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Issue Date: 04 November 2014

Case No.: 2014-AIR-00017

In the Matter of

JEFFREY A. SOBHANI
Complainant

v.

BOMBARDIER AEROSPACE
Respondent

DECISION AND ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

Procedural History

This matter involves a dispute concerning alleged violations by the Respondent, Bombardier Aerospace, ("Bombardier") of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21" or "the Act"), 49 U.S.C. § 42121 (2000). The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are located at 29 C.F.R. Part 1979, published at 67 FED. REG. 15,453 (Apr. 1, 2002).

On March 19, 2014, the Complainant filed a verbal complaint with the Occupational Safety and Health Administration ("OSHA") alleging that the Respondent discriminated against him in violation of the Act. The alleged protected activity involves the contents of an email-memorandum, dated January 30, 2014, that the Complainant sent to the Respondent. The memorandum reported numerous safety issues regarding the Respondent's Q-400 aircraft, including erroneous data and methodologies used for certification purposes.[1]

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[1] Specifically, the Complainant reported the following:

> Erroneous methodologies to evaluate flight test data, failure to archive flight test data, use of non-production FADEC for Certification Flight Test and improper inputs into engine deck for installation losses. Further, [Respondent] was improperly taking credit for power measured in Flight Test prior to RGB (reduction gearbox) loss when comparing to engine deck which considered the loss . . . .

Complainant's Response to the Notice of Assignment and Conference Call, dated August 13, 2014; *see also* OSHA "Report of Investigation," dated May 8, 2014.

On May 8, 2014, OSHA issued its Report of Investigation. The Secretary dismissed the case for lack of jurisdiction, finding that neither the Respondent nor Complainant were covered under AIR 21. The Secretary found that the Respondent was not covered under the Act because "it is not an air carrier within the meaning of 49 U.S.C. § 42121 and 49 U.S.C. § 40102(a)(2)." The Secretary also found that the Complainant was not covered under the Act because the Complainant worked in Canada and is therefore not an "employee within the meaning of 49 U.S.C. § 42121." The Complainant requested a hearing before an Administrative Law Judge ("ALJ") in a letter dated May 28, 2014.

On June 19, 2014, ALJ Stephen Purcell issued a Notice of Docketing and ordered the parties to show cause on the issue of whether this case should be dismissed for lack of jurisdiction. The parties timely complied.[2]

On July 31, 2014, ALJ Purcell issued his "Order Denying Dismissal of Complaint for Failure to State a Claim," finding that the Complainant stated "sufficient facts which provide 'fair notice'" that the Respondent is a contractor and that the Complainant is an employee under AIR 21.[3]

Subsequent to ALJ Purcell's Order, this case was transferred to me and I issued a "Notice of Assignment and Conference Call," on August 6, 2014. Therein, I asked the parties to brief me on the following issues: (1) whether the Complainant's complaint to OSHA was timely filed; (2) whether the complainant's appeal to the Office of Administrative Law Judges (OALJ) was timely filed; (3) whether the parties are properly identified and designated; (4) the discrete acts of retaliation or discrimination that the Complainant alleges give rise to subject matter jurisdiction under the Act; (5) proposed hearing dates; and (6) any anticipated discovery issues. The parties timely responded.[4]

On August 26, 2014 I issued a "Notice of Hearing and Pre-hearing Order," where I scheduled the hearing for January 21, 2015 through January 22, 2015 in Burlington, Vermont. I also set the discovery deadline for November 7, 2014; the deadline to submit a pre-hearing statement for November 21, 2014.[5] Finally, I set October 3, 2014 as the deadline for the filing of any dispositive motions.

On October 2, 2014, the Respondent, through counsel, timely filed its "Motion for Summary Judgment."[6] On October 22, 2013[7] this Office received Complainant's "Memorandum in Opposition to Bombardier Inc.'s Motion for Summary Judgment," dated October 16, 2014."[8]

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[2] The Respondent filed its "Response to Order to Show Cause" on July 17, 2014.
The Complainant filed its "Memorandum in Response to Order to Show Cause" on July 18, 2014.

[3] I note that ALJ Purcell's Order was silent on the issue of whether AIR 21 applies in this case.

[4] The Respondent filed its response on August 12, 2014. The Complainant filed its response on August 13, 2014.

[5] I also set November 21, 2014 as the date for the pre-hearing conference.

[6] Although the Respondent titled this document "Motion for Summary Judgment," the relevant motion for this tribunal is a "Motion for Summary Decision." I will, therefore, refer to Respondent's Motion as its "Motion for Summary Decision" throughout this Order.

Finally, on October 23, 2014, I held a conference call between the parties to discuss issues I had concerning the Stipulated Protective Order, dated October 13, 2014, as well as the Respondent's "Motion for Summary Decision."

Facts Alleged

The record before me is comprised of the following documents:

- U.S. Department of Labor's "Secretary's Findings" letter, dated May 8, 2014;
- Complainant's Reply to the "Secretary's Findings" letter, dated May 28 , 2014;
- Response of Bombardier Inc. to Order to Show Cause, dated July 17, 2014;
- Complainant's Memorandum In Response to Order to Show Cause, dated July 18, 2014;
- Order Issued by ALJ Purcell Denying Dismissal of Complaint for Failure to State a Claim, dated July 31, 2014;
- Bombardier's Response to August 6, 2014 Notice of Assignment, dated August 12, 2014;
- Complainant's Response to August 6, 2014 Notice of Assignment, dated August 13, 2014;
- Motion of Bombardier Inc. For Summary Decision, dated October 2, 2014;
- Complainant's Memorandum in Opposition to Bombardier Inc.'s Motion for Summary Judgment, dated October 16, 2014; and
- Reply in Support of the Motion of Bombardier Inc. for Summary Judgment, dated October 22, 2014.[9]

Complainant's Allegations

On or around January 30, 2014, the Complainant wrote an email-memorandum to the Respondent raising various safety concerns.[10] These concerns centered on the Respondent's Q-

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[7] The Rules of Practice and Procedure For Administrative Hearings Before the Office of Administrative Law Judges 20 C.F.R. § 18.40 provides the opposing party ten days after service of the Motion to respond. Section 18.4(b) provides an additional five days of response time when documents are filed by mail. Therefore, under the governing regulations, the Complainant's deadline for filing a response elapsed on October 17, 2014.

[8] The Certificate of Service attached to the Complainant's Memorandum indicates that this document was sent by mail to the Respondent but that the document was faxed to this tribunal on October 16, 2014. Nevertheless, the Complainant faxed this document to the OALJ office in Washington, D.C., not Cherry Hill, NJ where my chambers are located. I find that, even though the Complainant faxed its response to the wrong office, that it still made a good faith effort to comply with the time computations set forth in § 18.40. Therefore, I have incorporated the arguments set forth in the Complainant's opposition brief when drafting this decision.

[9] I granted the "Motion of Bombardier Inc. for Leave to File a Reply In Support of its Motion for Summary Judgment" during the October 23, 2014 conference call.

[10] *See* Complainant's Response to August 6, 2014 Notice of Assignment, dated August 13, 2014.

400 aircraft.[11] Specifically, the Complainant's memorandum detailed deficiencies in the methodology used to evaluate and archive Q-400 flight test data, including engine performance shortfalls.[12] This data was submitted to Transport Canada for the purpose of obtaining regulatory certification.[13] In early February 2014, the Complainant's manager voiced his displeasure with the contents of his memorandum. Also in early February 2014, the Complainant contacted the Federal Aviation Administration ("FAA") regarding the contents of his report. On February 21, 2014 the Respondent "laid off" the Complainant. The Complainant filed his complaint with OSHA by phone call on March 19, 2014.[14]

The Complainant made the following allegations to OSHA. First, the Q-400 flight tests were conducted in Wichita, Kansas in 1998. The data was also stored there. Second, the Respondent publishes a flight manual and the erroneous data could become part of that publication.[15] Third, the FAA is currently conducting an investigation of the contents of the Complainant's memorandum. Fourth, the Respondent provides "various follow up services . . . on the airplanes it sells, including warranty repair and maintenance." Fifth, the Respondent operates flights between Toronto, Montreal, Wichita and Mexico. Sixth, the Respondent has sold some 450 of the Q-400 with "hundreds" currently in use in the United States.[16] Finally, the Complainant is an American citizen.[17]

In his Reply to the "Secretary's Findings" letter, dated May 28, 2014, the Complainant alleged that the Respondent is an "air carrier" within the meaning of the Act. *See* 49 U.S.C. § 40102(a); *see also* 49 U.S.C. § 42121(a). In the alternative the Complainant argues that the Respondent is a "contractor" within the meaning of the Act. *See* § 42121(a); *see also* 29 C.F.R. § 1979.101.[18]

Respondent's Responses

The Respondent contends that it is not a covered entity under AIR 21 because it "is a Canadian aerospace company that designs and manufactures aircraft. [The Respondent] is a corporation organized under the laws of Canada and is publically traded on the Toronto stock

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[11] *See* Complainant's Reply to the "Secretary's Findings" letter, dated May 28, 2014.

[12] *See id.*

[13] According to its website, Transport Canada is a Department within the Canadian government that "is responsible for transportation policies and programs." *See* About Transport Canada, http://www.tc.gc.ca/eng/aboutus-menu.htm (last visited Oct. 22, 2014).

[14] *See* Complainant's Memorandum In Response to Order to Show Cause, dated July 18, 2014.

[15] The approved flight manual is the source document for operational limitations and performance parameters for an aircraft. The FAA requires an approved flight manual for aircraft type certification and is required to be available to the flight crew during air carrier operations. *See* 14 C.F.R. §§ 25.1581 and 121.141.

[16] *See* Complainant's Memorandum In Response to Order to Show Cause (alleging that the Respondent sold the Q-400 aircraft to U.S. air carriers, such as Frontier Airlines, Horizon Airlines, Island Air, L-3 Communications Advanced Aviation LLC, Republic Airlines and United Express).

[17] *See id.*

[18] I note that, although it touched upon the Respondent's extraterritoriality argument, Complainant's "Memorandum in Opposition to Bombardier Inc.'s Motion for Summary Judgment" is primarily concerned with the issue of whether the Respondent is an "air carrier" or a "contractor" under the Act.

Exchange. [It] is headquartered in Montreal, Quebec, Canada and its operations are substantially conducted within Canada."[19] The Respondent asserts that is not a contractor for any U.S. air carriers. It manufactures and sells aircraft that are fully certified pursuant to a bi-lateral agreement between the FAA and Transport Canada. Transport Canada issues the certification for the Respondent's aircraft, which the FAA then validates. This process is completed before the Respondent sells an aircraft to an American entity. The Respondent's customers take delivery of all aircraft in Canada. The Respondent itself maintains that it performs no safety-related functions once the aircraft is sold and goes into service in the United States. Bombardier Services Corporation, a wholly owned subsidiary of the Respondent, "perform[s] any necessary repair and warranty work in the United States."[20] It operates a free employee shuttle between Toronto and Montreal but does not provide air transportation to the public. The Complainant was never employed by any U.S. subsidiary of the Respondent. At all times, the Complainant's duties were performed in Canada on aircraft certified under Canadian laws.[21]

Legal Standard

The purpose of summary decision is to promptly dispose of actions in which the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. 29 C.F.R. § 18.40, *see also* Federal Rule of Civil Procedure 56(c).[22] An issue is genuine if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way. *See Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). A fact is material and precludes a grant of summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *See Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *See Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). If no issues are present, the moving party is entitled to a judgment as a matter of law. 29 C.F.R. 18.41(a)(1) ("Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard.")

The burden of proof in a motion for summary decision is borne by the party bringing the motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Because the burden is on the moving party, the evidence presented is construed in favor of the party opposing the motion who is given the benefit of all favorable inferences that can be drawn from it. *See id.* A non-moving party may not rest upon mere allegations or denials in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby*, 447 U.S. 242 (1986). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *See Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may

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[19] *See* Complainant's Memorandum In Response to Order to Show Cause, dated July 18, 2014.
[20] *See* Motion of Bombardier Inc. For Summary Judgment, dated October 2, 2014.
[21] *See id.*
[22] 20 C.F.R. § 18.1(a) states that "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 . . . ."

not escape summary judgment in the mere hope that something will turn up at trial. *See Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988).

Discussion

The Respondent argues that this tribunal should grant its "Motion for Summary Decision" for two reasons. First, Congress did not intend for AIR 21 to apply to events substantially occurring outside the borders of the United States. Second, there is no way to avoid the extraterritoriality issue given the facts comprising the Complainant's case. To survive the Respondent's "Motion for Summary Decision," then, the Complainant must demonstrate that a genuine issue of material fact exists as to whether: (1) AIR 21 was meant to apply to facts and events occurring outside of the United States, or (2) the Complainant's allegations involve a domestic application of the Act. For the following reasons, I **DENY** Respondent's "Motion for Summary Decision."

In *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010), the Supreme Court addressed the application of federal law to matters arising substantially outside the territorial borders of the United States. The Court found that § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") did not provide a cause of action to foreign plaintiffs suing foreign and American defendants for securities fraud allegedly committed on foreign exchanges. In doing so, the Court applied the "'long standing 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.'" *Id.* at 255 (quoting *EEOC v. Arabian Am. Oil Co.* 499 U.S. 244, 248 (1991) ("*Aramco*"). This principle rises to the level of a canon of statutory interpretation. *See id.* (citing *Blackmer v. United States*, 284 U.S. 421, 437 (1932)). "Thus, 'unless 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). This presumption is only rebutted when the statute evinces a "clear indication of extraterritoriality." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1665 (2014) (quoting *Morrison* 561 U.S. at 255); *see also Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993) (noting that courts are to consider "all available" evidence when discerning the meaning of a statute, including its "text, context, structure and legislative history"). When a statute is silent on extraterritorial application, "it has none." *Morrison*, 561 U.S. at 255.

The *Morrison* Court applied the foregoing principles and came to two conclusions. First, based on a textual analysis of the Exchange Act, § 10(b) had no extraterritorial reach. Second, the "focus" of the Exchange Act is to prevent fraud within the United States, rather than the country where the deception originated, and therefore the events in *Morrison* – involving shares of Australian stock – lay outside the domestic reach of § 10(b). *Morrison*, 561 U.S. 253-270.

Courts have interpreted *Morrison* to require a two-step analysis when assessing the viability of claims resting on the potential extraterritorial application of a federal law. *See, e.g. Liu Meng-Lin v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014); *Villanueva v. Core Laboratories NV*, ARB Case No. 09-198 (ARB December 22, 2011), *aff'd, Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103 (5th Cir. 2014); *Dos Santos v. Delta Airlines, Inc.*, OALJ Case No. 2012-AIR-00020

(OALJ January 11, 2013).[23] The first step requires the finder of fact to interpret the Act to determine whether Congress intended for it to reach beyond the domestic borders of the United States. *Morrison*, 561 U.S. at 262-263. The second step involves drawing a line between "domestic" and "foreign" claims. This requires determining where "the essential events [of the case] occurred." *Villanueva*, ARB Case No. 09-198 at *9. It also involves identifying "the focus of congressional concern." *Morrison*, 561 U.S. at 266. Therefore, the second *Morrison* step is, itself, a two-prong analysis. *See Villanueva*, ARB Case No. 09-198 at *10 n.22. Where the focus of the statute strongly correlates to the "essential events" of the case, concerns relating to the extraterritorial application of the statute are abrogated, as if the events occurred within the United States.[24]

I. Whether Congress intended AIR 21's whistleblower provision to reach extraterritorially.

As stated above, absent specific Congressional direction, federal laws are presumed to apply only within the territorial boundaries of the United States. *See Morrison*, 561 U.S. at 255. In this regard, the Complainant's claim faces steady headwind. For the following reasons I conclude that Congress included **no explicit statutory evidence** that it meant for AIR 21's whistleblower provision to apply extraterritorially. Therefore, I find that the Complainant has not met its burden to prove that a genuine issue of material fact exists regarding Congress's intent for § 42121 to apply extraterritorially. Put simply, Congress did not intend for § 42121 to apply to events occurring substantially outside the territorial borders of the United States.

The whistleblower provision of AIR 21 is set forth in 49 U.S.C. § 42121(a). In relevant part, it provides that "[n]o air carrier or contractor or subcontractor of an air carrier may discharge . . . or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . ." filed a proceeding relevant to a violation of federal law. "Air carrier" is defined in 49 U.S.C. § 40102(a) as "a **citizen of the United States**[25] undertaking by any means, directly or indirectly, to provide air

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[23] ALJ Purcell decided the *Dos Santos* case, as well as the July 31, 2014 "Order Denying Dismissal of Complaint for Failure to State a Claim," in the instant matter.

[24] For example, in *Morrison*, the Court found that Congress sought to regulate domestic transactions when passing the Exchange Act. Because the statute's aims are to protect parties in relation to domestic transactions, § 10(b) only applied to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities . . ." *Morrison*, 561 U.S. at 266. The dispute in *Morrison* concerned securities fraud allegedly committed on foreign exchanges. Therefore, the Supreme Court found that the Exchange Act did not reach such "wholly" extraterritorial matters and it affirmed the dismissal of petitioner's complaint. *See id.* at 273.

[25] 49 U.S.C. § 40102(a) defines "citizen of the United States" as:

> (A) an individual who is a citizen of the United States; (B) a partnership each of whose partners is an individual who is a citizen of the United States; or (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.

transportation." (Emphasis added). "Contractor" means "a company that performs safety-sensitive functions by contract for an air carrier." 29 C.F.R. § 1979.101.

Nowhere in § 42121(a) did Congress include explicit language indicating an intention to apply this whistleblower provision extraterritorially. Moreover, the Supreme Court has determined that to determine the "'scope of a statute, we must look first to its language.'" *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)). Because the plain language of AIR 21's whistleblower statute does not provide for its extraterritorial application, this weighs heavily against a finding that Congress intended for AIR 21 to apply to facts arising substantially abroad, as the Complainant alleges here.

Moreover, the term "air carrier" is defined in 49 U.S.C. § 40102(a). Under this provision, an air carrier is only covered when the air carrier is a "citizen of the United States;" or, in cases where the air carrier is a corporation, when the corporation has a sufficient ownership nexus with American citizens. As stated above, to show the extraterritorial effect of the Act, the Complainant must show a "clear indication of extraterritoriality." *Morrison*, 561 U.S. at 255. In contrast to this requirement, Congress specifically required that a covered Respondent be an American citizen or have American ownership.[26] This weighs further against a finding that Congress intended AIR 21's whistleblower protection provision to extend beyond the territorial boundaries of the United States.[27]

I note also that there is no evidence in the legislative history showing Congress's intention of applying extraterritorially to AIR 21's whistleblower provision. *See, e.g.* H.R. Rep. No. 106-167 (1999) ("Title VI would provide whistleblower protection for employees of air carriers[28] who notify authorities that the Respondent is violating a federal law relating to air carrier safety."); H.R. Rep. No. 106-513 (2000); H.R. Rep. No. 100-883 (1988); S. Rep. No. 105-278 (1998). Furthermore, I find that when Congress did expect the provisions of AIR 21 to have extraterritorial effect, it specifically referenced this purpose in the legislative history. *See, e.g.*, S. Rep. No. 105-278 ("Section 305(a) would restate the statutory authority that allows the

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[26] I, furthermore note that OSHA, in its final rule implementing the "Procedures for the Handling of Discrimination Complaint under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century," 68 FED. REG. 14,100, 14101, declined to incorporate the suggestion of commenters who wanted the term "air carrier" to include "carriers owned by foreign persons." OSHA declined, because "the general definition of air carrier is set forth [in § 40102(a) so] OSHA has no authority to define the terms otherwise."

[27] The Complainant argued in the alternative that AIR 21 applies, here, because the Respondent was a contractor. Congress defined the term "contractor" as "a company that performs safety-sensitive functions by contract for an air carrier." § 42121(e). Although a potential interpretation of this provision is that the definition of "contractor" is not circumscribed to apply to United States citizens only – as is the definition of "air carrier" – this is not the burden that the Complainant must meet here. The Complainant's must show Congress's "'affirmative intention . . . clearly expressed' to give the statute extraterritorial effect." *Morrison*, 561 U.S. at 255 (quoting *Aramco*, 499 U.S. at 248). Congress was silent on whether a "contractor" can be a foreign entity, for the purposes of applying the AIR 21 whistleblower provision. For this reason, I find that the Complainant cannot rebut the presumption against the extraterritorial application of AIR 21 due to the definition of "contractor," under § 42121(e).

[28] As noted above, 49 U.S.C. § 40102(a) defines "air carrier" as a "citizen of the United States."

FAA to charge fees for overflights of the United States by aircraft that neither land nor take off domestically . . . .The Committee expects that the U.S. and Canada, for example, which exchange air traffic control responsibilities along the border, will enter into a reciprocity agreement whereby neither one would charge the other for overflights that are purely domestic in origin and destination."). The silence of the legislative history regarding the issue of extraterritoriality weighs further against a finding that Congress intended § 42121 to reach matters occurring substantially outside the territorial borders of the United States.

Yet another factor showing that Congress intended AIR 21's whistleblower provision to apply to only domestic matters is the fact that many other provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 US.C. §§ 40101, *et seq.*, display Congress's intent for extraterritorial application. *See, e.g.* § 41313 (titled "Plans to address needs of families of passengers involved in foreign air carrier accidents); § 45301 (discussing the cost recovery mechanisms for foreign aviation services); § 44936 ("An air carrier, *foreign air carrier*, airport operator, or government that employs, or authorizes or makes a contract for the services of, an individual in a position described in paragraph (1) of this subsection shall ensure that the investigation the Under Secretary requires is conducted."); *see also* § 44701 (titled "Implementation of Article 83 bis of the Chicago Convention[29] [of the Convention on International Civil Aviation ("CICA")]." The foregoing provisions of AIR 21 show that when Congress intended for an AIR 21 provision to apply extraterritorially, it specifically stated this intent. This interpretation coincides with the canon of statutory interpretation that: "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 474 U.S. 15, 23 (1983). Here, the plain language of the Act shows that when Congress intended to apply AIR 21 extraterritorially, it explicitly stated its intent to do so in the statutory language. Because § 42121 provides no language whatsoever extending AIR 21's whistleblower protections extraterritorially, this weighs heavily against a finding that § 42121 is intended to apply outside the boundaries of the United States.

For the foregoing reasons, I find that the Complainant has not succeeded in rebutting the presumption that AIR 21's whistleblower protection does not have extraterritorial reach.

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[29] This section refers to Article 83 bis of the Chicago Convention of the International Civil Aviation Organization ("ICAO"). Articles 1 and 11, as well as the Preamble to the Chicago Convention, illustrate a theme of independent state sovereignty within the larger field of civil aeronautics law. For example, the Preamble states that the purpose of the Chicago Convention is to ensure that international civil aviation "may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity . . . ." Convention on International Civil Aviation Done at Chicago on the 7th Day of December 1994, http://www.icao.int/publications/Documents/7300_orig.pdf (last visited October 22, 2014). *See also*, 15 U.N.T.S. 295. Furthermore, Article 1 is titled "Sovereignty;" and Article 11 is titled "Applicability of Air Regulations" and mandates that the law of the state, where an aircraft engaged in international air transportation is located, "shall be applied to the aircraft of all contracting States without distinction of nationality . . . ." The ICAO's emphasis of state sovereignty, rather than extraterritoriality, provides further evidence to show that AIR 21's whistleblower protections do not extend beyond the borders of the United States.

Therefore, Summary Decision is appropriate unless the Complainant can establish that the facts comprising his complaint indicate a domestic application of § 42121.

II. A. Whether the facts alleged constitute a domestic, rather than extraterritorial, application of AIR 21.

To draw the line between "domestic" and "foreign" claims, *Morrison* requires the trier of fact to determine the "focus" of congressional concern. 561 U.S. at 266. Following *Villanueva*, the trier of fact must find not only the focus of the Act itself, but also the focus of the specific whistleblower provision under which the Complainant's cause of action arises. *Villanueva*, ARB Case No. 09-198 at *10-11 n.22 (addressing the focus of the Sarbanes Oxley Act ("SOX"), as well as Section 806 of SOX); *see also Dos Santos*, OALJ Case No. 2012-AIR-00020 at *21-23. Once the congressional concern is found, the judge must then apply the facts of the case to this focus to determine whether "the essential part of the . . . activity occurred domestically or extraterritorially." *Villanueva*, ARB Case No. 09-198 at *9.

The essential parts of the activity include, but are not limited to: (1) where the alleged protected activity and underlying violations occurred; (2) the location of the retaliatory actions; (3) the location of the Respondent; (4) the location of the retaliatory act; and (5) "the nationality of the laws allegedly violated that the complainant has been fired for reporting." *Id.* at *10 n.22 (dismissing the Complaint because the "driving force of the case, the fraudulent activity being reported, was solely extraterritorial and takes the events outside Section 806's scope."). Moreover, the connection between the driving force of the Act and the essential parts of the case must be "meaningful" and not the sort of '"fleeting' connection that 'cannot overcome the presumption against extraterritoriality.'" *Liu Meng-Lin*, 763 F.3d at 180 (quoting *Morrison*, 561 U.S. at 266); *see also In re Royal Bank of Scotland Grp. PLC Sec. Litig.*, 765 F.Supp.2d 327, 336 (S.D.N.Y. 2011) ("The idea that a foreign company is subject to U.S. [s]ecurities laws everywhere it conducts foreign transactions merely because it has 'listed' some securities in the United States is simply contrary to the spirit of *Morrison*."). For the following reasons, I find that the essential parts of the Complainant's allegations indicate a substantial nexus with the focus of AIR 21 as an air safety Act; and, consequently, the Complainant's allegations fall within a domestic application of the Act.

1) The focus of AIR 21, generally.

AIR 21 is, plainly, an air safety statute. Congress's focus on air safety is illustrated through the following observations. First, Title V of the Enrolled Bill is titled "Safety." Within this "Safety" title is Sec. 519. This section amended Chapter 421 of the United States Code to include § 42121 – the whistleblower protection program that provides the very cause of action under which the Complainant filed his Complaint against the Respondent in the instant action. Second, Sec. 714 amended 49 U.S.C. § 44701 and redesignated subsection (e) of this section as "Bilateral Exchanges of *Safety Oversight Responsibilities*," pursuant to Article 83 bis of the CICA. (Emphasis added). Third, discussing a bill that eventually became AIR 21, the Senate Committee on Commerce, Science and Transportation stated that "[t]itles I through V of the bill reaffirm the commitment of the Committee to ensuring [sic] that the *U.S. continues to have the safest and most efficient air transportation system in the world.*" S. Rep. No. 105-278, at 2 (1998) (emphasis added) ("The bill also includes various provisions *to improve aviation safety*,

security and system capacity . . . ."); *see also* 146 Cong. Rec. H1002-01, H1009 (daily ed. March 15, 2000) (statement of Rep. Kelly) ("[L]et there be no mistaking that **our fundamental purpose** here for undertaking this initiative is *to ensure the safety of the traveling public.*") (emphasis added). Finally, in his signing statement accompanying AIR 21, President Clinton remarked that "[t]his legislation contains *important measures to improve aviation safety* . . . ." 36 Weekly Comp. Pres. Doc. 14 (Apr. 10, 2000) (emphasis added).

In this way, AIR 21's text, as well the Executive and Legislative branches' comments about the Act, all show that AIR 21 is, fundamentally, an air safety statute. Therefore, in relation to the *Morrison* Court's instructions, as interpreted by the ARB in *Villanueva*, I find that AIR 21 contains a substantial "focus" on air safety.[30] *See* 561 U.S. at 266; *see also* ARB Case No. 09-198 at *10-11 n.22.

In a larger sense, when enacting AIR 21, Congress was merely continuing its tradition of regulating aviation that can be traced back to the Air Mail Act of 1925 and the Air Commerce Act of 1926. Such Acts were codified in the United States Code under Subtitle VII of Title 49. Part A of Subtitle VII is entitled "Air Commerce and Safety." Section 40101 (the first section under Part A) is entitled "Policy." It defines the following as being in the "public interest:"

> (1) assigning and maintaining safety as the highest priority in air commerce.
> (2) before authorizing new air transportation services, evaluating the safety implications of those services.
> (3) preventing deterioration in established safety procedures, *recognizing the clear intent, encouragement, and dedication of Congress to further the highest degree of safety in air transportation and air commerce*, and to maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public.

49 U.S.C. § 40101(a)(1-3) (emphasis added) (punctuation in the original).

Moreover, 49 U.S.C. § 44701 mandates that "Promoting Safety" is a "General Requirement," within the regulation of air commerce. Pertinent to the facts of the instant matter – concerning certification data and engine performance issues – this Chapter mandates that the Federal Aviation Administration "shall promote safe flight of civil aircraft in air commerce by prescribing – (1) minimum standards required in the interest of safety for appliances and for the *design*, material, construction, quality of work, *and performance of* aircraft, *aircraft engines*, and propellers . . . ." § 44701(a)(1) (emphasis added). Finally, when issuing airworthiness certificates, "the Administrator shall– (1) consider– (A) *the duty of air carrier to provide service with the highest possible degree of safety in the public interest* . . . ." § 44702(b); *see also* § 44704(a)(1) ("the Administrator . . . shall issue a type certificate for an . . . *aircraft engine* . . . when the Administrator finds that the . . . *aircraft engine* . . . *is properly designed and manufactured* . . . . The Administrator shall make, or require the applicant to make, tests the Administrator considers necessary in the interest of safety.") In the aggregate, then, Congress

[30] This is also the conclusion found in the *Dos Santos* case. OALJ Case No. 2012-AIR-00020 at *22.

has historically emphasized safety concerns when regulating the air industry.[31] In this way, AIR 21, like its earlier aviation reform counterparts, is clearly an air safety law.

2) The focus of § 42121, AIR 21's whistleblower provision, specifically.

The ARB also requires an ALJ to determine the "additional focus" of the whistleblower provision under which the Complainant has brought the instant claim. *See Villanueva*, ARB Case No. 09-198 at *10 n.2; *see also Walters v. Deutsche Bank AG*, ALJ No. 2008-SOX-070, *11 (ALJ Mar. 23, 2009) (concluding that the "predominant purpose of [the whistleblower provision of SOX] is fraud detection, not worker protection . . . ."). Likewise, I find that § 42121 is not a worker protection regulation, but is concerned, chiefly, with air safety. *See Dos Santos*, OALJ Case No. 2012-AIR-00020 at *24.

The plain language of § 42121 illustrates well AIR 21's "additional focus" as an air-safety statute, rather than a statute aimed at worker protection. For example, § 42121(a)(1) prohibits an "air carrier or **contractor**" from discriminating against an employee "because the employee . . . provided . . . to the Respondent . . . *information relating to any violation [of] . . . Federal law relating to air carrier safety* . . . ." (emphasis added). The term "contractor" is defined in § 42121(e), as "a company that performs *safety-sensitive* functions by contract for an air carrier." (emphasis added). The plain language of § 42121, then, clearly displays Congress's intent to regulate air-safety when enacting AIR 21's whistleblower protection section.

I also find the title of § 42121 persuasive to this same end. *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 462 ("The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature.") The title of § 42121 is "Protection of Employees Providing Air Safety Information." This title indicates that, even though workers are protected under the Act, only specific kinds of workers are protected: those providing air safety information. This lends credence to the conclusion that the "additional focus" of § 42121 is to promote air safety.

The legislative history also evinces Congress's concern for airline safety when implementing AIR 21's whistleblower provision. *See e.g.,* 146 Cong. Rec. S1247-07, S1252 (daily ed. Mar. 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, S1257 (daily ed. Mar. 8, 2000) ("[Air 21 provides] whistleblower protection to aid in our safety efforts and protect workers willing to expose safety problems.").

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[31] I also note a fundamental difference between laws regulating safety in the air and laws regulating other types of transportation. *See FAA v. Delaware Skyways LLC*, FAA-2002-14059, 2003 WL 23118403 (D.O.T.) (March 12, 2003) ("It is not difficult to understand the Board's reasoning. The promulgation, preservation, and enforcement of standards of safety in the air are among the most critical functions entrusted to any regulatory agency. The field of aviation safety carries special responsibilities because so much is at stake."); *see also* Ralph Bradburd & David R. Ross, Regulation and Deregulation in Industrial Countries: Some Lessons for LDCs 71 (World Bank Publications 1991) ("Unlike trucking, for air transport, safety is a major concern.").

Finally, I am persuaded by judicial precedent, stating that § 42121 is not primarily a labor law; rather "[it is] a means for incentivizing airline employees to speak up when they observe violation of Federal aviation safety laws." *Dos Santos*, OALJ Case No. 2012-AIR-00020 at *25. For the foregoing reasons, I find that the "additional focus" of AIR 21's whistleblower provision is to maintain the safety of the nation's airways. As a consequence, should an application of the facts signal a close nexus with air-safety, this will weigh in favor of finding a domestic application of § 42121, thereby eliminating any extraterritoriality concern.

II. B. Applying the facts alleged in the instant case to the focus of AIR 21, generally, and § 42121, specifically.

The allegations contained in the record demonstrate a sufficient nexus between the Respondent's alleged misconduct and the air safety concerns that Congress hoped to remedy when passing AIR 21 and § 42121. Applying the test set forth in *Villanueva*, I find that the essential part of the activities alleged by the Complainant relate to Congress's focus on air-safety, for the following reasons.

Plainly, Congress was concerned with the maintenance and advancement of air safety. The preponderance of the evidence currently before me shows that the Complainant's allegations fit within these concerns, because the Complainant's January 30, 2014 memorandum included items concerning the safety and certification of the Q-400 aircraft. Specifically, the Complainant alleged that the data collected for the Q-400 included improper inputs into the engine deck and improperly taking credit for power measured prior to reduction gearbox losses when compared to the engine deck. *See* Complainant's Response to the Notice of Assignment and Conference Call, dated August 13, 2014. The Respondent collected this data, allegedly, for the purpose of receiving certification for its Q-400 aircraft. *See id.* These certification tests were conducted over U.S. airspace in or around Wichita, Kansas. The purpose of certification was, in part, for the Q-400 to be sold and distributed within the American market.[32] Finally, the Complainant is an American citizen and complained to officials of the United States government regarding his allegations.

Discussion

Applying the test set forth in *Villanueva*, I find that the "essential part" of the activities alleged in the Complainant's complaint relate to the focus of the Act for the following reasons.

The most important *Villanueva* factor weighing in favor of a domestic application of AIR 21, generally, and § 42121, specifically, is "the nationality of the laws allegedly violated that the complainant has been fired for reporting." ARB Case No. 09-198 at *10 n.22. The allegations contained in the record constitute a potential violation of the letter and spirit of American laws. For example, the Complainant's alleged protected activity included a memorandum discussing concerns over the Q-400's engine. Section 44701 specifically tasks the FAA with promoting the "safe flight of civil aircraft in air commerce by prescribing minimum standards . . . for the design

[32] Anecdotally, I note that Alaska Airlines promotes the fact that its fleet contains fifty-one Q-400 aircraft. *See* Aircraft Information, http://www.alaskaair.com/content/travel-info/our-aircraft/q400.aspx (last visited October 27, 2014).

. . . of aircraft engines . . . ." Section 44704(a)(1) further mandates the FAA to issue type certificates for aircraft engines, "when the Administrator finds that the . . . aircraft engine . . . is properly designed and manufactured . . . ." A reasonable interpretation of the Complainant's memorandum – which described issues associated with the Q-400's engine and related data used for certification – shows a potential violation of American law. Judge Burton S. Kolko summarized the spirit of the American laws that the Respondent allegedly violated: "The promulgation, preservation, and enforcement of standards of safety in the air are among the most critical functions entrusted to any regulatory agency. The field of aviation safety carries special responsibilities because so much is at stake." *See FAA v. Delaware Skyways LLC*, FAA-2002-14059, 2003 WL 23118403 (D.O.T.) (March 12, 2003). As stated above, AIR 21, generally, and § 42121, specifically, are air-safety regulations. Based on my review of the text of the Act, its legislative history and the case law interpreting it, I find that the letter and spirit of AIR 21 and § 42121 each weigh heavily toward a finding that the Complainant's allegations constitute a domestic application of the Act.

Another *Villanueva* factor weighing in favor of a domestic application of the Act is that the alleged conduct of the Respondent underlying the Complainant's complaint occurred in the United States. This conduct concerns test flights of the Q-400 aircraft. These test flights occurred in or around Wichita, Kansas. There is, therefore, a substantial geographic nexus between the alleged violations underlying the Complainant's complaint and the territorial borders of the United States. Moreover, these test flights were concerned, in part, with compiling data for certification purposes. Although the Respondent asserts that Transport Canada certified its aircraft and received FAA certification by operation of a "bi-lateral agreement," I find that this fact[33] does not sever the Respondent's ties with the United States. Assuming *arguendo* that the Complainant's allegations are true, Transport Canada's certification of the Q-400 aircraft – based on erroneous data – would necessarily lead to FAA certification based on the same erroneous test data.[34] For the foregoing reasons, I find that this essential element weighs strongly in favor of finding a domestic application of § 42121.[35]

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[33] I take the Respondent at its word on this matter because, at this stage in the litigation, the record does not include a copy of this "bi-lateral agreement."

[34] In its Motion for Summary Decision, the Respondent alleged that this process was "streamlined." This fact only furthers the point that such a process, using erroneous data, would lead the FAA to unknowingly accept the certification of an aircraft that is potentially in violation of U.S. regulatory standards. A "streamlined" process connotes a process where the FAA does not review the data independently, but relies on Transport Canada to ensure regulatory compliance. Therefore, although the Respondent is correct in saying that certification "is established under Canadian, rather than American laws and regulations," the Respondent incorrectly concludes that this fact strengthens its argument that this case includes no domestic application of the Act. The nationality of the agent conducting the certification process is meaningless when potentially erroneous data is used as an underlying basis for such certification. The same can be said of the Respondent's argument that all of its planes are purchased in Canada. Because the data underlying the aircraft's certification was allegedly tainted, any aircraft entering the stream of commerce of the United States – regardless of the purchasing location – is similarly tainted. Further, Respondent represented that the aircraft purchased by US customers leave Canada with "a FAA type certificate issued prior to the consummation of the sale of the aircraft." Declaration of Emmanuel Garyfalkis attached to Respondent's Motion for Summary Judgment. Therefore, the US issued type certificate could be issued to an aircraft that was actually non-conforming to FAA regulations. Based on the record before me, therefore, the Respondent's arguments actually weigh against a finding of

Nevertheless, I do note that certain *Villanueva* factors weigh against a domestic application of the Act. For example, the Complainant worked in Canada and was fired in Canada; so the location of the retaliatory action occurred outside of the United States. The Respondent is also almost certainly a Canadian entity. It was incorporated under Canadian law, its headquarters is in Montreal, Quebec, and its stock is traded on the Toronto stock exchange. Although the data comprising the Complainant's memorandum was stored in Wichita, Kansas; the location of the Respondent in relation to the facts of this claim was in Canada. These factors weigh against a finding that the Complainant's complaint involves a domestic application of the Act.

However, *when viewed in a light most favorable to the Complainant*, the preponderance of the evidence currently before me shows that the essential elements of the complaint, in relation to the Congressional focus of the Act and § 42121, demonstrate a significant nexus with the United States. These connections are not "fleeting;" *Morrison*, 561 U.S. at 266, they strongly correlate with Congress's long standing policy of promoting air safety. Therefore, I find that the Complainant's allegations warrant a domestic application of the Act and therefore are not circumscribed by the presumption against extending American laws abroad.

This is not to mean that the Complainant is entitled to relief under the Act, or even that the Complainant has established a prima facie case under § 42121. This holding is narrowly tailored to the issues presented in the Respondent's "Motion for Summary Decision," based on a consideration of the record before me at this time. I find that the Complainant's complaint deserves a full and fair development prior to any final adjudication; in other words, there *are* genuine issues of material fact in this case suitable for continued litigation.[36] For the foregoing reasons, I **DENY** the Respondent's "Motion for Summary Decision."

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an extraterritorial application of the Act.

[35] Although *Villanueva* also suggests that the trier of fact look toward the "location of the protected activity" could be a factor, I find this factor unpersuasive based on the instant facts. Here, the alleged protected activity involves an email-memorandum where the Complainant voiced his concern over certain data used for certification and flight testing. The record is silent as to exactly where the Complainant filed his memorandum. Nevertheless, it would not matter for the purposes of this analysis whether the Complainant filed his memorandum in Canada or the United States, because the content of the memorandum concerned activities that Congress hoped to regulate through AIR 21. Because the allegations underlying the protected activity involve air safety, and because both AIR 21 and § 42121 are air safety regulations, this weighs heavily in favor of a finding that the current adjudication involves a domestic application of the Act.

[36] Of course, the parties are free to submit dispositive motions at the commencement of the discovery process.

SO ORDERED.

Digitally signed by Scott R. Morris
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Administrative Law Judge

Cherry Hill, New Jersey

SERVICE SHEET

Case Name: **SOBHANI_JEFFREY_A_v_BOMBARDIER_AEROSPACE_**

Case Number: **2014AIR00017**

Document Title: **DECISION AND ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION**

I hereby certify that a copy of the above-referenced document was sent to the following this 4th day of November, 2014:

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