblower activity.” *Id.*; *see also* 29 C.F.R. § 1979.102(b) (an air carrier violates Section 42121 if it intimidates, threatens, restrains, coerces, or blacklists an employee because of protected activity).

Respondent’s Motion to Dismiss

Respondent’s Motion to Dismiss relies exclusively on the argument that Complainant has failed to state a claim under AIR21 because “Section 42121 does not apply extraterritorially to employees employed outside the United States.” Resp. Mot., 4. Relying on three U.S. Supreme Court decisions, but principally *Morrison v. National Australian Bank, Ltd.*, 130 S. Ct. 2869 (2010) (“*Morrison*”), Respondent explains that the presumption against extraterritoriality is a canon of statutory construction which provides that “a federal statute applies only domestically is presumed unless the language of the statute ‘clearly expresses’ that it is intended to apply outside the U.S.” *Id.* at 18.

Applying this presumption to the text of AIR21’s whistleblower protection provision, Respondent concludes that “Section 42121 does not apply to foreign-based employees” because “nowhere in Section 42121 is there even an implicit statement that would suggest ... that Congress intended for it to apply extraterritorially to employees working outside the United States.” *Id.* at 33-34. In support of this conclusion, Respondent points to other provisions in AIR21 that explicitly permit extraterritorial application of the statute, Congress’ silence as to Section 42121’s applicability to foreign-based employees in AIR21’s legislative history, and the procedural provisions of Section 42121, which Respondent claims “confirm that it was not intended to apply to foreign-based employees.” *Id.* at 39-45. Respondent also rebuts Complainant’s argument in his Objections that AIR21’s definition of “air carrier” – which includes U.S. citizens that undertake to provide “foreign air transportation” – evidences Congress’ intent for Section 42121 “to apply to employees working for an air carrier that provides foreign air transportation.” Obj., ¶ B.(2); Resp. Mot., 34-35. Dismissing this argument as based on “boilerplate” language, Respondent cites several U.S. Supreme and appellate court decisions that have rejected similar definition-based arguments, and asserts that Section 42121’s coverage of air carriers that fly internationally “says nothing about whether Section 42121 would apply to *an employee who is employed in a foreign country.*” Resp. Mot., 37-38 (emphasis in original).

Having concluded that Section 42121's protections are not extended to "foreign-based employees," Respondent goes on to reject Complainant's assertions in his Objections that his complaint does not require extraterritorial application of the statute because Complainant's "protected conduct and Delta's retaliatory actions occurred within the territorial jurisdiction of the United States." Obj., ¶ B.(11). Respondent contends that Complainant's theory is foreclosed by *Morrison's* rejection of "the effort to use those U.S.-contact facts to circumvent the presumption against extraterritorial application of a federal statute," and criticizes Complainant's argument as an attempt "to create a legal framework whereby Section 42121 may or may not apply to foreign-based employees depending upon the facts relied upon by the particular employee in question." Resp. Mot., 47-48.

Moreover, Respondent argues that the facts that Complainant contends connect his claim with the territorial United States – his reporting of FAA violations to U.S.-based persons at the FAA and Delta, and the decisions made by U.S.-based Delta officials not to promote him – are "not facts that are either necessary or important to the nature of the conduct Section 42121 seeks to address domestically." *Id.* at 49. Instead, Respondent argues that the "actual discriminatory conduct" that Section 42121 prohibits only occurs "when a decision is implemented to affect the terms and conditions of employment." *Id.* at 51. In this case, because Complainant was employed in France, "any impact on his terms and conditions of his employment ... by definition occurred in France." *Id.* at 50.

Complainant's Response in Opposition to Respondent's Motion to Dismiss

Complainant argues in his Opposition to Respondent's motion that the extraterritorial application of AIR21 is not at issue in this case because "all requisite elements" occurred in the United States. Comp. Opp., 10. That is, "all facts directly related to [Complainant's] protected conduct and, more importantly, [Respondent's] retaliatory actions" occurred within the U.S. *Id.* Respondent's alleged retaliatory actions which occurred in the U.S. include Respondent's failure to hire and promote Complainant for several positions within the U.S. *Id.* at 16. Thus, extraterritorial application of AIR21 is not at issue here because Complainant is merely seeking application of a U.S. statute to a U.S. citizen for acts committed within the U.S. *Id.* at 11.

Complainant provides several legal arguments in support of his position. Relying on federal court and administrative law decisions, as well as administrative guidance, Complainant states that if the alleged wrongful conduct occurred within the U.S., then extraterritorial application of a statute is not implicated, regardless of whether some offending conduct also occurred outside U.S. territory. *Id.* at 11. For example, in *O'Mahony v. Accenture Ltd.*, the court did not need to address the extraterritorial application of SOX §1514A "because the alleged wrongful conduct by the Defendants giving rise to the claim occurred within the United States." 537 F. Supp. 2d 506, 515 (S.D.N.Y. 2008); Comp. Opp., 11. In *Sec. Investor Prot. Corp. v.*

Bernard L. Madoff Inv. Sec. LLC, the court similarly stated that the extraterritoriality of a statute is not implicated if “the acts or objects upon which the statute focuses are located in the United States, . . . even if other activities or parties are located outside the United States.” 480 B.R. 501, 523-24 (Bankr. S.D.N.Y. 2012); Comp. Opp., 13. Here, Respondent’s management in the U.S. decided not to hire and promote Complainant to seventeen different positions within the U.S. Comp. Opp., 16-17.

Complainant, in the alternative, argues that AIR21 applies extraterritorially. Complainant first makes a textual argument that because the definition of “air carrier” includes “foreign air transportation,” the plain language of the statute shows that AIR21 applies extraterritorially. Comp. Opp., 21-22. Complainant rejects Respondent’s argument that this is just “boilerplate” language, and states that the Federal Aviation Act specifically defines “foreign air transportation,” but the definitions of “foreign commerce” cited by Respondent are general definitions. Moreover, the Federal Aviation Act clarifies that the Act applies *internationally*, not merely interstate. Comp. Opp., 24.

Complainant also argues that the legislative history shows Congress intended for AIR21 to apply extraterritorially. Congress intended for AIR21 to provide airline employees a statutory whistleblower protection to ensure safe air travel for U.S. citizens. Comp. Opp., 25. Thus, if AIR21 “does not protect employees of air carriers who blow the whistle regarding the safety of aircraft returning to the United States from abroad, then the purpose of AIR21 would be lost and Congressional intent ignored.” *Id.*

Discussion

The issue of whether AIR21’s whistleblower provision protects employees of a covered air carrier when they are stationed overseas has not previously been decided.² Accordingly, my inquiry as to whether Section 42121 protects employees from retaliation where at least some of the relevant conduct occurred outside the territorial United States is a question of first impression.

From the arguments proffered in Complainant’s Objections and Opposition, and Respondent’s Motion to Dismiss, the parties appear to agree that the two-part test announced in *Morrison* is relevant to this inquiry, although they disagree as to how the *Morrison* test should be applied to § 42121 and the facts of the instant complaint. I therefore begin with a review of the *Morrison* decision, the test it created, and federal courts’ subsequent application of the *Morrison* test to cases arising under various statutes. Particularly, the ARB’s decision in *Villanueva v.*

² Parties do not dispute that Delta Airlines is a covered air carrier under 49 U.S.C. § 42121 and 49 U.S.C. § 40102(a)(2), nor do they dispute that Complainant has been an employee of Delta Airlines since September 1998. Obj., ¶ A.(1-2); Resp. Mot.. 3-4.

Core Laboratories, NV, ARB No. 09-108, ALJ No. 2009-SOX-6 (ARB Dec. 22, 2011) (*en banc*) (“*Villanueva*”) is instructive, as it applied the *Morrison* test to a complaint arising under the whistleblower protection provision of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX), 18 U.S.C.A. § 1514A.

THE *MORRISON* DECISION AND ITS TWO-PART TEST

In *Morrison*, a group of Australian citizens that owned shares in an Australian bank sued the bank and its American subsidiary – a mortgage servicing company – after the bank wrote down the value of the subsidiary’s assets, causing the bank’s share prices to fall. Claiming that officers of the subsidiary had utilized manipulated financial models to misrepresent the value of its mortgage services, and that the bank was aware of the subsidiary’s deceptive practices, the Australian shareholders brought their action under Section 10(b) of the Securities Exchange Act of 1934 (“the Exchange Act”). Because the case hinged upon a purchase of securities by Australian investors that took place entirely in Australia, the Supreme Court accepted the case to determine “whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges.”³ *Morrison*, 130 S.Ct. at 2875. Using a new two-step test, the Court ultimately found in the negative, concluding that Petitioners failed to state a claim on which relief could be granted because §10(b) does not apply extraterritorially, and the fraud alleged in the complaint did not occur domestically. *Id.* at 2888.

MORRISON TEST STEP 1: DOES THE STATUTORY PROVISION REACH EXTRATERRITORIAL CLAIMS?

First, the *Morrison* Court examined whether Section 10(b) applies to extraterritorial claims, and as Respondent recounts in its Motion, the Court began by rejecting the Second Circuit’s established test for making such a determination. *See* Resp. Mot., 25-28. To determine if a statute that is otherwise silent as to its extraterritorial application covers a claim involving foreign conduct, the Second Circuit would assess “whether the wrongful conduct had a substantial effect in the United States or upon United States citizens,” or “whether the wrongful conduct occurred in the United States.” *Morrison*, 130 S.Ct. at 2879 (citations omitted). In short, the Second Circuit used its “conduct test” and “effects test” to determine whether Congress would have wanted the statute to apply to predominately foreign claims on a case-by-case basis. *Id.*

³ The U.S. Court of Appeals for the Second Circuit described the complaint in *Morrison* as a “foreign-cubed securities class action” because it involved “(1) foreign plaintiffs suing (2) a foreign issuer in an American court for violations of American securities laws based on securities transactions in (3) foreign countries.” *Morrison v. National Australia Bank Ltd.*, 547 F.3d 167, 172 (2nd Cir. 2008).

Writing for the majority in *Morrison*, Justice Scalia criticized the Second Circuit’s approach as having no “textual or even extratextual basis,” and therefore replaced the Second Circuit’s “judicial-speculation-made-law” with a bright-line rule based on the Court’s well-established presumption against extraterritoriality. *Id.* at 2881. Citing the Supreme Court’s decision in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 , 248 (1991) (*Aramco*), the Court reasserted the “longstanding principle” that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” *Id.* Asserting that this canon of construction should be applied in all cases when ascertaining a statute’s meaning, the Court stated that unless the Court can find “affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions.” *Morrison*, 130 S.Ct. at 2877, 2881 (citing *Aramco*, 499 U.S. at 248). Although it emphasized the primacy of the text of the statute, the Court clarified that a “clear statement” of extraterritorial effect is not required, as context and other sources of statutory meaning may be relevant in the search for the true intent of Congress. *Id.* at 2883.

Applied to the provision at issue – Section 10(b) of the Securities Exchange Act – the *Morrison* Court began with a review of the text of the provision, finding that, on its face, the provision “contains nothing to suggest that it applies abroad.” *Id.* at 2881. The Court then rejected each of the Petitioners’ arguments that the statute expressed an “affirmative intention” of extraterritorial application. A reference to foreign commerce in the statute’s definition of the term “interstate commerce” was found insufficient to overcome the presumption against extraterritoriality, as was a “fleeting” mention of foreign commerce in Congress’ description of the purpose of the Exchange Act. *Id.* at 2882. Likewise rejected was Petitioners’ argument that because Section 30(b) of the Exchange Act expressly limited its applicability to territorial transactions, all other provisions of the Act – including Section 10(b) – should be presumed to apply both territorially and extraterritorially. *Id.*

MORRISON TEST STEP 2: GIVEN THE FACTS ALLEGED, IS EXTRATERRITORIAL APPLICATION OF THE STATUTE REQUIRED TO ENFORCE THE COMPLAINT?

Having applied the presumption against extraterritoriality and determined that Section 10(b) does not extend its protections to extraterritorial claims, the *Morrison* court next turned to Petitioners’ argument that the facts alleged in their complaint constituted a “territorial” claim, and therefore enforcement of the complaint would not require extraterritorial application of the statute. *Id.* at 2883. As support for that argument, Petitioners primarily noted that the American subsidiary’s executives who deceptively manipulated financial models were located in Florida. *Id.* Acknowledging that “it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States,” the Court first set out to clarify when the

“watchdog” that is the presumption against extraterritoriality “retreat[s] to its kennel”⁴ – or, more simply stated, when a claim alleging conduct that occurred both within and outside of the territorial United States is considered “territorial” or “extraterritorial” for purposes of Section 10(b). *Id.* at 2884.

To draw the line between “domestic” and “foreign” claims, the Court followed the approach taken in the *Aramco* decision, and identified the “focus of congressional concern” in enacting the statute. *Id.* Where *Aramco* found that the focus of congressional concern in passing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. (“Title VII”), was the “domestic employment relationship,” the *Morrison* Court used “the same mode of analysis” to find “that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States,” because “purchase-and-sale transactions are objects of the statute’s solicitude.” *Id.* In other words, because domestic transactions are what Congress sought to regulate in passing the Exchange Act, and because the statute aims to protect parties to those transactions, Section 10(b) only applies to “transactions in securities listed on domestic exchanges, and domestic transactions in other securities.”⁵ *Id.* After establishing this “transactional test” for evaluating the territoriality of a Section 10(b) claim, the Court swiftly dismissed Petitioners’ claim as not falling within that focus because the case “involve[d] no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States.” *Id.* at 2888.

APPLYING THE *MORRISON* TEST TO CLAIMS ARISING UNDER THE RICO ACT

Since the *Morrison* decision, federal courts have applied the *Morrison* test to claims arising in non-transactional matters, and in particular, several courts have applied the *Morrison* test in cases arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c).⁶ A review of these decisions reveals that district courts have had little trouble

⁴ In its Motion, Respondent twice quotes Justice Scalia’s memorable declaration that “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.” Resp. Mot., 28, 48. While the Justice’s point is well-taken, its usefulness in identifying the line between “territorial” and “extraterritorial” claims is limited, for the presumption against extraterritorial application would be an equally reckless watchdog if it launched a full attack whenever some foreign activity is alleged in a complaint. See also *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, No. 11–2861 SC, 2012 WL 1657108, *5 (N.D.Cal. May 10, 2012) (not reported) (explaining that *Morrison* held “that ‘some domestic activity’ will not save an otherwise extraterritorial RICO claim—not that any international activity will doom an otherwise domestic claim.”).

⁵ The Court found evidence of the statute’s “focus” evidenced in the prologue of the Exchange Act, other provisions of the Exchange Act, and the text of the Securities Act 1933, all of which suggested that Congress was exclusively concerned with regulating domestic transactions. *Morrison*, 130 S.Ct. at 2884-85. Additionally, the statute’s lack of discussion of a potential conflict of laws indicated to the Court that Congress did not intend to encompass foreign transactions. *Id.* at 2885 (citing and quoting *Aramco*, 499 U.S. at 256).

⁶ RICO, 18 U.S.C. § 1962(c), prohibits “any person employed by or associated with any enterprise engaged in ... interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s

applying *Morrison*'s first step, and have uniformly held that because the text of RICO is silent as to its extraterritorial application, the presumption of extraterritoriality dictates that RICO does not extend protection to "extraterritorial" claims. See *Mitsui O.S.K. Lines, Ltd. v. Seamasster Logistics, Inc.*, No. 11–2861 SC, 2012 WL 1657108, *3 (N.D.Cal. May 10, 2012) (not reported) ("*Mitsui*") (following the lead of a "half-dozen courts" in finding that under the first step of the *Morrison* test, the presumption against extraterritoriality prohibits application of the statute to foreign claims). However, the courts' application of *Morrison*'s second step to the facts of the complaints before them has led to inconsistent interpretations from court-to-court regarding which RICO claims require extraterritorial application of the statute and which do not. Illustrative of this confusion are two recent district court decisions, issued within four days of each other, in which the courts established different tests for distinguishing territorial and extraterritorial RICO claims because of their diverging views as to what Congress' "focus" was when it enacted RICO. See *Mitsui*, No. 11–2861 SC, 2012 WL 1657108; *Chevron Corp. v. Donziger*, No. 11 Civ. 0691(LAK), 2012 WL 1711521, (S.D.N.Y. May 14, 2012) (not reported) ("*Chevron Corp.*").

In *Mitsui*, a Japanese ocean shipper that operated between foreign and U.S. ports brought a RICO suit against several "non-vessel operating common carriers," which the court described as "trucking companies that engage only in inland or 'door' carriage." *Mitsui*, 2012 WL 1657108, at *1. The ocean shipper alleged that the trucking company-defendants "engaged in a scheme to charge [the shipper] for unnecessary or nonexistent inland carriage," wherein some of the allegedly fraudulent conduct occurred in inland China, and some occurred in the United States. *Id.* Applying the *Morrison* test, Defendants argued that RICO does not apply to extraterritorial claims, and because the claim primarily concerned conduct that occurred in China and effected the shipper in Japan, the claim required extraterritorial application of the statute and must be dismissed. *Id. Id.* at *3. Acknowledging that "post-*Morrison* RICO cases have yet to settle on a single approach" for distinguishing between extraterritorial and territorial RICO claims, the court explained that "the challenge of applying *Morrison* in RICO cases stems from the difficulty in ascertaining where a RICO enterprise is located." *Id.* at *4. This is a challenge that the *Morrison* Court did not have to deal with because each securities transaction is a "discrete event" that "occurs in a readily ascertained place at a readily ascertained time, whereas a RICO enterprise is a group of people." *Id.* Thus, while *Morrison* asks courts "to decide how much or what kind of domestic conduct sends the watchdog back to its kennel," the *Morrison* decision itself is not particularly helpful, as "*Morrison* does not say" how a court should draw this distinction in non-transactional matters. *Id.* at *3.

affairs through a pattern of racketeering activity." The statute thus requires the plaintiff to allege (1) an enterprise, (2) the conduct of the affairs of the enterprise through (3) a pattern of racketeering activity, and (4) injury to [its] business or property ... caused by the violation of Section 1962. *Chevron Corp.*, 2012 WL 1711521, at *3(citing *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir.2008)).

Ultimately, the *Mitsui* court followed the approach taken by the district court in *European Cmty. v. RJR Nabisco, Inc.*, No. 02–CV–5771 (NGG)(VVP), 2011 WL 843957, *5-6 (E.D.N.Y. Mar. 8, 2011), which found that the “focus” of RICO is the “enterprise,” and, borrowing a test created by the U.S. Supreme Court for “ascertaining the state citizenship of a corporation for purposes of diversity jurisdiction,” employed the so-called “nerve center test” to determine the geographic location of the enterprise. Recognizing the court’s need for “a consistent method that cuts through extraneous matter to the heart of the issue,” the *Mitsui* court lauded the “nerve center test” as “a familiar, consistent, and administrable method for determining the territoriality of RICO enterprises in cases ... which blend domestic and foreign elements.” *Id.* at *5.⁷ “Focusing on the brains rather than the brawns of the enterprise,” the court found the nerve center of the alleged enterprise to be domestic, as the Defendants were all incorporated in the United States, and they “arrang[ed] the allegedly illicit shipments” in the United States. *Id.* at *7. As such, the court found the complaint had alleged a “cross-national enterprise” involving “more than the merely incidental domestic activity” which, *Morrison* warned, would do nothing to shake the watchdog from its post.” *Id.*

In contrast, the district court in *Chevron Corp.* took a different approach when considering a RICO claim that involved a scheme formulated predominantly by Americans to extort funds from Chevron Corp. (a U.S. Company) through “a pattern of racketeering activity that included acts in the United States by Americans as well as acts in Ecuador by both Americans and Ecuadorians.” *Chevron Corp.*, 2012 WL 1711521, at *4. After finding that RICO applies only to territorial claims, the court moved on to the second step of the *Morrison* test. The court first paused to explain that limiting RICO’s reach to “purely domestic enterprises” is not a workable approach because “foreign enterprises have been at the heart of precisely the sort of activities—committed in the United States—that were exactly what Congress enacted RICO to eradicate.” *Id.* at *6 (citations omitted). Additionally, the court pointed out that because the RICO enterprise is not necessarily the named defendant in a RICO case, “there is no necessary or, in many cases, even probable connection between where the RICO enterprise makes its decisions and whether the application of RICO to the racketeering activity at issue in a given case was the sort of activity with which Congress would have been concerned.” *Id.* Consequently, although the location of the enterprise – whether identified by its “nerve center” or otherwise – may be relevant to determining the territoriality of some RICO claims, “its relevance, if any, would depend on the facts.” *Id.* at *7.

⁷ In so holding, the *Mitsui* court “part[ed] ways” with previous post-*Morrison* RICO decisions which used various other factors to determine the territoriality of an instant claim, such as “the nationality of a RICO enterprise’s constituent members, the location of racketeering activity, the location of ‘effects,’ or the location or quantity of ambiguously defined ‘conduct.’” *Mitsui*, 2012 WL 1657108, at *5 (citations omitted). Additionally, the *Mitsui* court expressly distinguished the location of the enterprise from the location of the “predicate acts,” *i.e.* the pattern of racketeering activity alleged in the complaint, noting that RICO’s purpose is not to “punish someone for committing a pattern of multiple criminal acts,” but rather to punish “the use of such a pattern to impact an enterprise.” *Id.* at *8, n.7.

Instead, the *Chevron Corp.* adhered to the district court’s reasoning in *CGC Holding Co., LLC v. Hutchens*, 824 F.Supp.2d 1193 (D.Colo. Nov. 1, 2011), which concentrated its inquiry on “the alleged pattern of racketeering activity—in other words, on the conduct that the statute is intended to eradicate.” *Id.* at *7. Finding that Congress in part passed RICO to protect “American victims at least against injury caused by the conduct of the affairs of enterprises through patterns of racketeering activity that occur in this country,” the court found that “the focus properly is on the pattern of racketeering activity and its consequences.” *Id.* at *8. This focus was found to be consistent with the Supreme Court’s “repeated recognition that the heart of any RICO complaint is the allegation of a pattern of racketeering,” and therefore, “if there is a domestic pattern of racketeering activity aimed at or causing injury to a domestic plaintiff, the application of Section 1962(c) to afford a remedy would not [amount to] an extraterritorial application of the statute.” *Id.* The court next found that the subject complaint satisfied this test, as the alleged racketeering activity “(1) was conceived and orchestrated in and from the United States (2) in order wrongfully to obtain money from a company organized under the laws of and headquartered in the United States ... and (3) acts in its furtherance were committed here by Americans and in Ecuador by both Americans and Ecuadorians.”

Just as *Morrison* created the “transactional test” to determine the territoriality of Section 10(b) complaints based solely on the location of the purchase and sale of the securities at issue, the courts in *Mitsui* and *Chevron Corp.* each created substantive tests for distinguishing between territorial and extraterritorial RICO claims based on each court’s assessment of which element is the primary object of Congress’ legislative focus. As the *Mitsui* court explained, its “nerve center test” is intentionally simplistic, as it “takes a sprawling network of decision makers and actors and reduces it, for legal purposes, to a single, simplified location,” and by doing so, it prevents courts from having to make “ad hoc determinations about territoriality without a reliable guide.” *Mitsui*, 2012 WL 1657108, at *8. However, as Justice Stevens warned in his dissenting opinion in *Morrison*, such tests may offer “clarity and simplicity,” but “all bright-line rules ... [have] drawbacks.” *Morrison*, 130 S.Ct. at 2895 (Stevens dissenting). While Justice Stevens’ dissent offered two hypothetical Section 10(b) claims to illustrate the undesirable narrowness of the majority’s “transactional test” and the otherwise-domestic violations that the test would preclude from coverage, the complaint in *Chevron Corp.* offers a confirmed example of a RICO case where the location of the enterprise – which *Mitsui* pinned as the turning point for evaluating territoriality – was of limited relevance because the enterprise was not the defendant in the case. *See Id.*; *Chevron Corp.*, 2012 WL 1711521, at *7. So while manufacturing a bright-line test for determining territoriality is appealing in its practicability, it takes little effort to imagine how an intentionally-simplified approach might disqualify complaints in ways that would “surprise and alarm...the Congress that passed [the statute].” *Id.*

APPLYING THE *MORRISON* TEST TO CLAIMS ARISING UNDER THE WHISTLEBLOWER PROTECTION PROVISION OF THE SARBANES-OXLEY ACT (SOX)

In *Villanueva*, the ARB advocated an alternative approach for distinguishing territorial and extraterritorial claims when it applied the *Morrison* test to a complaint arising under Section 806 of SOX. Rather than establishing a decisive bright-line test for determining the territoriality of every Section 806 complaint, the ARB limited its finding to the facts of the case before it, but also took time to articulate several factors to consider when assessing the territoriality of future Section 806 complaints. In doing so, *Villanueva* presents a more restrained approach to the second step of the *Morrison* test, and it thus provides useful guidance on how ALJs should apply the *Morrison* test to complaints, including the instant complaint, arising under other whistleblower protection provisions enforced by the Secretary of Labor.⁸

The complaint in *Villanueva* concerned the CEO of a Columbian company – a Columbian citizen who lived and worked in South America – who claimed that his employer’s Dutch parent company – which had an office in Houston and traded securities publicly on the New York Stock Exchange – had engaged in fraud under Columbian law. Mr. Villanueva alleged that the Dutch parent company had falsely claimed value-added tax exemptions and had carried out a “transfer pricing scheme,” both of which violated Columbian tax laws. Mr. Villanueva was eventually fired, and he subsequently filed a timely retaliation complaint against the Dutch parent company under Section 806 of SOX.

Ultimately affirming the ALJ’s dismissal of the complaint,⁹ the ARB, hearing the case *en banc*, applied the *Morrison* test to Mr. Villanueva’s claim in reverse order, and first sought to identify the “primary focus” of the statute to determine “where the essential events occurred,” and whether “the essential part of the ... activity occurred extraterritorially.” *Villanueva*, ARB No. 09-108, slip. op. at 9. After clarifying that the “primary focus” in question is that of the *entire statute* (rather than the statutory *provision* at issue), the majority in *Villanueva* identified SOX’s primary focus as “prevent[ing] and uncover[ing] financial fraud, criminal conduct in

⁸ As Respondent points out, “while different than Section 42121 in some material respects, the anti-retaliation provision in Section 806 of [SOX] ... has some similarities with Section 42121, including that they share the same procedural provisions.” Resp. Mot., 30.

⁹ Prior to the case reaching the ARB, the ALJ dismissed Mr. Villanueva’s complaint by relying heavily on the First Circuit Court of Appeals’ decision in *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir.), *cert. denied*, 548 U.S. 906 (2006), which, giving great weight to the presumption against extraterritoriality, found that SOX Section 806 does not reach extraterritorial conduct. *Villanueva v. Core Laboratories, NV*, ALJ No. 2009-SOX-6 (ALJ June 10, 2009). The allegations in *Carnero* were substantially similar to those in *Villanueva*: Mr. Carnero was an Argentinian citizen working in Brazil for an Argentinian subsidiary of an American parent company, and was terminated in retaliation for reporting the Argentinian subsidiary’s accounting misconduct. Because Mr. Carnero’s complaint alleged “misconduct abroad by overseas subsidiaries,” the First Circuit concluded that his Section 806 complaint against his employer’s American parent company was not a territorial complaint. Concluding that Mr. Villanueva’s complaint presented the “exact scenario” that the *Carnero* court found to be extraterritorial, the ALJ likewise concluded that Mr. Villanueva’s complaint would require impermissible extraterritorial application of the statute. *Villanueva*, ALJ No. 2009-SOX-6, slip op. at 5.

corporate activity, and violations of securities and financial reporting laws.” *Id.* at 10-11. Because “the alleged fraud and/or law violations involved Colombian laws with no stated violation or impact on U.S. securities or financial disclosure laws,” the majority quickly resolved that Mr. Villanueva’s complaint did not fall within that statute’s focus, as “enforcing compliance or punishing noncompliance with Columbian financial laws necessarily implicates extraterritorial enforcement.” *Id.* at 11.

Before continuing to the first step of the *Morrison* test, the majority acknowledged that because the “locus of the fraud Villanueva reported” so clearly indicated that enforcement of the claim would require extraterritorial application of the statute, the Board did not need to consider “the labor aspects presented in the case” as it would in a full two step analysis. *Id.* at 10. Nonetheless, in a footnote, the majority expounded on how the “labor aspects” of a SOX whistleblower complaint might be analyzed. *See Id.* at 10, n.22. The majority noted that Section 806 of SOX has the “additional focus of protecting against retaliation for reporting financial fraud,” and listed several factors that would be relevant when “assessing whether a complainant’s claims would require extraterritorial application of Section 806,” including “the location of the protected activity . . . , the location of the job and the company the complainant is fired from, the location of the retaliatory act, . . . [and] the nationality of the laws allegedly violated that the complainant has been fired for reporting.” *Id.* The majority stated that the “the fraudulent activity being reported” was the “driving force of the case,” and therefore the Board denied the complaint without considering its additional labor aspects.¹⁰ *Id.*

After establishing that Mr. Villanueva’s complaint would require extraterritorial application of the statute, the majority next undertook an abbreviated *Morrison* step one analysis to answer the “narrow question [of] whether Section 806(a)(1) includes extraterritorial laws within its definition of protected activity or whether the presumption against extraterritoriality limits the definition to domestic securities and financial disclosure laws.” *Id.* at 11. The majority looked to the text of Section 806 and found it provided no clear indication that employee communications regarding violations of foreign securities and financial laws are covered under the statute. The majority also compared the language of Section 806 to the language of other statutory provisions that, despite even more plausible indicators of extraterritorial effect, other federal courts found to be insufficient to overcome the presumption

¹⁰ Near the end of the majority’s decision, the majority briefly returned to the second step of the *Morrison* test to discuss Mr. Villanueva’s argument for why enforcement of this complaint would not require extraterritorial application of the statute. Specifically, Mr. Villanueva argued that executives of the Dutch parent company’s Houston office “directly controlled the fraudulent scheme to evade taxes, refused him a pay raise, and ordered his discharge.” *Villanueva*, ARB No. 09-108, slip op. at 12-13. Explaining that “the onus of the alleged fraud involved actions affecting foreign companies doing business in a foreign country, and a failure to comply with foreign tax law,” the majority found his arguments without merit, as his allegations that Houston officials committed misconduct and exerted direct control over the subsidiary did not change the “foreign nature of the alleged fraud.” *Id.* at 13. Especially dispositive was the fact that Mr. Villanueva’s “disclosures involved violations of extraterritorial laws and not U.S. laws or financial documents filed with the SEC.” *Id.*

against extraterritoriality. *Id.* at 11-12. Lastly, the majority noted that Section 929A of the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1852 (2010) – which Congress passed to clarify that Section 806 applies to the subsidiaries and affiliates of covered companies – did not address Section 806’s extraterritorial effect, but Section 929P of Dodd-Frank expressly extended coverage of some SOX provisions to foreign transactions. *Id.* at 12. The majority took this as evidence that Congress did not intend for Section 806(a)(1) to apply to extraterritorial complaints.

Villanueva provides several points of clarification regarding how ALJs should apply the *Morrison* test to similar Secretary of Labor-enforced whistleblower protection provisions. First, the *Villanueva* decision indicates that the second step of the *Morrison* test is itself dual-layered: a court should identify the “primary focus” of the statute in general, and unless the subject complaint plainly falls outside that basic focus (as it did in *Villanueva*), the court should also identify the “additional focus” of SOX’s whistleblower protection provision. *See Id.* at 10, n.22. After identifying both focuses, the ALJ will then need to examine the “labor elements” of the case to determine if the subject complaint falls within the statute’s territorial scope. *Id.* In short, *Villanueva* indicates that a complaint must fall within the focus of both the statute in general *and* the specific statutory provision at issue to be considered a “territorial” complaint.

Second, rather than selecting one element of a SOX complaint as the sole determinant of a complaint’s territoriality, *Villanueva* advocates a multifactor approach to the second *Morrison* step. Although the majority found the fraudulent activity that Mr. Villanueva reported to be the “driving factor” in its analysis, *Villanueva*’s discussion of the “labor aspects” analysis suggests that the factor (or factors) that are “driving” the analysis may vary from case to case, and will depend on the facts of each complaint. To “determin[e] where the essential events occurred,” *Villanueva* acknowledged that “the labor elements can also play a role,” and therefore a court should consider all of the factors identified in footnote 22, as they are “*all ... indeed a focus of the Section 806 component of SOX.*” *Id.* at 9, 10, n.22 (emphasis added). This case-by-case approach to assessing a complaint’s territoriality stands in stark contrast to the substantive, bright-line tests created in *Morrison* and *Mitsui*, as *Villanueva*’s approach considers where all of the essential conduct underlying a Section 806 complaint occurred, and acknowledges (as the *Chevron Corp.* decision did) that the relevance of certain elements may vary from case-to-case.

Third, by applying the *Morrison* test in reverse order, *Villanueva* undertook a restricted *Morrison* step one analysis, and reached a narrower finding regarding the extraterritorial reach of the statute. In *Morrison*, the court began its inquiry by searching the statutory text, context and legislative history of the Exchange Act for a clear indication that Congress intended the statute to apply to extraterritorial claims despite the presumption against extraterritoriality. *Villanueva*, in contrast, started its analysis with the facts of the subject complaint, and because the alleged fraud that Mr. Villanueva reported was of a “foreign nature” and only implicated extraterritorial laws,

it found the complaint to be extraterritorial. When the majority turned its attention to “step one” of the *Morrison* test, it did not search SOX’s statutory sources for an indication of Section 806’s extraterritorial applicability *in general*, but rather it narrowed its inquiry to “whether the presumption against extraterritoriality limits the definition [of Section 806(a)(1)] to domestic securities and financial disclosure laws.”¹¹ *Id.* at 11.

Respondent suggests that by using a “case-by-case analysis” to analyze the extraterritorial application of Section 806, the majority in *Villanueva* contravened the Supreme Court’s abrogation of the Second Circuit’s “conduct” or “effects” tests in *Morrison*. *Id.* I disagree. Although the majority adopted a narrower inquiry when it turned to the “first” step of the *Morrison* test, *Villanueva*’s inquiry is consistent with the text-based, presumption-against-extraterritoriality-anchored approach adopted in *Morrison*. More importantly, the ARB’s inquiry is not a reiteration of the case-by-case “conduct and effects” tests that the Supreme Court abrogated in *Morrison*. As Justice Scalia explained in *Morrison*, courts in the Second Circuit, when faced with a statute that is silent as to its extraterritorial application, would “disregard the presumption of extraterritoriality and instead apply its tests “to ‘discern’ whether Congress would have wanted the statute to apply” given the facts of the claim. *Morrison*, 130 S.Ct. at 2879. *Morrison* rejected this approach to the inquiry, instead choosing to “apply the presumption in all cases.” *Id.* at 2881. *Villanueva*’s step one analysis follows *Morrison* by reviewing the text of the statutory provision whilst applying the presumption against extraterritoriality, and at no point does the majority analyze the facts of the subject complaint when determining if Section 806(a)(1) covers violations of extraterritorial laws. The only difference between *Morrison*’s and *Villanueva*’s step one analyses is that *Morrison* reviewed Section 10(b) of the Exchange act for an indication of extraterritorial application *in general*, while *Villanueva* limited its search, and its finding, to what was necessary to resolve the complaint before it.

I find *Villanueva*’s restrained and reordered approach to the *Morrison* test appealing for several reasons. To begin with, *Villanueva*’s ordering of the inquiries is intuitively more practicable, as *Morrison* asks courts to look for indications of “extraterritorial application” before it defines what “extraterritorial” means in the context of the statute. If the presumption against extraterritoriality fundamentally reflects the notion that most statutes apply only to claims

¹¹ Respondent takes issue with Complainant’s assertion in his Objections that *Villanueva* did not definitively hold that Section 806 of SOX does not apply extraterritorially. Resp. Mot., 31, n.12 (citing Obj., ¶ B.(4)). Complainant has read *Villanueva* correctly: *Villanueva* avoided making a comprehensive determination of whether Section 806 of SOX has any extraterritorial application, and instead narrowed its step one inquiry, ultimately finding that Section 806’s definition of protected activity does not include complaints about alleged violations of purely extraterritorial laws. See *Villanueva*, ARB No. 09-108, slip. op. at 11 (“We see no clear context or legislative history extending the six protected categories to include extraterritorial laws without demonstrating a connection to a domestic law.”). For evidence that the court limited its territoriality review to the confines of the instant case, Respondent need look no further than the last sentence of the majority’s decision, which states, “we find that Section 806(a)(1) does not allow for the extraterritorial application *that this case would require* and AFFIRM the ALJ’s order dismissing the complaint.” *Id.* at 14 (emphasis added).

within their domestic scope, it is logical for the court to first examine whether the complaint under review falls within the statute's domestic scope before excavating statutory sources for an indication that the statute applies beyond it. Rather than starting with a comprehensive decision as to whether Section 806 reaches *any* "extraterritorial" claims, *Villanueva* first reviewed the essential elements of the complaint, and only after finding that they placed the complaint beyond the domestic focus of the statute did the majority search statutory sources for a clear indication that Congress nonetheless intended to enforce such a complaint (whilst presuming that it did not). Moreover, by using the factors that "drive" its "step two" analysis to constrict the scope of the ensuing "step one" analysis, *Villanueva*'s reordering of the inquiries allowed the majority to more narrowly define which extraterritorial claims are reached by Section 806, ultimately finding that Section 806 does not apply to claims where the alleged fraud implicated extraterritorial laws with no stated violation or impact on U.S. securities or financial disclosure laws. *Villanueva*'s method of defining the extraterritorial reach of a statutory provision strikes me as the more logical analytical approach.

Additionally, *Villanueva*'s multifactor approach to the second *Morrison* step permits ALJs to determine the territoriality of a whistleblower complaint without engaging in the "judicial-speculation-made-law" that creating an all-encompassing, bright-line "territoriality test" requires. Instead of inventing a bright-line test by selecting one essential element as the exclusive basis for identifying all "territorial" complaints under the statute, *Villanueva* considered all of the key labor factors within Section 806's focus. Moreover, by resisting the urge to construct a comprehensive bright-line test, *Villanueva* avoids the under-inclusiveness and unforeseen consequences that Justice Stevens warned against in his *Morrison* dissent, and which were revealed when the *Chevron Corp.* court considered *Mitsui*'s "location of the enterprise test" in the RICO context. Just as the ARB did in *Villanueva*, I decline the invitation to manufacture my own test for determining the territoriality of all complaints filed under Section 42121 of AIR21.

Villanueva's step two analysis arguably bears some resemblance to the approach taken by the district court in *O'Mahony v. Accenture LTD*, 537 F. Supp. 2d 506, 512 (S.D.N.Y. 2008), which used the Second Circuit's "conduct and effects" tests to find that a complaint filed under Section 806 of SOX did "not present an issue of extraterritorial application of §1514A because the alleged wrongful conduct by the Defendants giving rise to the claim occurred within the United States." Both parties in this case have offered opinions on the salience of the *O'Mahony* decision in the wake of *Morrison*: Complainant objects to OSHA's determination that *Morrison* renders *O'Mahony* "of limited value" because *Morrison* did not mention *O'Mahony* by name when it rejected the "conduct" or "effects" tests, and even so, Complainant interprets *Morrison*'s "transactional test" as simply "rephras[ing] the 'conduct and effects' test." Obj., ¶ B.(12). Respondent rebuts this interpretation, explaining that *Morrison* rejected the "conduct" and "effects" tests as a method for "determin[ing] whether a federal statute applied abroad," whereas

Morrison's "transactional test" is a "substantive interpretation of what constitutes a violation of Section 10(b) of the SEC Act." Resp. Mot., 31, n.11. In other words, according to Respondent, *Morrison* rejected the Second Circuit's use of the case-by-case "conduct" and "effects" tests in its determination of whether Section 10(b) covers extraterritorial claims, and separately created the substantive "transactional test" to determine whether the complaint in that case was itself extraterritorial. However, even though *O'Mahony* applied the "conduct" test to the *second Morrison* step of the analysis rather than the first, Respondent argues that because *O'Mahony* used the "conduct" and "effects" tests, *Morrison* renders *O'Mahony* "bad law." *Id.*

I need not resolve whether, and to what extent, *O'Mahony* remains good law after *Morrison*, as it does not impact my application of the *Morrison* test to the instant complaint. However, setting aside whether *Morrison* rejected any use of the "conduct" and "effects" tests, or just their use in the first step of the *Morrison* test, I note that *Villanueva*'s multifactor inquiry is not simply a rephrasing of the "conduct" or "effects" test. While the *Villanueva* inquiry examines the territoriality of the key "labor elements" of the claim to determine if the claim falls within the statute's domestic focus, the Second Circuit's "conduct" and "effects" tests are much broader, and consider, among other factors, the "timeline identifying when and where the relevant domestic and foreign acts occurred," the "materiality/substantiality of the domestic conduct, the "causal connection between the domestic conduct and the alleged financial losses," and "an overarching measure of reasonableness" in finding the complaint to be enforceable. *O'Mahony*, 537 F. Supp. at 512. In short, *Villanueva*'s multifactor examination of the instant complaint's key labor elements is a narrower inquiry, and because I apply neither the "conduct and effects" tests nor their equivalent in this matter, *Morrison*'s effect on *O'Mahony* does not influence my analysis of the instant complaint's territoriality.

APPLYING THE *MORRISON* TEST TO THE INSTANT COMPLAINT

For the reasons explained above, I follow *Villanueva* and apply the *Morrison* steps in reverse order, beginning with an analysis of whether Complainant's complaint falls within the primary focus of AIR21 as a whole, as well as whether it falls within the focus of Section 42121 specifically. Because I find, for the reasons explained below, that the instant complaint falls within both of those focuses, I further find that enforcement of this complaint does not require extraterritorial application of the statute.

THE PRIMARY FOCUS OF AIR21 IN GENERAL

To determine where the essential events described in Dos Santos' complaint occurred, we must first determine the "primary focus" of AIR21, or, as *Morrison* referred to it, "the focus of congressional concern" in enacting the statute. Because it spends the vast majority of its Motion discussing the presumption against territoriality and applying it to Section 42121, Respondent

does not offer any suggestion as to what Congress' primary focus was when it passed AIR21. As a point of comparison, the *Villanueva* majority found that "the primary focus of SOX generally is to prevent and uncover corporate financial fraud, criminal conduct in corporate activity, and violations of securities and financial reporting laws." *Villanueva*, ARB No. 09-108, slip op. at 11.

By looking to statutory sources (as the majority in *Villanueva* did), I find that the general focus of AIR21 is to ensure the safety of the air traveling public by strengthening the United States' aviation system. AIR21 introduced wide-sweeping reforms of the Nation's aviation industry – including modernization of the FAA's air traffic services, restructuring and expansion of the FAA's budget, and extension of the protections afforded to disabled air travelers – and the statute's legislative history makes clear that the primary focus of AIR21 was to initiate "broad, fundamental improvements in aviation safety." Statement of the President of the United States Signing the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 36 WEEKLY COMP. PRES. DOC. 745-47 (April 6, 2000); *see also*, 146 Cong. Rec. H1002-01, H1009 (daily ed. March 15, 2000) (statement of Rep. Kelly) ("let there be no mistaking that our fundamental purpose here for undertaking this initiative is to ensure the safety of the traveling public.").

AIR21's legislative history verifies that the object of the statute's solicitude is the United States' aviation system, as AIR21's multifaceted reforms aim to protect the air traveling public by "ensur[ing] that we continue to have the safest, most efficient aviation system well into the 21st century." 146 Cong. Rec. S1247-07, S1247 (daily ed. March 8, 2000) (statement of Sen. Gorton); *see also* 146 Cong. Rec. S1247-07 at S1250 (statement of Sen. Rockefeller) (AIR21 "is about improving safety and service for the traveling public and supporting aviation employees under great stress in their challenging jobs."); 146 Cong. Rec. H1002-01, H1008 (daily ed. March 15, 2000) (statement of Rep. Boehlert) ("That is our overarching objective, to maintain an aviation system that continues to be the finest and safest in the world."). Moreover, the Congress that passed AIR21 recognized that the FAA's regulation of airline activities is essential to the mission of safeguarding the Nation's aviation system. *See* 146 Cong. Rec. H1002-01 at H1012 (statement of Rep. Oberstar) (the United States maintains safe airspace "because year after year the FAA does its job overseeing the airlines, the airlines do their part, and our air traffic control system maintains safety in the air and on the ground."). So while the legislative history supports that the general focus of AIR21 is to bring about fundamental improvements in air safety, it also suggests that Congress intended to achieve that goal by regulating the air carriers that operate within the domestic aviation system and under the purview of FAA regulations.

THE ADDITIONAL FOCUS OF SECTION 42121 OF AIR21

Citing the statute and its legislative history, *Villanueva* found that Section 806 of SOX has “the additional focus of protecting employees who suffer an adverse action for reporting allegations of financial fraud committed by their employer.” *Id.* at 10, n.22. While I agree with this succinct statement of which individuals the whistleblower provision of SOX protects, to appreciate the statutory provision’s true purpose, it must be viewed within the context of the greater regulatory scheme to which it contributes, i.e., how does protecting employees further the primary purpose of the statute in general. To that end, a previous decision by a Department of Labor ALJ offers a more detailed explanation of Section 806’s focus, and its analysis of how Section 806 factors into SOX’s antifraud scheme informs my understanding of Section 42121’s “additional” focus.

In a pre-*Morrison* Section 806 case brought by a foreign-based employee of a foreign subsidiary of a publicly-traded company listed on the New York Stock Exchange, the ALJ in *Walters v. Deutsche Bank AG*, ALJ No. 2008-SOX-070, slip. op. at 2, 25 (ALJ Mar. 23, 2009) considered the extent to which a multinational company may be held liable under Section 806 for a retaliatory termination of an employee stationed overseas. In denying the respondents’ motion for summary decision, the ALJ spent considerable time expounding on the predominant purpose of Section 806, concluding that because “the predominant purpose of Section 806 is fraud detection, not worker protection,” it is improper to treat Section 806 as a traditional labor law. *Walters*, ALJ No. 2008-SOX-070, slip. op. at 11. As the ALJ explained:

[T]he primary goal of Section 806 is not *labor* protection. It provides job security, in theory at least, as a means of encouraging employees voluntarily to take an action Congress deems in the public interest. Like a reward to an informant, Section 806 affords an inducement to volunteers to provide needed information. It is no more intended primarily as a job protection measure than a reward is intended primarily to enrich the informant. Although it uses job protection as the method to achieve its purpose, the whistleblower protection provision in Section 806 is intended by Congress to serve as a vital *antifraud* reform designed to protect public investors by creating an environment in which whistleblowers can come forward without fear of losing their jobs.

Id. at 12-13 (italics added). In addition to the language of the statute, the ALJ looked particularly to SOX’s legislative history for evidence that Section 806 is fundamentally an antifraud provision, explaining that “virtually every Senator who commented on the issue described Section 806 as a measure predominantly designed and intended to increase transparency, encourage disclosures of incipient and actual fraud, and protect investors.” *Id.* at 27. In fact, the ALJ found “not a single example of a reference to Section 806 which describes it as primarily a labor law” in the legislative history, but rather “every reference to the protection of whistleblowers related to its primary purpose as a means of encouraging corporate insiders to

challenge the code of corporate silence.” *Id.* In other words, because “worker protection in Section 806 is not an end in itself, [but] simply a method designed to encourage insiders to come forward without fear of retribution,” the ALJ asserted that Section 806’s territorial scope can only be defined by considering the role that Section 806 plays in SOX’s overarching fraud prevention scheme.

Characterizing Section 806 as an antifraud provision had pivotal consequence in *Walter*, as it drove the ALJ to reject a Respondent’s *Carnero*-based argument that because the complainant’s job was located in Switzerland, his complaint implicated a foreign employment relationship, and therefore its enforcement would require impermissible extraterritorial application of the statute. The ALJ explained that because *Carnero* viewed Section 806 “principally [as] a labor law,” the First Circuit’s decision treated “the location of employment” as the driving factor, so as to remain consistent with the traditional principle that “each nation determines the labor standards and conditions applicable to the workers within its borders.” *Id.* at 25. In *O’Mahony*, in contrast, the district court “viewed Section 806 as an antifraud measure and treated it as such by invoking precedents in securities fraud cases,” and therefore “focused less on the location of employment than the location of the misconduct.” *Id.* After reiterating that it addressed a different issue than the First Circuit addressed in *Carnero* – *i.e.* “not whether an extraterritorial violation of Section 806 can be adjudicated domestically, but whether Congress intended to cover a domestic violation of Section 806 against a whistleblower working abroad for a publicly traded multinational company” – the ALJ used *O’Mahony*’s conduct-focused approach to find that the instant complaint did “not allege a predominately foreign violation which would necessitate an inquiry into the extraterritorial reach of Section 806.” *Id.* at 31, 34.

Although I do not apply *O’Mahony*’s “conduct test” to determine the territoriality of the instant complaint, I agree with *Walker*’s characterization of Section 806 as principally an antifraud measure, and, as explained below, I view Section 42121 as filling a role in AIR21’s aviation safety scheme as similar to that which Section 806 fills in SOX’s antifraud scheme. While the “additional focus” of Section 42121 can, as Complainant suggests, be basically described as protecting “air industry employees providing information relating to violations of federal law relating to air safety,” this focus must be viewed primarily as a means for achieving AIR21’s greater aviation safety goals. Obj., ¶ B.(9). Just as the predominant purpose of Section 806 of SOX is fraud detection, the predominant purpose of Section 42121 is detection of aviation safety hazards and airline non-compliance with FAA safety laws, rules and regulations. As with Section 806 of SOX, Section 42121 of AIR21 provides an incentive to airline workers which promotes aviation safety inasmuch as “it provides job security ... as a means of encouraging employees voluntarily to take an action Congress deems in the public interest.” *Id.* at 13.

Section 42121's plain text and orientation in the AIR21 statute confirm that Section 42121 is, at its core, an aviation safety provision. AIR21's whistleblower protection provision appears in AIR21 as Section 519 under the heading "Protection of Employees Providing Air Safety Information," located in Title V of the statute, which is simply titled "Safety." *See* AIR21 § 519, 49 U.S.C. 42121 (2000). In addition to the Subchapter entitled "Whistleblower Protection Program" (which includes Section 519), Title V of AIR21 provides a variety of airline safety provisions, including regulations that relate to cargo collision avoidance systems, the sale and use of certain aircraft parts, transportation of hazardous materials, unruly air passengers, and runway safety areas. *See* AIR21 §§ 501-20, Pub. L. No. 106-181, 114 Stat 61 (codified as amended in scattered sections of 49 U.S.C. and 18 U.S.C. (2000)). Thus, while Title V's umbrella of regulations concerns a wide variety of activity, it is apparent that Congress grouped these regulatory provisions together because they are principally aimed at ensuring aviation safety.

AIR21's legislative history also indicates that AIR21's whistleblower protection provision is just one of many aviation safety mechanisms in a statute that holds aviation safety as its preeminent goal. For example, each time AIR21's whistleblower provision was specifically mentioned during the congressional floor debates preceding the statute's enactment, it was discussed as a mechanism for further ensuring aviation safety, and at no point did a legislator suggest that Section 42121's purpose is to regulate labor conditions in the industry. *See, e.g.*, 146 Cong. Rec. S1247-07, S1252 (daily ed. March 8, 2000) (statement of Sen. Grassley) ("whistle-blower protection adds another, much needed, layer of protection for the traveling public using our Nation's air transportation system."); 146 Cong. Rec. S1255-01 at S1257 (statement of Sen. Hollings) (AIR21 includes "whistleblower protection to aid in our safety efforts and protect workers willing to expose safety problems."); 146 Cong. Rec. H1002-01 at H1008 (statement of Rep. Boehlert) (AIR21 "provide[s] whistle-blower protection for both FAA and airline employees so they can reveal legitimate safety problems without fear of retaliation."); 146 Cong. Rec. H1002-01 at H1011 (statement of Rep. Shuster) (listing "whistle-blower protection for airline and FAA employees" as one of the "important safety initiatives" in AIR21). Likewise, in the official statement issued upon signing AIR21, President Clinton characterized the provision providing whistleblower protection to "air industry employees" as one of several provisions aimed at "address[ing] real safety concerns we face today." *See* Statement of the President of the United States Signing the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 36 WEEKLY COMP. PRES. DOC. 745 (April 6, 2000).

Consequently, in determining whether the essential facts of the instant complaint place it within or outside of the territorial scope of Section 42121's protections, I keep in mind Section 42121's purpose within AIR21's scheme of ensuring aviation safety by strengthening the domestic aviation system. I do not view Section 42121 as primarily a "labor law," but rather as a means for incentivizing airline employees to speak up when they observe violations of Federal aviation safety laws.

WHETHER THE COMPLAINT’S LABOR ELEMENTS PLACE IT WITHIN THE FOCUSES OF AIR21 AND SECTION 42121

Upon review of the factors identified in *Villanueva* and assuming all facts asserted by Complainant to be true, I find that the instant complaint alleges a claim that falls squarely within both focuses of congressional concern, and therefore the complaint can be enforced without applying Section 42121 extraterritorially. The instant complaint concerns an employee of a U.S.-based air carrier that is subject to FAA regulations who reported to the FAA and company officials that his manager violated Federal aviation safety laws by fraudulently clearing aircraft as safe for air travel. Other than the location of the employee’s position, each key element of Complainant’s complaint has significant interaction with the United States aviation system, and, heedful of Section 42121’s role as a means for safeguarding the U.S. aviation system, it is clear that circumstances of the complaint place it within the scope of claims that Congress intended to enforce.

LOCATION OF PROTECTED ACTIVITY AND UNDERLYING VIOLATION

A review of the protected activity described in Dos Santos’ complaint establishes that the instant complaint falls within the focus of Section 42121, as it connects the misconduct forming the basis of Complainant’s protected communications with the domestic aviation safety goals that Section 42121 was designed to achieve. Complainant alleges multiple protected acts, as he lodged multiple internal complaints regarding his former manager’s falsification of FAA documents to improperly clear aircraft, as well as an external complaint to the FAA’s Aviation Safety Hotline. Although some of the recipients of these protected communications were stationed in Europe, several others, including the FAA and Delta’s Safety and Compliance Department, were located in the United States. Although the conduct that prompted Complainant to lodge these complaints – Mr. Crandall’s falsification of aircraft release forms – occurred abroad at CDG, Mr. Crandall’s actions directly implicate Federal aviation safety regulations (specifically, 14 C.F.R. § 43.12 and 14 C.F.R. § 135.429). AC, 1-3. Additionally, by “operating aircraft without proper certificates of airworthiness,” Mr. Crandall’s actions put Respondent in violation of 14 C.F.R. § 135.413, and presented a potential safety hazard for any Americans flying onboard the aircraft as well as those who were anywhere near the path of the aircraft after it entered U.S. airspace when returning from France. *Id*; see also AC, 4, ¶ 21 (“The specific Airbus A330 to which the logbook copies referred arrived at CDG from Atlanta, Georgia . . . and was scheduled to return to Atlanta, Georgia after release . . .”). Thus, both the misconduct that prompted Complainant’s communications and the recipients of those communications evidence that Complainant’s protected activity is directly associated with the domestic aviation regulatory system. Particularly, unlike the complaint in *Villanueva*, the misconduct underlying Complainant’s protected activity plainly implicates a source of Federal

aviation law that is expressly referenced in Section 42121(a)(1), which strongly suggests that this complaint concerns the kind of misconduct (non-compliance with FAA rules by airlines that are subject its regulations) that Congress specifically passed Section 42121 to thwart. Mindful that the focus of Section 42121 is to improve airline compliance with Federal aviation safety laws by incentivizing workers to disclose violations when they arise, both the content and the recipients of Complainant's protected communications place Dos Santos' complaint within Section 42121's ordinary scope.

LOCATION OF RETALIATORY ACTIONS

Moreover, the adverse actions that Complainant allegedly suffered in retaliation for his protected communications demonstrate a strong connection with the territorial United States, as Complainant alleges that Delta officials based in the United States made retaliatory decisions to deny his numerous applications for promotion. Additionally, while Complainant also alleges that Delta managers and employees at CDG harassed and otherwise retaliated against him, Complainant repeatedly notified Delta management officials both at CDG and in the United States about the harassment, yet Delta did nothing to prevent or correct his mistreatment. Taking Complainant's allegations as true and drawing inferences in his favor, Complainant has alleged several adverse actions that he suffered at the hands of Respondent, which, to varying degrees, occurred (or were permitted to occur) by Respondent's officials in the United States.¹² Adverse employment actions taken by management officials of an American airline against an employee that provides information about a Federal aviation safety law violation are just the sort of retaliatory adverse actions that Congress sought to protect airline employees from suffering when it passed Section 42121.

¹² Respondent argues that "virtually all of the facts related to [Complainant's] allegations [of] retaliatory actions occurred in France," because Section 42121 is only violated when an employer's action impacts the "terms and conditions" of the employee's employment, and in this case the "terms and conditions of [Complainant's] employment are located in France." Resp. Mot., 46-51. Setting aside for the moment the assumption that the "terms and conditions of Complainant's employment are located in France," Respondent appears to argue that the place where the adverse action impacts or effects the employee is where the adverse action "occurs." I disagree, and again, following the sound reasoning of the ALJ in *Walters*, I view an adverse action as occurring where the employer makes the decision to take the action. Citing decisions of the ARB and the Court of Appeals for the Seventh Circuit, the ALJ explained that the date that a violation of Section 806 of SOX "occurs" is the date that the respondent's officials decide to take adverse action against the employee in retaliation for his or her protected activity. *Walters*, ALJ No. 2008-SOX-070, slip. op. at 30, n.30 (citing, generally, *Overall v. Tennessee Valley Authority*, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990), cert. denied, 501 U.S. 1261 (1991)). Thus, the date that the violation occurs is distinct from the date that the complainant's statutory time period for filing a complaint begins to run, which is on the date that he or she becomes aware of the respondent's adverse action. *Id.* Similarly, to determine *where* a respondent's alleged violation occurred, the more pertinent inquiry is where the respondent's officials made the decision to take each unfavorable employment action that was more than trivial against the complainant.

LOCATION OF EMPLOYER AND EMPLOYEE

Although Complainant was stationed in France during the period of time relevant to this complaint, he was at all times in an exclusive employment relationship with Respondent, an American airline headquartered in Atlanta, Georgia. In arguing that his complaint is not extraterritorial, Complainant emphasizes the location of his employer, noting that regardless of where he is stationed, he is in an employer-employee relationship with a United States airline. Obj., ¶ B.(15). Respondent, in contrast, focuses exclusively on the location of Complainant's job: essentially, Respondent views the "target" of Section 42121 as preventing an employer from taking retaliatory adverse actions against an employee "in his or her terms and conditions of employment." Resp. Mot., 3, 49-51. Because Respondent seems to equate the location of Complainant's "terms and conditions of employment" with the physical location of his job, Respondent finds that "the terms and conditions of [Complainant's] employment are located in France,"¹³ and thus his claim is extraterritorial. *Id.*

Neither the location of the employee's job, nor the location of the employer, is conclusive of the territoriality of this complaint, because, as explained above, Section 42121 is not chiefly a labor law. In contrast to Title VII (at issue in *Aramco*), Section 42121 is not principally focused on regulating labor relationships, standards or conditions, and to the extent that AIR21 exhibits a domestic focus, it is the domestic aviation system (and the actors within it) that are the objects of the statute's solicitude. Consequently, because Section 42121's regulation of employment relationships is a secondary means for achieving the statute's primary ends, the physical locations of the employee and the employer are relevant, but not determinative, factors. Their value in my analysis depends on the extent that they evidence whether the instant complaint falls within or outside the focus of congressional concern in enacting AIR21 and Section 42121. And, as explained fully above, the primary focus of AIR21 is safeguarding the United States' aviation system, while Section 42121 furthers this purpose by strengthening airlines' compliance with Federal aviation safety laws by incentivizing airline employees to speak out when evidence of violations arise. So while it is relevant that Complainant worked and observed violations of Federal Aviation Administration safety laws and regulations at an overseas location, it is even more relevant that Complainant works for, and reported the legal failings of, a major American air carrier¹⁴ that is a key participant in the American aviation system. It is significant that

¹³ To the extent that the "terms and conditions" of an individual's employment relationship with his or her employer have a defined location, it is unclear (and indeed, Respondent does not explain) why the physical location of an employee's job determines their location. One might reasonably argue that the location of an employee's work is itself a term and condition of an individual's employment agreement, along with salary, benefits, hours, promotions, etc.

¹⁴ In his Objections, Complainant argues that he is protected under Section 42121 because the applicable definition of "air carrier" includes those that provide "foreign air transportation." Obj., ¶ B,(2-3). Respondent dismisses these arguments, contending they are based on "'boilerplate' general definitional language," and after *Aramco* and *Morrison*, they are insufficient to overcome the presumption against extraterritoriality. See Resp. Mot., 34-38. I note this only to clarify that while *Aramco* and *Morrison* may very well have found that such definitional

Respondent is, and Complainant is an employee of, a U.S.-based, FAA-certified air carrier under 14 C.F.R Part 121, the activities of which are subject to Federal aviation safety regulations, and whose compliance with said regulations is the very reason Congress enacted Section 42121.

In sum, virtually all of the key elements of Complainant's complaint demonstrate a substantial connection with the United States' domestic aviation system, as he complained to U.S.-based officials regarding violations of Federal aviation safety laws by an American air carrier, and he suffered retaliatory adverse actions that may be attributable to Respondent's management-level employees in the United States. As a U.S.-based airline that is indisputably subject to FAA regulations, Delta's alleged violation of FAA safety regulations is exactly the kind of non-compliance that Section 42121 aims to deter by empowering airline employees to report misconduct without fear of retaliation, and the ordinary enforcement of the instant complaint fits squarely within the AIR21's focus of ensuring aviation safety. Contrary to Respondent's belief, the physical location of Complainant's job is not decisive as to this complaint's territoriality.

Because I find that enforcement of the instant complaint does not require extraterritorial application of Section 42121, I need not assess whether Section 42121 extends its protections to extraterritorial claims, and I do not rule on that question.¹⁵ Instead, in light of the focus of congressional concern in enacting the statute, I find only that facts alleged in the instant complaint state a territorial claim for relief under Section 42121.

Order

Based on the foregoing, Respondent's Motion to Dismiss is hereby **DENIED**.

In light of this ruling, and pursuant to the parties' agreement in their Joint Proposed Briefing Schedule filed with this office, the parties' are hereby directed to meet and confer

extrapolations do not provide the clear expressions of affirmative intent that are necessary to defeat the presumption that the statute does not apply to extraterritorial claims, those rulings do not foreclose use of definition-based arguments when assessing the focus of congressional concern in passing the statute under the second *Morrison* step.

¹⁵ Respondent spends the bulk of its Motion arguing that that Section 42121 lacks extraterritorial reach, as it finds insufficient indicia of congressional intent to apply the provision to extraterritorial claims. *See* Resp. Mot., 32-45. Most of its analysis rests on the supposition that if a Section 42121 complainant's job is physically located abroad, enforcement of that employee's complaint would *per se* require extraterritorial application of the statute. *See, e.g.*, Resp. Mot., 38 (Respondent applied a "legal presumption that Section 42121 does not apply to employees working abroad" because where a complaint involves an employee that is employed in a foreign country, the inquiry as to whether Section 42121 applies to the complaint "is a question of extraterritoriality and one that is strictly governed by the presumption against extraterritoriality."). In practice, Respondent narrowed its *Morrison* step one analysis based on its interpretation of where a violation of Section 42121 occurs (*i.e.* where it affects the terms and conditions of the employee's employment). As noted above, I disagree with that interpretation of where a Section 42121 violation occurs. Additionally, in making the location of the employee's job the decisive factor, Respondent does not clearly identify the focus of congressional concern in passing AIR21 and Section 42121, and gives no regard to the role that Section 42121 plays in the context of AIR21's aviation safety scheme in its analysis.

regarding proposed hearing dates, an appropriate site for the formal hearing, an estimate of the time needed by each party for the presentation of its evidence at trial, and a proposed deadline for the completion of all discovery and the filing of any dispositive motions.

STEPHEN L. PURCELL
Chief Administrative Law Judge

Washington, DC