



In the Matter of:

CHARLES SHI,

ARB CASE NO. 2017-0072

COMPLAINANT,

ALJ CASE NO. 2016-AIR-00020

v.

DATE: December 5, 2019

MOOG INC., AIRCRAFT GROUP,

RESPONDENT.

Appearances:

For the Complainant:

Charles Shi; *pro se*; Shanghai, China

For the Respondent:

Robert J. Lane, Jr., Esq. and Jessica L. Copeland, Esq.; *Hodgson Russ, LLP*; Buffalo, New York

**Before: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie,
*Administrative Appeals Judges***

FINAL DECISION AND ORDER

PER CURIAM. The Complainant, Charles Shi, filed a retaliation complaint under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or Act)¹ with the

¹ 49 U.S.C. § 42121 (2000). AIR 21's implementing regulations are found at 29 C.F.R. Part 1979 (2019).

Department of Labor's Occupational Safety and Health Administration (OSHA). Complainant alleged that his employer, a Chinese subsidiary of Respondent Moog Inc., terminated his employment in retaliation for making safety-related complaints. OSHA dismissed the complaint because it determined that Respondent was not a covered employer as it was not a contractor or a subcontractor of an air carrier. At Complainant's request, the case was referred to the Office of Administrative Law Judges (OALJ). After the parties agreed to allow the Administrative Law Judge (ALJ) to resolve the matter on the record, the ALJ dismissed Complainant's complaint sua sponte for lack of jurisdiction because adjudication of Complainant's complaint would require impermissible extraterritorial reach. D. & O. at 4, 15, n.24. Complainant filed a petition requesting that the Administrative Review Board (ARB or the Board) review the ALJ's order. We granted that petition and now affirm.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions in review or on appeal of matters arising under AIR 21 and its implementing regulations at 29 C.F.R. Part 1979. Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (April 3, 2019); 29 C.F.R. §1979.110(a). The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings as long as they are supported by substantial evidence. 29 C.F.R. §1979.110(b); *Yates v. Superior Air Charter, LLC, d/b/a Jetsuite Air*, ARB 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 4 (ARB Sept. 26, 2019).

DISCUSSION

AIR 21's employee-protection provisions generally prohibit covered employers and individuals from retaliating against employees because they provide information or assist in investigations related to the categories listed in the AIR 21 whistleblower statute.² To state a claim under the Act, a complainant must allege

² The employee protection provisions of AIR 21 state the following:

- (a) Discrimination against airline employees.--No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting

that his employer took an unfavorable action against him and that protected activity by the Complainant was a contributing factor in the adverse action. *See* 49 U.S.C. § 42121(b)(2)(B)(iii).

It is undisputed that Complainant is a foreign citizen who worked for Moog Inc.'s Chinese subsidiary under a Chinese contract and was paid in Chinese currency. While he alleges that he took work-related trips to the U.S. on some occasions, it is undisputed that his primary worksite was in China. It is likewise undisputed that Respondent, his employer's parent company, is a U.S. company. Complainant reported to his Chinese supervisors that Chinese subcontractors used "fake" materials in machine parts. He alleges that the parts were sold to and used by Boeing and other U.S. manufacturers to manufacture aircraft control system parts in the U.S. and could cause aircraft to crash.

The question addressed by the ALJ and now before the ARB on appeal is whether the AIR 21 employee protection provisions reach Complainant's complaint alleging a retaliatory discharge in China. For this inquiry, the Board looks to the analysis described by the Supreme Court in *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247 (2010) and followed by the Board in *Hu v. PTC Inc.*, ARB No. 2017-

pursuant to a request of the employee)—

(1) 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 or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding 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 or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a).

0068, ALJ No. 2017-SOX-00019 (ARB Sept. 18, 2019). The two-step framework in *Morrison* requires analysis of (1) whether the statute at issue extends extraterritorially and, if not, (2) whether the activity comprising the focus of the statute occurred within the United States or outside of it. *Hu*, ARB No. 2017-0068 at 6-7; *Morrison*, 561 U.S. 266-70. If the activity identified under Step 2 occurred within the U.S., then there is a permissible domestic application of the statute. *Id.* at 6. If the activity occurred outside the U.S., then there is an impermissible extraterritorial application and the complaint must be dismissed. *Id.* at 7, 11.

Applying *Morrison* to Complainant's claim, we first set forth the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" 561 U.S. at 255 (quoting *EEOC v. Arabian American Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991)). "This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate." *Id.* "It rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." *Id.* Whether a statute has extraterritorial reach turns on the statutory text, the relevant statutory context, and the legislative intent. "[U]nless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'" *Id.* (quoting *Aramco*, 499 U.S. at 248).

Reviewing the text of the employee protection provision of AIR 21, we do not find any indication that Congress intended extraterritorial application. The statute prohibits "air carrier[s] or contractor[s] or subcontractor[s] of an air carrier" from engaging in discrimination against employees because they engaged in certain protected activities. "Air carrier" is defined under AIR 21 as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C. §40102(2). While United States laws are referenced several times, nothing in the statute references application to circumstances outside of the U.S. Neither does any legislative history regarding the statutory provisions. Finding no Congressional indication of extraterritoriality, we hold that the employee protection provisions of AIR 21 are not extraterritorial.

Therefore, to allow the adjudication of the complaint before us, it must be a domestic application of the employee protection provision of AIR 21. Applying the second step of the *Morrison* analysis, we next conclude that the primary focus of the

employee protection provisions of AIR 21 are on the retaliatory adverse personnel action. While AIR 21's overarching purpose may be to protect air carrier safety, that "meta-purpose is not dispositive of the question before us." *Hu*, ARB No. 2017-0068, slip op. at 9. Rather, we look to the text of the statute and the primary focus of the employee protection provisions of AIR 21 itself. *Id.* The employee protection provisions of AIR 21 provide that "[n]o [covered] air carrier . . . may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee [engaged in protected activity]." 49 U.S.C. 42121(a). Applying *Morrison*, the primary focus of the employee protection provisions of AIR 21 are necessarily connected to the employee's compensation, terms, conditions, or privileges of employment. This focus helps to explain why the employee protection provisions of AIR 21 are administered by the U.S. Department of Labor and not by the Federal Aviation Administration (FAA).

Because we conclude that the primary focus of the employee protection provisions of AIR 21 is deterring and punishing retaliation against an employee's compensation, terms, conditions, or privileges of employment, "the location of the employee's permanent or principal worksite is the key factor to consider when deciding whether a claim is [domestic or extraterritorial]" in application. *Hu*, ARB No. 2017-0068, slip op. at 10. Again, the focus is the employee and the controlling authority is labor and employment law rather than air carrier safety law. "Accordingly, the location of other conduct, which may be the subject of other requirements, regulations or prohibitions under [AIR 21], becomes less critical, if not irrelevant." "In perhaps a majority of extraterritorial complaints under [the employee protection provisions of AIR 21] there is some tangential connection to the United States." *Morrison*, 561 U.S. at 266 ("[T]he 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 . . ."). But an AIR 21 complaint concerning an adverse action that affects an employee at a foreign principal worksite does not become territorial because the alleged misconduct occurred in the U.S., or because it had, or would have, effects on U.S. air carrier safety, or because the alleged retaliatory decision was made in the U.S.

Applying this analytical framework to this AIR 21 complaint, we conclude that it does not represent a domestic application of the employee protection provisions. As previously noted, it is undisputed that Complainant's primary worksite was in China, he was employed under a Chinese contract, he was paid in

Chinese currency, and his direct employer was a Chinese corporation. The only alleged domestic contacts in this matter are that Complainant 1) took a few work-related trips to the U.S., 2) believes that some of the people responsible for the adverse action taken against him may be U.S. citizens, and 3) complained about counterfeit parts that were used to manufacture aircraft in the U.S. which were flown in the U.S. Even assuming that all of these allegations are true, they still would not, without more, create a domestic application of the employee protection provisions of AIR 21. The primary responsibility for protecting aviation safety lies with the FAA, which has been notified of and investigated this matter.³

CONCLUSION⁴

The ALJ's conclusions are correct that the employee protection provisions of AIR 21 are not extraterritorial and that in this case there is no permissible domestic application allowing for adjudication of this matter. Thus, we **AFFIRM** the ALJ's dismissal of the complaint.

SO ORDERED.

³ 49 U.S.C. 42121(b)(1) (“Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint . . .”); D. & O. at 15 (citing JX X, described as a “June 1, 2016 letter from the FAA to Complainant stating: ‘[t]he investigation did not substantiate that a violation of an order, regulation, or standard of the FAA related to air carrier safety occurred.’”).

⁴ We note that while Shi has appealed the ALJ's sanctions against him for failing to submit to a deposition and has filed a motion with the Board to compel Respondent to verify and disclose information, it is not necessary for the Board to rule on these matters because the question of jurisdiction is dispositive and would not be changed by any additional evidence.