U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 08 May 2008

Case No.: 2007-SOX-00016

In the Matter of

JOSEPH R. BURKE
Complainant

v.

WPP GROUP, PLC.
OLGILBY & MATHER WORLDWIDE, INC.
Respondent

Appearances: DAVID STAND, Esquire
STEVEN R. TALAN, Esquire
For the Complainant

PAUL F. CORCORAN, Esquire
HEATH ROSENTHAL, Esquire
For the Respondents

Before: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

Jurisdictional Basis

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Section 806 of the Sarbanes-Oxley Act of 2002, ("the Act"), Public Law 107-204, enacted on July 30, 2002, and codified at 18 U.S.C. § 1514A, and its implementing regulations, 29 C.F.R. part 1980. Section 806 of the Act provides the right to bring a civil action to employees of covered companies who:

> (1) … provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348 [of Title 18, U.S. Code], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by – (A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such

other person working for the employer who has the authority to investigate, discover, or terminate misconduct);

By its terms, Section 806 applies to companies with securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) ("the SEC Act"), or that are required to file reports under Section 15(d) of the SEC Act (15 U.S.C. § 78o).

Procedural History

On May 28, 2006, Joseph R. Burke ("Complainant") filed a Complaint with the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") against WPP Group PLC ("WPP Group") and Ogilvy & Mather Worldwide, Inc., ("O&M"), and four named individuals, ("Respondents") under Section 806 of the Act.

In his OSHA complaint, the Complainant alleged that the Respondents decreased his job responsibilities, and ultimately terminated his employment, in retaliation for his cooperation with a Federal criminal investigation and his testimony at the resultant trial. On December 1, 2006, after an investigation, the Secretary of Labor, acting through her agent, the Regional Administrator for OSHA, issued Findings and ordered the complaint dismissed. The complaint was dismissed on the grounds that Complainant failed to demonstrate a nexus between his protected activity and his termination of employment, and that the Respondents established they had terminated his employment for legitimate business reasons. OSHA Findings and Order at 3-4.

By correspondence dated December 28, 2006, Complainant objected to the Administrator's findings and requested a hearing before an administrative law judge. The matter was subsequently assigned to me. Under the applicable regulations, an administrative law judge's action is de novo. 29 C.F.R. § 1980.107(b).

On January 29, 2007, the Respondents filed a Motion for Summary Decision, which I granted in part and denied in part on March 8, 2007. [1] I granted the Respondents' Motion as it related to alleged acts occurring prior to February 27, 2006, the 90th day prior to the filing of the Complaint, because such actions are time-barred under the Act. See 18 U.S.C. § 1514A(b)(2)(D). Consequently, because the Complainant's employment was terminated on February 28, 2006, this proceeding deals only with Respondents' actions relating to the termination of the Complainant's employment. See OSHA Complaint at 1.

Hearing was held before me in New York City on September 25, and 26, 2007, at which time the Parties had full opportunity to present evidence and argument.[2] I held the record open

---

[1] Simultaneous with filing his response to the Motion for Summary Decision, Complainant filed a cross-motion requesting leave to withdraw his action against two of the named Respondents. Respondents did not oppose the Motion, and on March 8, 2007, I granted the Complainant's Motion and dismissed the Complaint as to those two individuals. This action left two individual Respondents: Gunther Schumacher and Kenneth Gray.

[2] The Complainant was ill and did not attend the second day of the hearing. His counsel waived his presence. T. at 176.

for 30 days after the hearing, to enable the parties to submit any additional matters on the issue of jurisdiction over the Respondents. T. at 353, 375. Neither party submitted any matters. The Parties submitted written briefs.

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

The Parties' Contentions

Based on their post-hearing briefs, the parties' contentions are as follows:

The Complainant asserts the following:

- The Complainant engaged in activities protected by the Act;
- As an employee of a wholly-owned subsidiary of a parent company covered by the Act, the Complainant is a covered person under the Act;
- The Respondents had actual and constructive knowledge of the Complainant's protected activity;
- The Complainant suffered an unfavorable personnel action;
- The Complainant's protected activity was a contributing factor in his unfavorable personnel action;
- The Respondents' Purported "Non-Retaliatory Rationale" for the Complainant's termination of employment is not supported by clear and convincing evidence.

In their brief, the Respondents asserted the following: [3]

- The Complainant failed to establish, by a preponderance of evidence, his prima facie case. Specifically, the Respondents stated that Complainant failed to establish that the individual who decided to terminate his employment, Gunther Schumacher, knew about the Complainant's alleged protected activity. In addition, the Respondents stated that Complainant failed to establish that his alleged protected activity contributed to his termination of employment.

---

[3] At the hearing, the Respondents orally asserted that this matter should be dismissed, because the Respondent is not a company subject to § 806 of the Act. T. at 165. They did not discuss this matter in their Brief. The Respondents also moved to strike that portion of the Complainant's testimony that concerned his receipt of stock options, asserting that the Complainant's testimony was inconsistent with the pre-hearing statement the Complainant filed in response to my Notice of Hearing, because the Complainant failed to provide advance notice that he would testify regarding his receipt of stock options. T. at 351-52. I denied the Respondents' motion.

- In the event that I find the Complainant has established a prima facie case, the Respondents have established, by clear and convincing evidence, that the Complainant would have been terminated from employment even in the absence of the alleged protected activity.

- In any event, because there is no evidence to establish that Kenneth Gray played any role in the termination of the Complainant's employment, the Complaint should be dismissed as to Mr. Gray.

Respondents' Motion to Strike Portions of Complainant's Brief

On or about January 31, 2008, in response to my direction, both parties submitted closing briefs. On February 25, 2008, the Respondents filed a "Motion to Strike Portions of Complainant's Post-Hearing Memorandum of Law." Specifically, the Respondents moved to strike portions of the Complainant's brief, which the Respondents asserted contained "outrageous accusations" that the law firm representing the Respondents "plotted with Respondents" and "aided Respondents in covering-up (sic) for the alleged retaliation," and put a "spin" on the events surrounding the Complainant's termination. Respondents' Motion at 1. The Respondents alleged the Complainant's counsels' actions were a "violation of their ethical obligations as legal professionals" and requested that the alleged accusations be stricken from the Complainant's Memorandum of Law and that sanctions be imposed against Complainant's counsel.[4] Respondents' Motion at 1-2.

On March 4, 2008, by letter, the Complainant's counsel submitted a response to the Respondents' Motion. I construe the Complainant's counsel's letter as an answer to the Respondents' Motion. See 29 C.F.R. § 18.6(b). In the answer, the Complainant's counsel argued that Respondents' Motion should not be entertained for the following reasons: it is a disguised reply brief, submitted beyond the directed deadline; and it was submitted without prior consultation, in violation of my prehearing Order, and did not contain a statement regarding consultation between counsel prior to submission.[5]

Upon review of the Respondents' Motion and review of the comments at issue in Complainant's brief, I make the following findings. First, I find that the Respondent's Motion discussed the evidence in light of statements made in the Complainant's brief. I find, therefore, that the Respondents' Motion, insofar as it discusses the merits of the evidence, constitutes a reply brief. I have not authorized the parties to submit reply briefs; moreover, the Respondents have not sought leave, by Motion, to submit a response to the Complainant's brief. Under the governing regulation, an administrative law judge may limit the post-hearing submissions. See

---

[4] Although only one attorney signed the post-hearing brief submitted on behalf of the Complainant, the Respondents' Motion lodges its assertions against the entire firm representing the Complainant.

[5] In addition, in the event the Respondents' Motion was to be entertained, the Complainant requested a twenty-one day extension to respond to the substance of the motion.

generally 29 C.F.R. § 18.53. In light of the foregoing provision, therefore, I shall disregard those portions of the Respondents' Motion that constitute a reply brief.

Second, I find that the Complainant's brief contains gratuitous and inappropriate comments about Respondents' counsel, as the Respondents' Motion sets forth. In a 23-page brief, I noted three instances of such comments.[6] In one instance, the comment seems to consist of an unsupported assertion that ascribes the Respondents' actions, in part, to their counsel as well. See Complainant's brief at 18. It is not clear to me whether this comment was purposeful or inadvertent. However, I note that Complainant's counsel signed his brief, and therefore is responsible for its contents. See generally FED. R. CIV. P., Rule 11(b). In any event, the comment was improper, and I will disregard it.

The other two instances, in which Complainant's counsel seems to suggest Respondents and their counsel agreed to label the Complainant's behavior as "erratic," are more serious. See Complainant's brief at 21, 22. Presented in their context, these comments imply that the Respondents and their counsel agreed to mischaracterize the Complainant's behavior. Based on my review of the record, including the testimony of the witnesses and the documents admitted into evidence, there is no indication whatsoever that any of the Respondents determined they would mischaracterize the Complainant's actions. Rather, the evidence reflects that different persons had different opinions about the Complainant's behavior. Moreover, based on my observations as well as the record before me, there is absolutely no evidence that Respondents' counsel played any role in shaping witness testimony, as the Complainant's brief seems to imply.

Clearly, these comments in the Complainant's brief are unfounded and improper, and I will disregard them. I note that the counsel who signed the brief was not present at the hearing and did not represent the Complainant at any stage of the proceedings prior to the filing of the post-hearing brief. Nevertheless, any lack of familiarity with the intricacies of the Complainant's case does not excuse counsel from responsibility for inappropriate and unprofessional remarks in his written submissions.

In his answer to the Respondents' Motion, the Complainant's counsel points out that filing of the Motion did not comply with my pre-hearing order, in that it did not reflect the result of consultation with the opponent. As the parties will recall, my pre-hearing order, issued on January 7, 2007, stated: "Except for dispositive motions, no motion will be entertained unless the moving party describes the results of consultation with the opposing party or parties." Order at 4.

I must comment, that had the Respondents adhered to my pre-hearing order, as I directed, this unfortunate situation regarding the improper comments currently found in the Complainant's brief could likely have been avoided. One of the purposes of the directive in my pre-hearing Order is to vest the parties with significant responsibility for resolving disputes that do not relate

---

[6] In addition, Complainant's brief discusses the Respondents' practice of conferring with counsel regarding personnel matters, including decisions to terminate employment. Evidence regarding these actions was presented at the hearing. Complainant's brief at 16. I find the Complainant's mention of this issue is a fair comment on the evidence.

to the merits of their respective cases. Another purpose is to permit a party, after the opponent has extended the professional courtesy of informing the party of an inappropriate or ill-advised action, to reflect upon and perhaps correct ill-considered behavior.

In this regard, I note that Rule 11 of the Federal Rules of Civil Procedure, prescribes a similar (but more formalized) process for dealing with the parties' concerns regarding the contents of documents filed with tribunals. Rule 11(b) states that, by signing a pleading or other paper, the attorney certifies, among other things, that "the allegations and other factual contentions have evidentiary support…" FED. R. CIV. P., Rule 11(b)(3). A Motion for sanctions, for failure to comply with Rule 11(b), may be made, but shall not be filed or presented to the tribunal unless, after service of the motion on the opponent, the challenged contention is not withdrawn or appropriately corrected. FED. R. CIV. P., Rule 11(c)(1). This process permits parties who inadvertently, carelessly, or imprudently made assertions in their submissions to rectify their actions. Just as important, a party that chooses not to withdraw or amend its submissions, after service of a motion for sanctions, may be presumed to stand on the contentions therein.

Regrettably, the Respondents' failure to discuss this matter with the Complainant's counsel prior to filing a Motion with me has not only embarrassed opposing counsel, perhaps unnecessarily, but also has likely resulted in increased work and costs for all parties.

Based on the foregoing, I DENY the Respondents' Motion. However, I inform the parties that I will disregard the comments made by Complainant's counsel, as set forth in the discussion above, as I find no basis in the evidence for such comments.[7]

ISSUES

The issues before me for adjudication are as follows:

1) Whether Respondent, O&M, is a company covered under Section 806 of the Act;
2) Whether the Respondent, O&M, or any of the individual Respondents, are agents of WPP Group with regard to the Complainant's employment;
3) Whether the Complainant engaged in protected activity, as defined in the Act;
4) Whether the Respondents knew of the Complainant's purported protected activity;
5) Whether the Respondents' termination of the Complainant's employment was due in part to his purported protected activity; and
6) If the Respondents' termination of the Complainant's employment was due in part to his purported protected activity, whether the Respondents have established, by clear and convincing evidence, that they would have terminated the Complainant, even in the absence of protected activity.

[7] As noted above, I also inform the parties that, to the extent the Respondents' Motion discusses the merits of the case before me, I will disregard that discussion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SUMMARY OF THE EVIDENCE

Documents Submitted by the Parties

The Parties submitted the following documents, which I admitted at the hearing:[8]

- The Complainant's complaint to OSHA, dated May 28, 2006, with portions highlighted (JX A).[9]

- A copy of a note to the Complainant from Bill Gray, President of O&M, dated October 29, 2003, congratulating the Complainant on his nomination to Senior Partner (JX B).[10]

- The Complainant's Complaint to OSHA, dated May 28, 2006, with three attached exhibits. Two of the attached exhibits are communications from an attorney representing O&M, dated May 2003 and May 2006; the third is a letter to the Complainant from Gunther Schumacher, dated April 14, 2006 (CX 1).[11]

- A Press Release from the U.S. Attorney, Southern District of New York, dated July 15, 2005, announcing the sentencing of two former O&M executives, after their federal conviction on charges of "conspiracy to defraud the United States, to make false claims, and to make false statements, and with nine substantive counts of making false claims against the United States" (CX 2).

- Various congratulatory notes and e-mails to the Complainant, dated from 1998 to 2004 (CX 3).

- A copy of my Order of March 8, 2007 (CX 4).

- An extract from AdAge.com, dated February 8, 2005, recounting the Complainant's testimony at the criminal trial of the former O&M executives (CX 5).

- Declaration of Ken Gray, dated June 30, 2006 (CX 6).

- Declaration of Gunther Schumacher, dated June 29, 2006 (CX 7).

[8] Joint Exhibits are denominated "JX;" Complainant's Exhibits are denominated "CX;" and Respondents' Exhibits are denominated "RX."
[9] A copy of this exhibit (without any highlighting) also appears at CX 1.
[10] This document is included within CX 3.
[11] The letter is actually dated "April 14, 2005," but it is clear from the context of the letter that it was written in 2006, because it discusses the termination of the Complainant's employment.

- Transcript of the Deposition of Kenneth Gray, dated July 20, 2007 (CX 8).[12]

- Transcript of the Deposition of Gunther Schumacher, date uncertain (CX 9).[13]

- Transcript of the Deposition of the Complainant, dated September 5, 2007 (RX 1).

- Timesheet records for the Complainant, encompassing various time periods between May 1999 and February 2006 (RX 2).

- Letter from the Complainant to Gunther Schumacher, dated April 4, 2006 (RX 3).

- Letter from Gunther Schumacher to the Complainant, dated April 14, 2006 (RX 4).[14]

- Letter from the Complainant to Bill Gray and Carla Hendra, dated April 16, 2006 (RX 5).

- Anonymous letter to O&M's Personnel Director, dated February 25, 2000, making allegations of impropriety against the Complainant (RX 6).

- Redacted internal O&M Memorandum dated March 16, 2000 from Joy Mauerhoff, subject: "Investigation Print Production Department," which includes report of an interview with the Complainant (RX 7).[15]

- Memorandum to the Complainant dated March 17, 2000 from Joy Mauerhoff, subject: "Respect at Work," with written acknowledgment of receipt from the Complainant (RX 8).

- Extract of trial transcript dated February 7, 2005, showing the Complainant's testimony at the criminal trial in the Southern District of New York. The Complainant's testimony, including cross-examination and redirect examination covers pages 904 through 927 of the transcript (RX 9).

- Extract of trial transcript dated February 1, 2005, reflecting the Assistant U.S. Attorney's opening statement at the criminal trial in the Southern District of New York (RX 10).

---

[12] "Ken Gray" and "Kenneth Gray" are the same person.

[13] This transcript is not attested and begins at page 5. The top of each page includes the date: "6/29/07." It is unclear whether this is the date the deposition took place or the date the transcript was prepared.

[14] This document also appears as an attachment to CX 1.

[15] Names of persons other than the Complainant are redacted from this document.

- Extract of trial transcript dated February 17, 2005, reflecting the Assistant U.S. Attorney's closing argument at the criminal trial in the Southern District of New York (RX 11).

- O&M Employee Act/Requisition form, reflecting promotion of Kara Levens to Director of Print Production, effective May 14, 2002 (RX 12).

- Complainant's Objections and Response to Respondents' First Request for Production of Documents by Complainant, in conjunction with the instant matter, dated April 16, 2007 (RX 13).

- Copy of Extract from Complainant's desk calendar for week of April 21, 2003 (RX 14).

- O&M Timesheet for Jacqueline Blank for week of October 18, 1999 (RX 15).

- Summary of hours worked by Complainant, broken down by account, for years 1999 through 2006, inclusive (RX 16).

- Copy of letter from Howard J. Rubin, an attorney representing O&M, to Henry Putzel, III, an attorney who represented the Complainant, dated May 2, 2003 (RX 17).[16]

- O&M E-mail from Carlene Zanne to Bill Gray, dated October 21, 2003, subject: Partner/Senior Partner Nominations (RX 18).

- Confidential O&M Memorandum, dated July 18, 2005, regarding the Complainant's salary increase of $5,000 per year, to a salary of $148,000 annually (RX 19).

- Document titled "Ogilvy Employees Who Testified in ONDCP Trial and Were Then Employed By Ogilvy; and Document Titled "Promotions After ONDCP Trial (February 2005)" (RX 20).

- Document titled "New York Agency Reductions in Force" listing names and titles of employees with termination dates of 3/18/2003, 5/19/2004, 5/31/2004, 4/1/2005, and 2/28/2006 (RX 21).

- Document titled "Ogilvy & Mather/ONDCP Witness List" (RX 22).

- Document listing account responsibilities for eight employees; Document, dated 10/15/2004, listing account responsibilities for various employees and percent of

[16] This document also appears as an attachment to CX 1.

time spent on accounts; Document listing account responsibilities for seven employees (RX 23).[17]

- E-mail from Complainant to Kara Levens, with copy to Ken Gray, dated May 23, 2002, listing accounts for fourteen employees and dollar volume per employee (RX 24).

- Portions of Complainant's federal tax returns for 2005 and 2006 (RX 25).

- Letter to Complainant dated April 11, 2006, from IBM, signed by Michael Greene, reflecting IBM's offer of employment to the Complainant (RX 26).

- Billing documents from Henry Putzel, III, Esq. to O&M, reflecting "Representation of Certain Ogilvy & Mather Employees" for the period between May 2002 and April 2003 (RX 27).

- Document Titled "Print Production Departmental Meeting Agenda, September 26, 2001;" Organizational chart, titled "Ogilvy & Mather Print Production;" Document titled "Ogilvy & Mather – Print Production" listing "Production Partners;" and Document titled "Print Production Account Assignments – Effective October 1, 2001." (RX 28).

- E-mail from Marc Rachman to Ira Raphaelson, dated April 15, 2003, Subject: "Call from Kim after Ken gray (sic) interview." Marked "Privileged & Confidential." (RX 29).

- Handwritten listing, dated 4/16/03, reflecting messages left for various persons (RX 30).

Testimonial Evidence

Hearing testimony is summarized below as follows:

Joseph Burke

Joseph Burke, the Complainant, testified as a witness in his own behalf. He stated that he worked for O&M from 1995 until 2006, and that he started as a print producer and at the time of his termination from employment he was a senior partner and director of print production. He stated that he knew Ken Gray and Gunther Schumacher, and described their relationship as "very very close" based on his observation of them. The Complainant stated he was responsible for all print production under O&M's contract with the Office of National Drug Control Policy (ONDCP). The Complainant described a meeting in August 1999 in which an O&M executive directed that "more time" be put into the ONDCP account. Ken Gray was present at this

[17] The first and third documents listed are undated. According to the Exhibit Index prepared by the Respondents, these documents reflect responsibilities in August 2003 and December 2005.

meeting. Eventually, the Complainant testified, a federal investigation regarding falsified time sheets resulted. According to the Complainant, there was a civil lawsuit, which O&M settled, and also a criminal investigation. The Complainant stated he was contacted by the "assistant district attorney," and there was eventually a criminal trial, and two people who worked for O&M were "put in prison" because they were proven to have falsified time sheets. The Complainant testified he offered information to the FBI, upon their request, and stated he was called to interviews "a bunch of times." T. at 23-30.

The Complainant stated that Mr. Putzel, the attorney who represented him in his dealings with the federal government in the criminal investigation, stated he could no longer represent Ken Gray, among others, because their testimony regarding the falsification of timesheets contradicted the Complainant's testimony. Regarding when his cooperation with the federal government began, the Complainant stated it was months before May 2, 2003, the date of the letter from O&M's counsel to Mr. Putzel regarding the Complainant's cooperation. The Complainant also stated that on one occasion Ken Gray asked him what he told the government. He stated he told Mr. Gray he couldn't tell him what he said, but that he told the truth, and Gray replied that information was "probably going to put me in the hot seat." According to the Complainant, he felt that was when the retaliation against him started, because he had heard that if you want to get rid of somebody, to roll in into something else, such as a RIF [18] [reduction in force]. As the Complainant put it: "the moment Ken Gray was in a hot seat I felt my roles and responsibilities started getting diminished." T. at 30-37.

The Complainant stated he testified at the criminal trial in February 2005, and the media coverage of the event was "tremendous." He stated his testimony was covered by Fox News, by Ad Week (a trade magazine), and possibly other publications, such as the New York Times and the Wall Street Journal. He also stated that the criminal investigation and trial were talked about a lot within O&M. The Complainant stated he probably could not get a job in the advertising agency business again because of his cooperation. T. at 37-42.

The Complainant testified that Ken Gray retaliated against him by diminishing his responsibilities within the department, and taking responsibility for some accounts away from him and giving those accounts to Kara Levens. Among others, these included Kraft Foods, Maxwell House coffee, and Miller Lite beer. He said he remained focused on client interfacing and with the two largest clients, and he was more than happy to have Ms. Levens take on additional initiatives because there were other things that needed doing. T. at 42-51.

He stated his termination of employment "came as a shock," and said "I felt like I was labeled ever since I got involved in the FBI." The Complainant stated that Gunther Schumacher was the person who did the termination. According to the Complainant, Schumacher had been his supervisor a short time before the termination, perhaps up to 60 days. Between the time Schumacher was promoted to director of operations and the time he terminated him, the Complainant estimated, they might have talked twice. The Complainant stated that he had received many laudatory letters and accolades regarding his work for O&M, and had also been given several awards. The Complainant also stated that he received stock options under the WPP

[18] The transcript has "RIG" at page 35, which is a typographical error.

Partnership Program based on his performance. The Complainant stated that he now works for IBM, and took a significant pay cut in his new employment. T. at 52-61.

On cross-examination, the Complainant stated he ran the print department alone from 2001 to 2002, and then had a co-director after that. He acknowledged that Ken Gray was his supervisor in 1998 or 1999, but was uncertain regarding the role that Mr. Gray played in his promotions. Presented with Respondent's Exhibit 18, he acknowledged that document reflected that he and Kara Levens were both nominated for promotion to senior partner at the same time, in October 2003, and he was nominated by Ken Gray. T. at 62-66.

The Complainant testified that the assertions he made, in his initial complaint to OSHA regarding the range of his responsibilities, were accurate, but later indicated they might not be accurate but that he had anticipated more responsibilities would be transferred to him. He stated that Kara Levens shared co-director duties from May 2003 forward, but not before that time, because after she was promoted to co-director, she was on extended maternity leave. Regarding the division of responsibilities between him and Ms. Levens, the Complainant stated his recollection was that Ken Gray was involved in the process. The Complainant stated he believed that Ken Gray took billing oversight relationship away from him and gave it to Kara Levens because Gray had a corrupt relationship with some suppliers. T. at 66-80.

The Complainant stated that he and Ms. Levens shared the same responsibilities, but over different accounts, and that is when he believed he was being marginalized. According to the Complainant, he viewed the start of retaliation against him when his responsibilities began to be taken away, in May of 2002, when Ms. Levens was appointed the co-director. For timesheet purposes, the Complainant stated, he recorded his activities in a journal, which he cannot now find. In response to questions regarding his timesheets for specific weeks in 1999, the Complainant stated he recorded his time accurately, and set out how much time he worked on each different account. T. at 81-93.

On examination of the Respondents' Exhibit 16, the Complainant conceded he billed no hours for Kraft Foods, which owned Maxwell House coffee, in 2000, but stated it might not have been a billable entity. He also conceded the exhibits reflects he billed no hours to Miller Lite beer from 1999 to 2006. Regarding other accounts, the Complainant indicated some of them could have been billed to the corporation that owned the product. T. at 95-100.

The Complainant testified his "hot seat" conversation with Ken Gray took place, to the best of his recollection, early in 2002. He stated this conversation centered on what had been told to the federal authorities. The Complainant stated he did not testify in his deposition about the "hot seat" conversation, because he had not been asked about it, and also stated he did not know what Gray told the authorities, only that Mr. Putzel had told him that his testimony and Mr. Gray's conflicted. T. at 101-106.

The Complainant conceded that his deposition testimony, in which he did not dispute Mr. Putzel's assertion that his cooperation in the federal investigation began in April of 2003, was inaccurate. The Complainant stated that Mr. Putzel's assertion could not be accurate, because there was no way that so much could have happened in between the start of his cooperation and

the date of the letter to Mr. Putzel, May 3, [2003] if it started in April 2003.[19] The Complainant stated: "I badgered him for months….It took months for him to produce that letter, months, so that's exactly why I feel so confident that, yes, I apologize for giving that testimony at that, but that was like at the end of a five-hour session and I was – inaccurate is the best way to say it." T. at 118-20.

The Complainant stated he assumed Mr. Gray learned the substance of what he told the federal authorities through Mr. Putzel, and stated he believed Mr. Putzel had disclosed the information the Complainant had given the government. T. at 120-22.

The Complainant recalled that Mr. Schumacher informed him of his termination of employment, and admitted he did not say anything to Mr. Schumacher at that time regarding any retaliation. He confirmed he wrote a letter to Mr. Schumacher in April 2006, and another letter to senior O&M officials that month. The Complainant conceded the only document he provided to the Respondent regarding any meetings with Mr. Putzel was a page of his desk calendar from April 2003, but he stated there was "no way" this was the first meeting with Mr. Putzel; he also stated he could not find any other documents, and stated he was unsure whether he wrote down the meetings, because he was fearful of retaliation. T. at 128-37.

The Complainant stated that others at O&M feared retaliation from Ken Gray. As he stated: "the conditions at Ogilvy & Mather was if you took on Ken Gray, you were out the door." He stated there was no justifiable reason for his termination. As he stated: "I felt it kind of out of character for him [Mr. Schumacher] to terminate the number one producer in the production department, the person who had led it through troubled times into a very stable, great environment, and was quite shocked that he chose to save money by terminating a vital part of Ogilvy & Mather." T. at 142-45.

In response to my questions, the Complainant stated that he received some stock options due to his rank, but when he was terminated he got a letter stating that he had to turn them in, which he did, and he received about two thousand dollars. He also stated he received several WPP shares as an award, and he still owns those shares. T. at 159-60.

Gunther Schumacher

Mr. Schumacher, a named Respondent, testified on behalf of the Respondents. He testified that he has been employed by O&M since 1995, and is currently the Chief Business Operations Officer in North America. Previously, from December 2005 to September 2006, he was the Chief Operating Officer in New York. Prior to that position, he was the Worldwide Managing Partner leading the IBM account for OgilvyOne, and had been in that position almost six years. He stated the Complainant worked for him between December 2005 and February 2006, when the Complainant was subject to a reduction in force (RIF). He stated there were five RIFs at O&M between 2003 and February 2006. In the February 2006 RIF, Mr. Schumacher stated, 17 people were terminated from employment, and the levels ranged from very junior up to senior partner. He also stated there was a financial goal for the RIF. T. at 176-83.

[19] The date of the letter is actually May 2, not May 3. CX 1, RX 4.

Mr. Schumacher testified it was his decision to include the Complainant in the RIF. He stated that because the financial target was an indication that some senior people needed to be let go, so there would be enough people left to get the work done. Another consideration was the skill sets that were needed for the future. The third consideration was based on the intention to further integrate two operating units (O&M and OgilvyOne), and that they needed to keep people who could help lead that integration. Mr. Schumacher stated that the revenues for O&M, a more traditional advertising agency, were dropping, but the revenues for OgilvyOne, a direct or relationship marketing agency, were increasing. The print production department consisted of about 30 people, half of whom were on the O&M side. There were three managers: Terri Dannenberg, at OgilvyOne; Kara Levens; and the Complainant. Mr. Schumacher stated he was convinced he needed to reduce the senior level staff because of the financial targets, and also there were three directors for a shrinking department overall. He testified that Terri Dannenberg was not considered for the RIF as she was the only one of the three who had skills in the areas that were actually growing. T. at 184-86.

Between the Complainant and Ms. Levens, they were both good performers; however, Ms. Levens had volunteered for additional work that "sort of extended her involvement in the company," such as implementing new software, and Ms. Levens also was a "resident expert" on Sarbanes-Oxley compliance. In addition, Ms. Levens received uniformly good feedback on her leadership skills, whereas the Complainant's feedback was "very mixed." This feedback was based on conversations with different people with whom the two individuals worked. T. at 186-88.

Mr. Schumacher testified the Complainant was included in the RIF because "we had to reduce" and participation in the ONDCP matter did not factor into the RIF decision. He also testified he was not aware of the Complainant's participation in the ONDCP matter until the Complainant sent him a letter after his termination from employment, in April 2006, and he stated he informed the Complainant of that in his response to the Complainant. Mr. Schumacher testified he personally told the Complainant that he was being included in the RIF, and at that time, the Complainant did not mention the ONDCP matter or retaliation. T. at 189-92.

Mr. Schumacher stated he knew Ken Gray, and worked for Mr. Gray between 1996 and 2000, and testified he was friendly with Mr. Gray, but does not socialize with him. Mr. Schumacher testified he never discussed the Complainant or the RIF with Mr. Gray, and Mr. Gray did not suggest to him that he should take retaliatory actions against the Complainant. T. at 192-94.

On cross-examination, Mr. Schumacher stated he consulted with Carlene Zanne, head of HR [human resources] and two of the creative directors, after he was at the point of deciding that terminating the Complainant's employment was the correct thing to do, and asked if they had any concerns about such action. They did not. Mr. Schumacher stated he did not see the Complainant every day during the ten weeks the Complainant was under his supervision, but was familiar with his reputation for work product, and that the Complainant did a good job in that area. Mr. Schumacher admitted that, during the time he supervised the Complainant, he had no independent basis to make any determination about the quality of the work the Complainant

produced. Mr. Schumacher stated the Complainant had very good technical skills in his area of print production. He stated that Kara Levens also had the same skills, plus she more deeply understood the business requirements linked to the billing process. T. at 194-205.

Mr. Schumacher confirmed that Ken Gray was his supervisor from 1996 to 2000, and said he did not go to lunch regularly with him. He testified he was aware of the ONDCP trial, but does not recall when he became aware of it, and does not recall how he became aware of it. He stated he did not follow the trial, but said it was a significant event for O&M. Mr. Schumacher stated he did not recall ever speaking to Ken Gray about the ONDCP investigation or trial, and does not recall that Ken Gray ever spoke to him about these matters either. Mr. Schumacher stated he did not follow the trial actively because he found it an embarrassment and did not seek out information about it. T. at 206-10.

In response to my questions, Mr. Schumacher testified that, of the 17 persons terminated from employment in the February 2006 RIF, only the Complainant reported to him directly, and three or four others reported to him indirectly. He stated he made the decisions regarding the RIF on those other persons also. T. at 213-20.

Kenneth Gray

Mr. Kenneth Gray, a named Respondent, testified on behalf of the Respondents.[20] He stated he retired in May 2005, and at the time of his retirement, he was the general Manager of OgilvyOne and the Director of Operations for O&M. He stated he had been employed with Ogilvy for about 12 years prior to his retirement, and that at the time of his retirement about 12 managers were reporting to him. He stated it was common knowledge within the company for 12-18 months that he was going to retire as soon as possible. After his retirement, Mr. Gray testified, he worked as a consultant for Ogilvy for nine days in June, nine days in July, and six days in August, and his work consisted primarily of winding down the projects he had been working on. T. at 221-224.

Mr. Gray testified that he knew the Complainant, who reported directly to him from about 1999 onward. He stated he promoted the Complainant to Executive Print Producer and then to Director of Print Production, and he was responsible for giving the Complainant raises and bonuses. The last raise the Complainant received under him was in February 2005. Mr. Gray stated the Complainant was hardworking and did excellent work, but his administrative skills were not terrific. Therefore, he appointed Kara Levens to the same position as the Complainant to help run the department and to help with his administrative skills. Mr. Gray stated that when Ms. Levens was appointed to that position all of the people that had been reporting to her kept reporting to her, and she reported to him. T. at 225-28.

Mr. Gray testified he was contacted about the ONDCP investigation in April 2003, and met with the government one time. He stated he did not testify at the grand jury and was not charged with any crime. Mr. Gray stated he did not discuss the ONDCP matter with the Complainant. T. at 228-29.

---

[20] Mr. Gray's personal counsel was present during his testimony.

Mr. Gray testified he knew Gunther Schumacher, and that Mr. Schumacher reported to him before 2000. Their relationship, he stated, was that of working colleagues, and they did not socialize. He stated he never discussed the ONDCP matter with Mr. Schumacher, and never discussed the Complainant with him. He stated no one discussed the 2005 or 2006 RIFs with him, and noted he had been retired by that time. Mr. Gray also stated he would not have terminated the Complainant's employment, because he was a terrific worker. He stated his preference would have been to give the two managers of the department the problem to decide whose employment would be terminated. T. at 230-233.

On cross-examination, Mr. Gray testified that the Complainant was terrific technically and had a good work ethic; Kara Levens had good technical skills but "she leaned more towards administration." He testified he never discussed the information he provided in the ONDCP investigation "to a soul." He said he was aware the Complainant had provided information to the government, but did not know what the Complainant said. Mr. Gray stated that Mr. Putzel never represented him. T. at 235-237.

On redirect examination, Mr. Gray stated he had a conversation with Mr. Putzel, as directed by the company, but Mr. Putzel was not his attorney. On recross examination, Mr. Gray stated he discussed the ONDCP matter with Mr. Putzel, and later he was contacted and told Mr. Putzel would not be his representative. T. at 239-41.

In response to my questions, Mr. Gray stated his conversation with Mr. Putzel was in February or March 2003, and that he was contacted about the ONDCP investigation between February and April 2003. T. at 241-247.

Kara Levens

Ms. Levens testified on behalf of the Respondents. She stated he is currently a senior partner at O&M, and has worked for the company for 12 years. She stated she was promoted to senior print producer, and then in 2001 was promoted to executive print producer. She stated that the Complainant promoted her to that position, at about the time that he had been promoted to Director of Print Production. Ms. Levens identified Mr. Gray as the Complainant's "direct report." She stated the Complainant did not have day-to-day management of the print producers, but rather oversaw the entire department. T. at 248-52.

Ms. Levens stated she was promoted to partner and Director of Print Production in May 2002, and to senior partner in 2003. When she was promoted to Director of Print Production, she and the Complainant were co-directors. The people who reported to her continued to report to her, and she appointed a new executive print producer. She stated she still oversaw the group, but worked more directly with the new executive print producer, and started to get more involved with company initiatives and to try to improve the department. She testified that Mr. Gray did not take any duties away from the Complainant from the time he was promoted to the director of the department until his employment was terminated. Ms. Levens testified that print production is one of the smaller departments at O&M, in terms of dollars spent. T. at 252-259.

After her promotion, Ms. Levens testified, she and the Complainant tried to work together as a team, but it started essentially becoming two separate departments. She managed her team and he managed his team. There was never a discussion about reorganizing the people within the groups. In her opinion, the Complainant was upset about her promotion. T. at 259-60.

Ms. Levens testified about Respondents' Exhibit 24, which included an e-mail the Complainant sent to Mr. Gray on May 23, 2002, which lists the accounts various print producers were working on. She testified that none of the accounts moved from her group to the Complainant's group, or vice versa, between May 2002 and the time the Complainant's employment was terminated. Ms. Levens testified that if a client were to move from one group to another, that would be a joint decision between her and the Complainant and that Mr. Gray would have nothing to do with that decision. Ms. Levens stated that Mr. Gray did not step in to settle disputes and was likely to say that she and the Complainant needed to work things out. T. at 261-66.

Ms. Levens stated her interaction with clients was minimal, because the account people, not print producers, dealt with the clients. Print producers would be available in case there were questions, but day-to-day they do not have client interaction. Regarding her participation in company initiatives, Ms. Levens described work with conversation of a new financial system and a new digital asset management system, as well as setting up an employee review process. She stated she was also the lead on the last two vendor reviews, filled out the Sarbanes-Oxley documents for the group, and worked to put a new tax structure in place for print production. She testified the Complainant did not take part in any of these initiatives. Ms. Levens stated she went on maternity leave twice, once in July 2000 and then again with her second child in September 2002. She stated she was on maternity leave for about four months, and returned in January 2003, right after the holidays. Ms. Levens stated that at no time between her promotion in May 2002 and the Complainant's termination did the Complainant have complete control over the print production department. She stated that the work that has come through her own production department has dropped off significantly over the past couple of years. T. at 266-73.

In response to my questions, Ms. Levens stated she was told there would be a RIF by Gunther Schumacher, who told her that the Complainant was to be terminated from employment. Mr. Schumacher was concerned that the clients whose accounts were under the people who were let go would be managed "without any slipups." Ms. Levens stated two people, in addition to the Complainant, were let go from the print production department. She suggested those people for termination but did not have the final authority on the matter. T. at 276-77.

<u>Henry Putzel, Esq.</u> [21]

Mr. Henry Putzel testified as a witness for the Respondents. He stated he believed he first met the Complainant in April 2003, and that the Complainant was referred to him for purposes of representation in dealings with the Assistant U.S. Attorneys who were investigating

[21] Through the counsel representing him at the hearing, the Complainant waived any attorney-client privilege relating to Mr. Putzel's representation. T. at 289.

the ONDCP matter He identified his billing documents, at Respondents' Exhibit 27, as reflecting the first reference to the Complainant at a telephone conference on April 21, 2003. Mr. Putzel testified he met with the Complainant two days later, and then accompanied him to the office of the U.S. Attorney. Mr. Putzel states that from the beginning, the Complainant was willing to cooperate with the government, and also testified he conveyed to the Complainant that "the Ogilvy firm" was requesting all of its employees cooperate fully with the investigation. T. at 287-89.

Mr. Putzel confirmed that Respondent's Exhibit 17 was a letter he received from O&M's attorney confirming its request that the Complainant cooperate fully with the investigation, and he also confirmed that he requested this letter at the behest of the Complainant. Mr. Putzel stated he requested the letter on about April 23, 2003, and it was about ten days before he received it. Mr. Putzel stated he did not recall the number of times the Complainant met with the United States Attorney's office. He testified that, in late December 2004 the government contacted him and advised him that the Complainant, among others, would be a witness at the upcoming trial. Mr. Putzel stated he accompanied the Complainant to one or two meetings to prepare his testimony, and also accompanied him to court when he testified. Mr. Putzel stated that the Complainant did not testify before the grand jury. T. at 289-93.

On cross-examination, Mr. Putzel testified he met with Mr. Gray on March 25, 2003, and determined it would be inappropriate for him to represent Mr. Gray at the same time he represented other individuals, and thereafter Mr. Gray was referred to separate counsel.[22] T. at 294-95.

In response to my questions, Mr. Putzel stated that when his billing records use the term "meet," it means a face-to-face meeting. He stated all of the persons he represented authorized him to convey information to the O&M attorneys regarding their recollections. Mr. Putzel clarified that in December 2004, the Assistant U.S. Attorneys were actively preparing their case for trial, and were engaged in witness preparation. He also stated that his first contact with O&M employees was in 2002. There were multiple investigations in which the Complainant was not involved, including a civil investigation. Mr. Putzel stated he did not represent the Complainant in the civil investigation. T. at 295-301.

Carlene Zanne

Carlene Zanne testified on behalf of the Respondents. She stated that she was the O&M Director of Human Resources for North America, and had been in that position for nine years. Ms. Zanne testified that a Reduction in Force (RIF) is the method the company uses to consolidate or downsize as a result of business loss, business contraction, drop in budget, or need to restructure. She stated there have been multiple RIFs since 2003, including two in 2006 and two in 2007. Ms. Zanne testified the procedure is that she works with the Director of Finance in identifying the budget, and how that correlates to full-time equivalents. She stated that the RIF is a "general overall, kind of remix and consolidating, based on business, what's needed currently

---

[22] Mr. Putzel stated his testimony on this matter did not violate attorney-client privilege. T. at 293.

and what's needed to go forward." She stated that performance can be a factor. Ms. Zanne stated Human Resources does not decide who is included in a RIF, and testified that before every reduction takes place they do an "impact analysis," in which they work with their attorneys and look at the who are being impacted, to ensure that the reduction in force does not suggest any discrimination. T. at 303-07.

Ms. Zanne stated she discussed the Complainant and Ms. Levens with Gunther Schumacher prior to the RIF. She stated that she did not discuss the ONDCP matter with Mr. Schumacher in connection with the RIF and said neither he nor she had any idea the Complainant was a witness in the ONDCP trial. Ms. Zanne stated she and an attorney did an impact analysis in connection with the RIF, and there was no discussion about the ONDCP matter. T. at 307-09.

On cross examination, Ms. Zanne stated she knew about the ONDCP investigation through the media, and she was not privy to the list of people who were testifying or cooperating. She stated there was a lot of media coverage of the trial in the trade publications. Ms. Zanne admitted she did not know what Mr. Schumacher knew regarding the ONDCP matter at the time of the RIF. She stated she based her conclusion that Mr. Schumacher was surprised from conversations with him, when they were preparing statements in the Complainant's case. T. at 312-14.

Regarding the February 2006 RIF, Ms. Zanne stated that she approached Mr. Schumacher and told him "overall we are looking at all departments and we need to consolidate. And if you have reason to consolidate based on changing business needs we would ask you to consider that in your structure …. And to this day print production is becoming more obsolete and there are more consolidations that will be taking place in that unit in upcoming months because … everything is done digitally, everything is done on the computer." Ms. Zanne also remarked, "it was really about what his [the Complainant's] skill set versus Kara [Levens], and then Kara had the stronger skill set to lead the group, uh, where we need, you know where we needed things to go based on the digital changes…" T. at 315.

In response to my questions, Ms. Zanne stated she did not recall what she told Mr. Schumacher regarding targets for the RIF, but stated her normal practice would be to tell each department, "This is approximately what we think we need to take out from your department, and please consider us in any restructuring that you, you may need to do." Ms. Zanne also stated that RIFs were effective the date they were announced, and that persons affected were given two weeks' pay in lieu of notice. Ms. Zanne also stated that managers were strongly urged not to give advance notice of any RIFs. She testified that all employees are at-will employees and the title "senior partner" does not give additional job protections. She stated stock options are given to the upper tier of the executive population, not senior partners. T. at 316-27.

Marc Rachman, Esq.

Mr. Rachman testified as a witness for the Respondents. He stated that he was a partner in the law firm of Davis & Gilbert, and had been at that firm since 1997. He stated he

represented O&M in the ONDCP investigation from its onset, in 2000. He stated he is familiar with the Complainant's name, but does not believe they have ever met. T. at 333-34.

Mr. Rachman testified the Complainant's name came up well into the ONDCP investigation in April 2003. He stated his name was raised by an attorney who had spoken to the U.S. attorney who was working on the investigation, and this U.S. Attorney wanted to speak to all the persons who had been present at a specific meeting, and one of those persons was the Complainant. Mr. Rachman stated that was the first time he had heard there was any interest in speaking to any of those individuals. He also stated it was his understanding that Mr. Gray had brought that meeting to the attention of the government. Mr. Rachman identified Respondents' Exhibit 29 as the e-mail the attorney sent to him regarding this matter, and noted it was dated April 15, 2003. Mr. Rachman stated that as a result of the e-mail he called Mr. Putzel, and also left voicemail messages for the people on the list. Mr. Rachman identified Respondents' Exhibit 30 as his handwritten notes. T. at 335-338.

According to Mr. Rachman, the issue about which the Complainant testified was a small issue in a larger story. The print production was not the main area that was being investigated; rather, the focus of the inquiry was the media department. T. at 339.

Credibility of the Witnesses

During the course of the two-day hearing, I had the opportunity to observe all of the witnesses. I observed the Complainant throughout the first day of the hearing, which included his testimony, but was unable to observe him during the second day of the hearing, because he absented himself from the proceedings. Based on my observations, I found the Complainant to be articulate and forceful regarding his assertions. He was quite obviously sincere in his belief that his participation in the ONDCP investigation and trial led to his eventual termination of employment.

Based on the evidence, however, I find the Complainant overstated his job responsibilities, in that they were not nearly so broad as he alleged in his OSHA Complaint. As the Complainant's cross-examination revealed, his responsibility extended only to the print production department. I am not convinced that O&M ever intended, as the Complainant asserted, to broaden his job responsibilities beyond that department, especially after Kara Levens was appointed as co-director. In addition, the Complainant's testimony about how Ms. Levens' promotion to co-director impacted his responsibilities is at odds with the testimony of Ms. Levens and Mr. Gray.

More importantly with regard to this proceeding, I find the Complainant inflated his importance in the investigation and prosecution of the ONDCP matter. All parties agree that the Complainant cooperated fully with the Federal investigative authorities in the ONDCP investigation. He deserves great credit for his willingness to provide full and truthful information. However, the evidence establishes that, contrary to the Complainant's representations, he was not a critically important government witness. He did not testify to the grand jury. T. at 292. His direct testimony at the Federal District Court criminal jury trial covers approximately 10 pages of transcript. RX 9. This is hardly the treatment one would expect of

the testimony of a crucial witness. The record indicates the Complainant's testimony received news media attention; however, the media coverage seems to have been limited to reports of his courtroom testimony.

In addition, the Complainant's testimony about when his cooperation in the ONDCP matter began and the substance of his communications with Mr. Putzel are contradicted, not only by Mr. Putzel's testimony, but also by written records. See T. at 287-95; RX 7. The date the Complainant's cooperation began is critical to his Complaint for at least two reasons: first, the earlier he began to provide information, the more important his role in the ONDCP investigation can be presumed to be, and thus the more important it would conceivably be for O&M to retaliate against him; second, the Complainant asserted that O&M began to retaliate against him in May 2002, when it promoted Kara Levens as co-director. O&M's decision to place Ms. Levens as co-director cannot be characterized as retaliation if it occurred prior to the Complainant's protected activity.[23]

I find the Complainant's assertion that Mr. Putzel told him the reason he could not represent Mr. Gray was that Mr. Gray's "story" contradicted the Complainant's is inherently not credible. Mr. Putzel acknowledged that he had conversations with Mr. Gray regarding issues involving the ONDCP matter and determined it would not be appropriate for him to represent Mr. Gray. The substance of any such conversation would be protected by the attorney-client privilege. See T. at 293-94. It would have been a violation of professional ethics for Mr. Putzel to have made the comment the Complainant alleges. See generally MODEL RULES OF PROF'L CONDUCT, 1.6(a) (1983). I have examined the record and observed the witnesses, and find no reason to question Mr. Putzel's veracity. However, as the Complainant's testimony reflects, the Complainant has made overstatements and misstatements regarding the ONDCP matter and his role therein.

The evidence establishes that Mr. Gray retired from O&M in May 2005, and stopped working as a consultant for them the following August. T. at 221-24. As there is no evidence Mr. Gray's business relationship with O&M continued past the summer of 2005, he cannot be deemed to have retaliated against the Complainant regarding his termination of employment, which occurred in February 2006, unless such action was at his direction. Based on my observations, I found Mr. Gray to be irritated and defensive as to the Complainant's assertions against him. This attitude is perhaps understandable, as Mr. Gray apparently thought highly of the Complainant when the Complainant worked for him. Mr. Gray testified he recommended the Complainant for multiple promotions and gave him raises up until February 2005. T. at 225-26. Mr. Gray also stated, credibly in my judgment, that he would not have terminated the Complainant's employment, but would have given the problem (to cut personnel for budget reasons) to the Complainant and Ms. Levens, and required them to figure it out. T. at 232-33. This testimony is consistent with the testimony of Ms. Levens, who stated that Mr. Gray's management style was to listen and then return the problem to his subordinate managers to handle. T. at 266. I also found Mr. Gray to be credible regarding his testimony as to his

---

[23] As noted above, I granted the Respondents' Motion for Summary Decision regarding alleged actions by O&M that occurred more than 90 days prior to the Complainant's OSHA complaint. These actions are not before me for adjudication. See Order of March 8, 2007.

relationship with Mr. Schumacher, which both parties characterized as professional only, contrary to the Complainant's assertion they were "very close." T. at 25. Contrary to the Complainant's unsupported conjecture, both Mr. Gray and Mr. Schumacher deny there was any discussion between them regarding the Complainant. T. at 194, 231.

I also find Mr. Schumacher to be credible regarding his role in the termination of the Complainant's employment. Mr. Schumacher candidly admitted he was the official who made the decision, and acknowledged that he was the Complainant's supervisor for a very short time period (about eight weeks) prior to making this decision. However, Mr. Schumacher explained his decision adequately as a decision necessitated by the budget. T. at 184-89. Mr. Schumacher also explained Ms. Levens' other contributions to O&M as a manager; as the Complainant admitted, he was not interested in such matters. T. at 186-88; T. at 50-51.

Mr. Schumacher's explanation regarding the decision to terminate the Complainant's employment was supported by the other witnesses, in particular Ms. Levens and Ms. Zanne. I found Ms. Levens' testimony exceptionally credible. She articulated quite knowledgeably the manner in which the print production department was run, both before and after her promotion to co-director, especially regarding the delineation of responsibilities between her and the Complainant. The Complainant had an incentive to overstate his own importance within O&M, to make Mr. Schumacher's decision to terminate his employment appear less defensible. Ms. Levens, however, had no such motive. Ms. Zanne's testimony regarding the process in which reductions in force were carried out was also credible.[24] She spoke knowledgeably about the print production department's vulnerability to staff reductions because of print's declining importance in the advertising industry.[25]

I cannot completely explain the many contradictions between the Complainant's testimony and the testimony of the other witnesses based solely on the Complainant's possibly faulty memory. Although the Complainant apparently quite sincerely believed his cooperation was a linchpin of the government's prosecution in the ONDCP investigation and trial, the facts establish otherwise. In addition, the other witnesses contradicted the Complainant's statements regarding his job responsibilities. Whether the Complainant was deliberately deceitful regarding his responsibilities or was merely "puffing" is difficult to discern. In either event, I find his testimony regarding his employment is, in general, not reliable.

---

[24] Although Ms. Zanne's testimony in some areas was at times hesitant, I conclude this hesitation was likely due to a lack of preparation for hearing regarding O&M's employment policies, other than reductions in force.

[25] As the highest paid person in a department in which total business was declining, it is not surprising that the Complainant was a candidate for job termination. T. 153, 283-84. It may be the Complainant failed to recognize, as others did, the declining importance of print production within O&M. In addition, by his own acknowledgment, the Complainant did not attend to management concerns as forcefully as Ms. Levens did. See T. at 50-51; 258, 267-70.

Applicability of Section 806 of the Act

Section 806 of the Sarbanes-Oxley Act, the whistleblower protection provision, relates to employees of covered companies. In order to prevail under Section 806, a complainant must establish the following elements by a preponderance of the evidence: (1) he engaged in a protected activity or conduct, as defined in the statute; (2) the respondent knew of the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. Bechtel v. Competitive Technologies, Inc., Case No. 06-010 (ARB: Mar. 26, 2008), citing Platone v. Flyi, Inc., Case No. 04-154 (ARB: Sept. 29, 2006), and other cases. See also Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1375 (N.D. Ga. 2004).

By its terms, Section 806 of the Sarbanes-Oxley Act, the whistleblower protection provision, covers companies with a class of securities registered under Section 12 or who are required to file reports under Section 15(d) of the SEC Act. (15 U.S.C. § 78l, § 78o). Section 806 is captioned: "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud," and directs that 18 U.S.C. § 1514A(a), a new section of the United States Code, be titled as follows: "Whistleblower Protection for Employees of Publicly Traded Companies." P.L. 107-204 (July 30, 2002), 116 Stat. 802

The Complainant bears the burden to establish, by a preponderance of evidence, that he is covered under Section 806 of the Act. See Peck v. Safe Air Int'l, Inc., Case No. 02-028 (ARB: Jan 30, 2004), slip op., at 6.[26] Therefore, the Complainant must establish that he is an employee of a company to which Section 806 applies. The record establishes that the Complainant was an employee of O&M, a non-public subsidiary of WPP Group. OSHA Complaint at 1. The Complainant named both entities, WPP Group and O&M, as Respondents in his initial Complaint to OSHA, and in his subsequent action in this forum.

In their submission of January 19, 2007, in response to my Order of January 9, 2007, the Respondents conceded that WPP Group is an entity required to submit reports under Section 15(d) of the Securities Exchange Act of 1934.[27]

[26] This citation is to a case brought under 49 U.S.C. § 42121(b), the whistleblower protection provision of the Wendell H. Ford Aviation Investment Act for the 21st Century (AIR 21). Section 806 of the Sarbanes Oxley Act states that actions brought under its whistleblower protection provisions shall be governed by the legal burdens of proof set out in 49 U.S.C. § 42121(b).

[27] The Respondents did not provide any information regarding whether WPP Group or O&M has any class of securities registered under section 12 of the Securities Exchange Act of 1934, and the record does not contain any information about whether the parent, WPP Group, or the subsidiary, O&M has any registered securities. I will presume, however, that WPP Group does have registered securities, because Section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o, relates to reports filed in connection with securities registered under 15 U.S.C. § 78l (Section 12 of the SEC Act).

Throughout the course of this litigation, the Respondents have asserted that the Complainant is not an employee of a company described in Section 806 and, consequently, he is not covered under the whistleblower protection provisions of the Act. Further, the Respondents assert that the Complainant's action in naming his Employer's publicly-traded corporate parent as a Respondent is insufficient to bring him under the Act's coverage.

In his post-hearing brief, the Complainant asserts: "It is unmistakably relevant and important that the SEC Act [of 1934] states clearly that a wholly owned subsidiary of a publicly traded parent is an integral part of the Section 12 registration of the parent." Complainant's Brief at 9. He notes that Section 12 of the SEC Act requires that an issuer provide certain information about persons the issuer controls, and cites 15 U.S.C. § 78c(a)(9) to establish that the term "person" includes a company. The Complainant also comments that Section 15 of the SEC Act requires issuers to file regular reports, in accordance with SEC regulations, regarding its securities issued under Section 12. Complainant's Brief at 11. Consequently, the Complainant concludes, the whistleblower protection provisions of Sarbanes-Oxley must cover employees of wholly owned non-public subsidiaries. Id.

To interpret Section 806, one must start with the wording of the section itself. As noted above, by its terms the section protects "employees" of companies that issue securities or file reports under specified provisions of the SEC Act from retaliatory actions by the company, or the company's "officer, employee, contractor, subcontractor, or agent."

The term "company" is not defined in the SEC Act, or in the Sarbanes-Oxley statute. Under Sarbanes-Oxley, only companies "with a class of securities registered under section 12" [of the SEC Act] or "required to file reports under section 15(d) [of the SEC Act]" are covered under the whistleblower protection provisions of Section 806. Sections 12 and 15(d) of the SEC Act impose obligations upon "issuers," not companies. 15 U.S.C. §§ 78l, 78o.[28] This statutory language acts to narrow, not expand, the class of "companies" covered under the whistleblower protection provisions of the Act to those "companies" who are also issuers.

Based on the evidence of record, established in the Respondents' answer to my Order of January 9, 2007, WPP Group is a company that is required to file reports under Section 15(d) of the SEC Act. I presume that WPP Group is also an "issuer" that registers securities under Section 12. The Complainant correctly notes that Sections 12 and 15 of the SEC Act require issuers to make disclosures about "persons" they control, such as their subsidiaries and also points out that WPP Group's SEC filings necessarily include information about its subordinate entities, presumably including O&M. However, there is no evidence that O&M itself either issues securities or files reports. Therefore, based on the statutory language itself, O&M is not a company subject to Section 806 of the Act.

---

[28] "Issuer" is defined in the SEC Act of 1934 as "any person who issues or proposes to issue any security." 15 U.S.C. § 78c(8). The Sarbanes-Oxley Act defines "issuer" consistent with the SEC Act of 1934. P.L. 107-204 (July 30, 2002), Section 2(a)(8), 116 Stat. 747.

The meaning of the statute is plain: only employees of publicly traded companies are protected under the Act.[29] In addition, I note that the title of Section 806 of the Sarbanes-Oxley Act, as well as the caption of the relevant statutory section in the United States Code, both reflect that the whistleblower protection provision is intended to cover "employees of publicly traded companies." P.L. 107-204 (July 30, 2002), 116 Stat. 802; 18 U.S.C. § 1514A. The Supreme Court has explained that a title of a statutory provision cannot limit the plain meaning of a text, and instead should only be used when it sheds "light on some ambiguous word or phrase." Pennsylvania Dept. of Corr. v. Yeskey, 524 U.S. 206, 212 (1998), quoting Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-29 (1947). In the statute at issue here, the titles Congress appended to the relevant section are consistent with the statutory wording, which is that the provision relates only to the employees of publicly traded companies, and protects only against actions by those companies, or by the officers, employees, etc., thereof.

As an employee of O&M, the Complainant is not an employee of a publicly traded company. Therefore, in order for him to be covered under the whistleblower protection provisions of the Act, I must find either that Section 806 covers non-public subsidiaries of publicly-traded companies, or that the facts establish that O&M or any of the individual Respondents acted was the "officer, employee, contractor, subcontractor, or agent" of WPP Group, in order to bring this case within the ambit of Section 806.

More than five years after Sarbanes-Oxley was enacted, the courts have still not definitively resolved whether employees of non-public subsidiaries of public companies are themselves covered under the Act. In Morefield v. Exelon Services, Inc., and Exelon Corporation, a case in which the complainant was employed by the non-public subsidiary of a publicly-held parent company and named both entities as Respondents, the administrative law judge denied a Respondent's motion to dismiss, and stated the following:

> Under such circumstances it does not serve the purposes or policies of the [Sarbanes-Oxley] act to take too pinched a view of this remedial statute when it comes to protecting those in an organization who can address the concerns Congress sought to correct….Considered in context, it seems clear that Congress intended the term "employees of publicly traded companies" in Section 806 to include the employees of the subsidiaries of publicly traded companies …. Subsidiaries … are an integral part of the publicly traded company, inseparable from it for purposes of evaluating the integrity of its financial information, and they must be treated as such …. A publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units; and Congress insisted upon accuracy and integrity in financial reporting at all levels of the corporate structure, including the non-publicly traded subsidiaries. In this context, the law recognizes as an obstacle no internal corporate barriers to the remedies Congress deemed necessary. It imposed reforms upon the publicly traded company, and through it, to its entire corporate organization. …. I conclude that employees of non-public

[29] Notably, the definition of "company" in the applicable regulation is the same as the statutory definition, that is "any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))." 29 C.F.R. § 1980.101. The term "employee" is not defined in the Act, but is defined in the applicable regulations. 29 C.F.R. § 1980.101.

> subsidiaries of publicly traded companies are covered by the whistleblower protection provisions of Sarbanes Oxley.

Morefield v. Exelon Services, Inc., Case No. 2004-SOX-2 (ALJ: Jan 28, 2004), slip op. at 4-6.[30]

In contrast to Morefield, a different Department of Labor administrative law judge granted summary judgment for the respondent in a case where the complainant was an employee of a non-public subsidiary of a publicly-held corporation. The administrative law judge found there was no allegation that the subsidiary acted as an agent of the corporate parent, and remarked:

> In drafting the whistleblower protection in SOX [Sarbanes-Oxley], Congress specifically defined the employers subject to its limitations. If Congress had wanted to include non-publicly traded subsidiaries of publicly-traded parent companies as covered employers, it could have done so in drafting the statute. (citation omitted).
>
> Furthermore, the legislative history of the Act indicates that Congress did not intend for the Act to view subsidiaries and parent companies as one entity. In fact, while discussing the bill before the Senate, Senator Sarbanes specifically addressed the limited scope of the Act. Senator Sarbanes stated that he wished to 'make very clear that [the Act] applies exclusively to public companies – that is, to companies registered with the Securities and Exchange Commission…..' 148 Cong. Rec. S7351 (daily ed. July 25, 2002)(statement of Sen. Sarbanes)…. To include non-publicly traded subsidiaries (sic) as a 'company' merely because it has a publicly traded parent, would widen the scope of the Act beyond the intentions of Congress.

Bothwell v. American Income Life, Case No. 2005-SOX-57 (ALJ: Sept. 19, 2005), slip op. at 6.

In a recent case in which an administrative law judge granted a respondent's motion to dismiss, the administrative law judge commented that he was "persuaded" by the "caption Congress chose for 18 U.S.C. § 1515A – Whistleblower Protection for Employees of Publicly Traded Companies." Based on that caption, as well as evidence that the publicly-traded parent had "at best only a non-active, informational role and exerted no control or influence over the terms, conditions, and eventually termination" of employment, the administrative law judge found that an employee of a wholly-owned subsidiary is not an employee protected under Section 806 of the Act. Ambrose v. U.S. Foodservice, Inc., Case No. 2005-SOX-105 (ALJ: Apr. 17, 2006), slip op. at 11-12.[31]

The caption of the statutory section and the legislative history, as outlined above, are not inconsistent with this interpretation. The reasoning set forth by the administrative law judge in Morefield has not generally been followed. See Savastano v. WPP Group, PLC, Case No. 2007-SOX-00034 (July 18, 2007). Moreover, as other administrative law judges have also noted, I find it important that the language of Section 806 explicitly limits its scope and applicability. Although Congress could have extended the coverage of Section 806 beyond "issuers," thereby

---

[30] The complainant's complaint was later dismissed, as a result of a settlement between the parties. Morefield v. Exelon Services Inc., 2004-SOX-2 (ALJ: Feb. 14, 2005).

[31] The Complainant appealed this determination to the Administrative Review Board, but the parties later settled the matter, and the Board dismissed the appeal. See Ambrose v. U.S. Foodservice, Inc., Case No. 06-096 (ARB: Sept. 28, 2007).

including the subsidiaries of publicly-traded companies, it did not do so. I find, therefore, that O&M is not a company to which Section 806 of the Act applies.

The analysis of the applicability of the statute does not end here, however. Section 806 of the Act also applies to actions by any "officer, employee, contractor, subcontractor, or agent" of a covered company. 18 U.S.C. § 1514A(a). Consequently, Section 806 of the Act applies if the Complainant establishes that he was terminated from employment by a person who is an "officer, employee, contractor, subcontractor, or agent" of WPP Group.

In this regard, reported cases have discussed what constitutes an "agency" relationship under Sarbanes-Oxley. In Klopfenstein v. PCC Flow Technologies Holdings, Case No. 04-149 (ARB: May 31, 2006), the Administrative Review Board remanded the matter back to the administrative law judge for factual determinations, and remarked:

> Nothing in … the Act, the interim and final regulations, and the common meaning of the term 'agent' gives us reason to conclude that a subsidiary, or an employee of a subsidiary, cannot ever be a parent's agent for purposes of the employee protection provision (footnote omitted)(emphasis in original).
>
> Whether a particular subsidiary or its employee is an agent of a public parent for purposes of the SOX [Sarbanes-Oxley] employee protection provision should be determined according to principles of the general common law of agency. (footnote omitted.) General common law principles of agency are set forth in the Restatement of Agency, a 'useful beginning point for a discussion of general agency principles.' (footnote containing cited case omitted.) Although it is a legal concept, 'agency depends upon the existence of required factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control.' Rest. 2d Agen. § 1(1), comment b.(emphasis in original.) The function of the ALJ [administrative law judge] is to ascertain whether these factual elements are present."

Klopfenstein v. PCC Flow Technologies Holdings, Case No. 04-149 (ARB: May 31, 2006), slip op. at 13-14.

On remand, the administrative law judge found the subsidiary, to be the agent of the corporate parent.[32]

Shortly after the Board issued its opinion in Klopfenstein, an administrative law judge, relying on that case, granted a respondent's motion for summary judgment. The judge observed that "there is no factual predicate for a finding that there is any agency relationship pertaining to employment matters" between the complainant's employer, a privately held subsidiary, and the publicly-traded corporate parent.[33] Savastano v. WPP Group, PLC, Case No. 2007-SOX-00034 (ALJ: July 18, 2007), slip op. at 7. He also stated: "Thus, for an employee of a non-public

---

[32] However, he dismissed the complaint, as he found the employee's purported protected activity was not a factor in his termination from employment. Klopfenstein v. PCC Flow Technologies Holdings, Inc., Case No. 2004-SOX-11 (ALJ: Oct. 13, 2006).

[33] Interestingly, in this case the corporate parent, WPP Group, Inc., is the same corporate parent as in the case before me. The subsidiary in the Savastano case, according to the administrative law judge's opinion, was several layers removed from the parent.

subsidiary to be covered under Section 806 the non-public subsidiary must act as an agent of its publicly held parent, and the agency must relate to employment matters." Id. This is consistent with the result in a separate case, in which the administrative law judge noted that, under an agency theory, "the key issue is whether or not [the publicly traded parent company] was involved in matters related to the hiring and firing, discipline, pay and employment records, supervision and work assignments of the [c]omplainant and other [subsidiary] employees." Stone v. Instrumentation Laboratory SpA, et al., Case No: 2007-SOX-00021 (ALJ: Sept. 6, 2007). See also Mann v. United Space Alliance, LLC, Case No. 2004-SOX-15 (ALJ: Feb. 18, 2005), slip op. at 9.

Although no Federal Court has ruled directly on the issue of whether an employee of a privately-held subsidiary of a publicly-traded corporate parent is covered under Section 806 of the Act, several courts have commented on the matter. In Carnero v. Boston Scientific Corp., 433 F.3d 1 (1st Cir. 2005), cert. denied No. 05-1397 (Jun. 26, 2007), the complainant was an employee of a foreign subsidiary of an American corporation. The Court affirmed the District Court's dismissal of the action based on a determination that the employee protection provisions of Sarbanes-Oxley did not have extraterritorial effect. The Court also stated: "The whistleblower statute also makes clear that the misconduct it protects against is not only that of the publicly traded company itself, but also that of 'any officer, employee, contractor, subcontractor, or agent of such company'… Thus, the statute can be read to embrace an agent-subsidiary's retaliation against a protected employee." Carnero, 433 F.3d at 6.

Somewhat instructive are decisions from within the Second Circuit itself, under whose jurisdiction the instant case arises. In Brady v. Calyon Securities (USA), 406 F. Supp. 2d 307 (S.D.N.Y 2005), the plaintiff was an employee of a privately-held company that did business with publicly-traded companies. The Court granted the defendant's motion to dismiss the plaintiff's Sarbanes-Oxley complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. In a footnote, the court cited various administrative decisions that "illustrate the proper application of the 'agency' provision to companies that have acted as agents of publicly traded companies with respect to their employment relationships." Brady, 406 F. Supp. 2d at 319 n.6 (emphasis in original).

In a quite recent case involving the employee of a private American subsidiary of a publicly-held overseas corporation, the Southern District of New York denied a defendant's motion to dismiss under Rule 12(b)(6). O'Mahony v. Accenture Ltd., Case No. 07-Civ-07916 (S.D.N.Y. Feb. 5, 2008). Although the focus of the case was on whether Section 806 of the Act applied to an American employee of a foreign subsidiary who alleged corporate misconduct by executives of an American subsidiary of the company, the Court also discussed the nature of the relationship between the corporate parent and subsidiary. It remarked: "On the record before it, and absent discovery as to the pertinent inquiry, it is unclear to what extent [the parent] participated in the alleged fraud or retaliation, whether [the parent] maintained control over [the American subsidiary], or whether the Court can pierce the corporate veil to hold [the parent] liable for the acts of its [American] subsidiary…" O'Mahony, slip op, at 22.

The foregoing cases indicate that if the non-public subsidiary of a publicly traded corporate parent is the "agent" of the parent, it comes within Section 806 of the Act.

Klopfenstein, supra at 14-16. Moreover, as the Administrative Review Board has held and courts in the Second Circuit have noted, the subsidiary must be the "agent" of the parent on matters relating to the Complainant's employment. Brady, 406 F. Supp. 2d at 319. The issue of whether the subsidiary is the "agent" of the parent is a question of fact. Klopfenstein, supra; Sevastano, supra at 7.

Upon my consideration of all the evidence in this case, and after a full hearing, I find there is no evidence that either of the named respondents, Gunther Schumacher and Kenneth Gray, held any position in the parent company or received any instruction or direction from the parent company regarding the terms or conditions of the Complainant's employment. Moreover, the record before me is devoid of any documents (such as personnel manuals or policies) that might suggest O&M and WPP Group were a unified organization in their employment matters so that the former is the agent of the latter for employment purposes.

There is evidence that Ms. Zanne informed outside counsel of the Complainant's proposed termination, in accordance with company practice. T. at 307. I note that the law firm consulted is the same law firm that represents both O&M and WPP Group in the litigation of this case. Based on this evidence, I find that there was an attorney-client relationship between O&M and its outside counsel regarding employment matters in general and specifically including the Complainant's termination of employment. I also find there currently is a unity of interest between O&M and WPP Group with regard to the Complainant's case before me, exemplified by the same counsel's representation of all Respondents. However, these factors do not establish that O&M acted as the agent for WPP Group regarding the Complainant's termination of employment.

As set forth above, the record establishes that the Complainant was not employed directly by WPP Group. The Complainant asserted, however, he received WPP Group stock and options while an O&M employee. Complainant's response to Order of January 9, 2007 at 2. The Complainant testified that he received stock as an award and options because of his status as an O&M senior employee. He also testified that, after his employment was terminated, his options were dissolved and he received a check from WPP Group. T. at 58; 159-60.

I am aware of nothing that prohibits an employer from purchasing any publicly traded stock, in the employer's parent company or any other company, and transferring that stock to an employee as a form of compensation. So, for instance, O&M could have purchased stock in General Motors and given the Complainant that stock. Such a transaction does not make the Complainant an employee of General Motors, but merely a stockholder.

Stock options, however, present a different picture. In general, stock options consist of the right to purchase a specific amount of a specific stock at a certain price, to be exercised at some defined time in the future. See Executive Compensation and Related Person Disclosure: Final Rule, 71 Fed. Reg. 53,158 (Sept. 8, 2006) at 53,162. Stock options are a recognized form of compensation. See generally Lucente v. International Business Machines Corp., 310 F.3d 243 (2d Cir. 2002). There are multiple reasons for such a practice. First, the tender and exercise of stock options provides an employee with a limited financial stake in the employer's company, thereby providing the employee with a sense of ownership in the company. Secondly, as courts

have recognized, the tender of stock options provides an incentive for the employee to direct his or her efforts on behalf of the employer. See generally Boyce v. Soundview Technology Group, Inc., 464 F.3d 376 (2d Cir. 2006). When the employee exercises stock options, he or she may realize a financial gain. And, in addition, when the price of a stock increases, the employing company enjoys the overall benefits of the higher stock price.

Based on the foregoing, I find that the practice of awarding options in the parent company's stock to the employees of the subsidiary suggests a level of intermingled control to establish that the subsidiary is the agent of the parent for employment purposes. Under such a scheme, the award of stock options acts to incentivize employees of the subsidiary to work toward the financial growth of the parent in a tangible way. This is consistent with the common law principle of agency, in which the agent operates for the benefit of the principal, based on authority the principal provided to the agent. See Minskoff v. Am. Express Travel Related Servs. Co., 98 F.3d 703, 708 (2d Cir. 1996), quoting RESTATEMENT (SECOND) OF AGENCY, § 7 cmt. a (1958). Based on the foregoing, I find the tender of stock options in the parent company may establish that the subsidiary which awarded the options is the agent of the parent, at least with regard to the employment of employees who receive stock options.[34]

However, based on the evidence of record, I am not satisfied that the Complainant has established, by a preponderance of evidence, that he received stock options in WPP Group as a result of his employment with O&M. The only evidence of record on this point, the Complainant's assertions and his testimony, is contradicted by the testimony of Ms. Zanne, the Human Resources Director, who testified that the Complainant would not be eligible to receive stock options based on his employment, and that receipt of options was limited to very senior executives. T. at 326-27. In addition, the Complainant did not respond to my invitation to submit additional evidence after the hearing on this issue. See T. at 353-55; 375.

As stated above, the receipt of stock shares does not suggest any relationship between the holder of the shares and the issuing company. Based on Ms. Zanne's position, I find it reasonable to presume Ms. Zanne would have knowledge of which individuals in O&M were eligible for stock options. As discussed above, I find the Complainant is generally not credible on matters relating to his employment. In addition, he has not provided any corroboration on the issue of his receipt of stock options, even though given the opportunity to do so.

I find that the issuance of stock options in the parent company's stock may be sufficient to establish an agency relationship. However, due to my reservations regarding the Complainant's credibility, I cannot find that the Complainant indeed received stock options in WPP Group, based on the evidence of record on this issue, which consists solely of his contradicted testimony and assertions. Therefore, based on the record before me, after a full

---

[34] An alternative argument is that tender of stock options in the parent company to the subsidiary's employees creates an employer-employee relationship between the parent company and the subsidiary's employees. Receipt of compensation is one of the hallmarks of an employer-employee relationship. However, there is no evidence before me as to how, if at all, the parent company controlled the tender of stock options. Therefore, I decline to find an employer-employee relationship between WPP Group and the Complainant.

hearing, I find there is no evidence that O&M or any of the individually named Respondents acted as the agent of WPP Group on matters regarding the Complainant's employment. I also find, therefore, that none of the Respondents acted as the agent of WPP Group with regard to the termination of the Complainant's employment.

I therefore conclude, and I so find, that the Complainant has not established, by a preponderance of evidence, that he is an employee of a company covered under Section 806 of the Act. Consequently, I must find that the whistleblower protections of the Sarbanes-Oxley Act do not apply to this Complainant.

Therefore, I must conclude that the Complainant's Complaint should be dismissed. Because the issue of the applicability of Section 806 of the Act is dispositive, I do not address whether the Complainant has established any of the other elements necessary for recovery.

ORDER

The Complainant's Complaint is DISMISSED.

SO ORDERED.

A

ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).