U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 March 2008

CASE NO.: 2007-SOX-00027

In the Matter Of:

JONATHAN ZANG
Complainant

v.

FIDELITY MANAGEMENT & RESEARCH COMPANY,
FMR CO., INC., FMR CORP,
FIDELITY SELECT PORTFOLIOS, and
FIDELITY TREND FUND
Respondents

Appearances:

R. Scott Oswald, Nicholas W. Woodfield and Jason Zuckerman, The Employment Law Group, PC, Washington, D.C. for the Complainant

Wilfred J. Benoit, Jr. and Ethan Z. Davis, Goodwin Proctor LLP, Boston, MA for Respondents

DECISION AND ORDER GRANTING SUMMARY DECISION DISMISSING COMPLAINT

Jonathan M. Zang ("Complainant") filed a complaint of discrimination against Fidelity Management & Research Company, FMR Co., FMR Corp.[1], Fidelity Select Portfolios, and Fidelity Trend Fund (Respondents) under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of The Sarbanes-Oxley Act of 2002, 18 U.S.C.A. §1514A (West 2004) ("Sarbanes-Oxley" or the "Act") and the procedural regulations found at 29 C.F.R. Part 1980 (2004), alleging that he was terminated in violation of the Act.[2] On April 3, 2007, the Respondents filed a motion for summary decision. (Mot. SD). On May 8, 2007, the Complainant opposed the motion for summary decision (Opp.

[1] The Named Respondent FMR Corp. was merged into a limited liability company after the complaint was filed in the present action. FMR LLC is the surviving entity.

[2] For clarity of discussion herein I refer to Respondents Fidelity Management & Research Company, FMR Co., FMR Corp. (FMR LLC), as Respondents Fidelity and to Respondents Fidelity Select Portfolios, and Fidelity Trend Fund as Respondent Fidelity Funds.

to SD) and filed a motion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure seeking to stay consideration of Respondents Fidelity's motion for summary decision to permit discovery.[3] On October 4, 2007, I issued an Order Granting Complainant's Rule 56(f) Motion to Delay Consideration of the Motion for Summary Decision Pending Discovery and permitted discovery on the issue of whether Respondent Fidelity is a covered employer under Section 806 of the Act.

The parties have now completed discovery on the issue of coverage. On February 3, 2008, the Complainant filed his Supplemental Opposition to Respondents' Motion for Summary Decision. (Zang Supp. Opp.) Respondents filed a Supplemental Reply Memorandum in Further Support of Respondent's Motion for Summary Decision Dismissing the Complaint on February 15, 2008.[4] (Resp. Supp. Reply)

I. Uncontested Facts[5]

1. The Complainant was employed as a research analyst at Fidelity Management & Research Company beginning in 1997and was later employed by FMR Co. Inc. until his termination in 2005. Complaint. ¶1; Mot. SD Ex. 3 (Lombardi Decl); [6] Opp. to SD. at Ex. 1 at 2.[7] In the Fall of 2001, Zang was assigned to the Health Care Services group, where he served as research analyst and managed the Select Medical Delivery Portfolio. In October 2004 he was transferred to the Energy group, where he served as research analyst and in January 2005 he also began managing the Select Natural Gas Portfolio.[8] *Id*.

[3] On June 8, 2007, Respondents submitted a Reply Memorandum in Further Support of the Motion for Summary Decision and an Opposition to the Complainant's Rule 56(f) Motion. The Complainant filed a Surreply Opposing Summary Decision on June 21, 2007. Respondents opposed the Surreply on July 5, 2007.

[4] Respondent filed a Motion to File Under Seal the minutes of three Board meetings pursuant to the parties' confidentiality agreement which was approved by the undersigned on January 8, 2008. Complainant has filed a consent to the motion and the motion is granted.

[5] Zang submitted a Statement of Material Facts in Dispute (Statement) with his Supplemental Opposition to Summary Decision along with fifty-two exhibits. The Statement includes what Zang contends are undisputed facts and also disputed facts. Respondents indicate that for purposes of this motion, they accept all of the admissible evidence offered by Zang. (Respondents have moved separately to strike the disclosure of expert Mercer E. Bullard). In reviewing Zang's Statement and the evidence submitted, many of the alleged "disputed" facts are not actually factual disputes, what is disputed is the legal conclusion one ought to draw from the facts. To the extent that additional facts, not outlined above, may be relevant or necessary to the discussion herein, those additional facts will be referenced under analysis of the specific issues.

[6] Dana Lombardi is Vice President and Director, Human Resources for FMR Co. Mot. SD Ex 3; Zang Supp. Opp. (Statement (Proper Names)).

[7] The factual references include reference to submissions by the parties in their initial complaint, motion for summary decisions, opposition and reply.

[8] The Select Medical Delivery Portfolio and Select Natural Gas Portfolio are two of the 42 separate portfolios that make up the Fidelity Select Portfolios Fund. Mot. SD (Wyant Decl ¶ 8).

2. Respondent FMR Co. is a wholly owned subsidiary of Respondent Fidelity Management & Research Company, which is a wholly-owned subsidiary of Respondent FMR Corp. Mot. SD Ex. 4 (Wyant Decl); Opp. to SD at 2-3. FMR Co., Fidelity Management & Research Company, and FMR Corp. (Respondents Fidelity) are privately held companies. *Id*. at ¶2. None of these three entities have securities registered pursuant to Section 12 of the Securities and Exchange Act of 1934, nor are any of the three entities required to file reports pursuant to Section 12(d) of the Securities and Exchange Act of 1934. Mot. SD Ex. 4 (Wyant Decl).

3. Fidelity Select Portfolio and Fidelity Trend Funds are two of the mutual funds in the Fidelity Mutual Fund family of funds. Fidelity Select Portfolio is made up of 42 separate funds and the Fidelity Trend Fund has one fund, the Fidelity Trend Fund. *Id.* at ¶¶ 8, 9. Fidelity Select Portfolio and Fidelity Trend Funds (Respondents Fidelity Funds) are required to file reports under Section 15(d) of the Securities and Exchange Act of 1934. *Id.* at ¶¶ 12, 13; Compl. ¶¶ 7, 8;

4. The Fidelity Funds are owned by the shareholders of the funds. Mot. SD. Ex. 4 (Wyant Decl.) at ¶4.

5. Respondent Fidelity Management & Research Company has a management contract to act as investment advisor to Fidelity Trend Fund and each of the funds in the Fidelity Select Portfolio. *Id.* at ¶7. Under the terms of the contract, Fidelity Management & Research Company is responsible for directing the investments of each fund consistent with the investment objectives, policies and limits of each fund. *Id*. at ¶10.

6. Fidelity Management & Research Company is subject to the supervision of the Fidelity Mutual Funds' Board of Trustees in carrying out its contractual obligations. *Id.* The Board of Trustees meets throughout the year in overseeing the Fidelity Mutual Funds. *Id*. at ¶ 4; Resp. Supp. Reply, Ex 3 at 23:17-22, 24:1-6.

7. The Fidelity Funds Board of Trustees meets throughout the year to review the performance of each of the Fidelity Funds. The Board of Trustees have established a committee structure to facilitate their oversight responsibility. *Id*. at ¶ 6; Resp. Supp. Reply Ex 2 at 98:21-22, 99:1-22; Ex 3 at 26:10-22.

8. In performing this oversight function the Fund Board meets annually with the portfolio manager to review the performance of each fund. Resp. Supp. Reply, Ex 1 at 148:6-12; Ex 3 at 26:17-22. If a fund is underperforming, the Fund Board discusses performance improvements with Fidelity. Resp. Supp. Reply, Ex 1 at 149:4-13; Ex 3 at 23:17-22, 24:1-6. The Fund Board is not involved in day-to-day operations at Respondent Fidelity, does not participate in personnel decisions regarding individuals assigned by Fidelity to work on specific Funds and has not sought to replace portfolio managers. Resp. Supp. Reply, Ex 1 at 164:1-5; Ex 3 at 41:18-20, 43:11-14, 62:2-15, 63:5-10, 89:7-13, 104:15-22, 110:2-14.

9. Fidelity Management & Research Company has a sub-advisory agreement with FMR Co., under which FMR Co. is responsible day-to-day for selecting investments for many Fidelity

mutual funds including the Respondents' Fidelity Select Portfolio and Fidelity Trend Funds. Mot. SD Ex 4 (Wyant Decl. at ¶ 11).

10. In addition to investment advice, pursuant to the management contracts Fidelity Management and Research or its affiliates provide management and administrative services required to operate each mutual fund, including maintaining the fund's records and registration of each Fund's shares under federal securities law as well as furnishing office space, equipment and personnel for servicing the investments of the Portfolio. *Id.* at ¶¶11, 13; Resp. Supp. Reply Ex 4 and Ex 5; Zang Supp Opp. Ex 9. Fidelity Management & Research Company is also responsible for registering the Funds' shares and preparing drafts of reports required by the SEC. *Id;* Compl. at 2.

11. The Fidelity Fund's Board of Trustees annually assesses and reviews whether or not it will renew the mutual funds investment advisory contracts with Respondent Fidelity on an annual basis. Mot. SD Ex 4 (Wyant Decl) at ¶4.

12. Respondent Fidelity Funds (Fidelity Select Portfolio and Fidelity Trend Funds) has officers and a board, but does not have any employees. *Id.*

13. In 2005, the Fidelity Fund Board of Trustees included four interested trustees. (Edward Johnson, Robert Reynolds, Stephen Jonas and Abigail Johnson) Zang Supp Opp., Ex 2 at 48:10-49:9; EX 1 at 71:15-72:5; Resp. Reply in Support of Mot Sum Dec. at 10; Mot. SD Ex 4 (Wyant Decl) at ¶5. Trustees are deemed interested under the Investment Company Act of 1940, 15 U.S.C. §80(a)-2(a)(19) based on, among other things, affiliation with a Fidelity Mutual Fund or various entities under common control with an investment adviser. Mot SD Ex 4 (Wyant Decl) at ¶5; Resp. Supp Reply Ex 9 at 28:5-7. Independent Trustees are trustees who are not interested as that term is defined in the Investment Company Act of 1940 in other words trustees that do not have a financial interest in Respondent Fidelity. Resp. Supp Reply Ex 9 at 28:16-17. The majority of Trustees were independent and the independent trustees were a supermajority of the Fidelity Funds Board. Zang Supp. Opp, Ex 50, Resp. to Interrogatory No. 20.

14. Fidelity research analysts perform research on assigned companies and stocks within a given industry. Mot. SD Ex. 1 (Lombardi Decl.) at ¶3; Resp. Supp Reply Ex 3 at 51:1-6, 97:16-22. Fidelity portfolio managers ("PMs") manage large diversified mutual funds that invest across a spectrum of industries. Mot. SD Ex. 1 (Lombardi Decl.) at ¶3.

15. On or about February 18, 2005, Zang and other research analysts who served as Fidelity Select Portfolios managers received a draft Statement of Additional Information ("SAI") for review and comment. Mot. SD at 7 (Jensen Decl at ¶2); Compl ¶10; Zang Supp. Opp. Ex 33.

16. On March 13, 2005, the Complainant sent an e-mail memorandum titled "We Should Each Take A Stand" to over 100 other Fidelity employees. Mot. SD. at Ex. 2; Opp to SD at 31. In this memorandum the Complainant discusses and criticizes several Fidelity policies as being inconsistent with company goals and he makes suggestions he believes will improve the company. The Complainant questions Fidelity's current structure regarding the relationship

between research analysts and PM's, including a Fidelity career path that the Complainant believed undervalued analysts and increased the number of PMs with little regard for the effect on overall mutual fund returns. The Complainant was also highly critical of the use of PM surveys in evaluating and compensating analysts and he questioned whether the use of such a tool in evaluating analysts advanced the goal of shareholders to maximize returns. Mot. SD at Ex. 2. The Complainant suggested various changes to Fidelity's philosophy and business practices that he asserted would improve performance of the funds.

The Complainant also quoted a portion of a draft SAI for the Fidelity Select Portfolios fund filed with the Securities and Exchange Commission ("SEC") and which had been distributed to him and to other research analysts who served as Fidelity Select Portfolios fund managers for comment. Zang's memo stated that the SAI's statements regarding fund managers compensation "portrayed inaccurately the relative importance of compensation drivers." *Id.* at 5.

17. On March 15, 2005, Katherine Collins, the former head of U.S. Equities for Respondent Fidelity, informed the Complainant that his previously required attendance at the March 17 Board of Trustees meeting for Select Medical Delivery Fund was not necessary. Compl. at ¶13; Compl. Response to Respondents Response to Complainant's Memo of Fact and Law at Tab 3; Zang Supp. Opp. Ex 36.

18. On March 18, 2005, Ms. Collins sent a voice-mail message to Portfolio Managers and Research Analysts which criticized the use of company e-mail to complain about the company as inappropriate. Compl. at 15; *Id.*

19. On the same day, Ms. Collins gave the Complainant a written warning, which was copied to John McDowell, Senior Vice President of Respondent Fidelity Management and Research Company, stating that the manner in which he complained of Fidelity policies violated the Company policy prohibiting solicitation. Resp. Opp. to Default at Tab C1G; Zang Supp. Opp. Ex 17; Resp. Supp. Reply Ex 1 (Lombardi Dep.) at 124:15-20.

20. On March 18, 2005, the Complainant met with Mark Jensen, Associate General Counsel for FMR Corp., regarding his comments on the draft SAI. As a result of this meeting, some clarifying language changes were made to the SAI to address concerns raised by Zang. *Id.* at Ex. 5 (Jensen Decl) at ¶¶4, 5, 8.; Compl. at 4; Zang Supp. Opp. Ex 47; Resp. to Interrogatory No. 19).

21. On June 27, 2005, the Complainant was notified by Boyce Greer, FMR Co. Senior Vice President of Equity Research and Asset Allocation and Dana Lombardi, FMR Co. Human Resources Vice President, that his employment was terminated effective July 15, 2005. *Id.* at Ex. 5 (Jensen Decl) at ¶12, Compl. at ¶25.

22. The Complainant was terminated on July 15, 2005.

II. Standard of Review - Summary Decision

The standard for granting summary judgment or decision is set forth at 20 C.F.R. §18.40(d) which is derived from Federal Rules of Civil Procedure (FRCP) 56.[9] Section 18.40(d) permits an Administrative Law Judge to enter summary decision, "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issue as to any material fact and that a party is entitled to summary decision." 20 C.F.R. §18.40(d) (1994). A material fact is one whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And, a genuine issue exists when the non-movant produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties' differing versions at trial. *Id*. at 249.

In deciding a Rule 56 motion for summary decision, the Court must consider all the material submitted by both parties, drawing all reasonable inferences in a manner most favorable to the non-movant. *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 158-159 (1970). In other words, the Court must look at the record as a whole and determine whether a fact-finder could rule in the non-movant's favor. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324. If the non-movant fails to sufficiently show an essential element of his case, there can be "'no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial." *Id*. at 322-323.

III. Coverage Under Section 806 of Sarbanes Oxley

A. Statutory Provision

Section 806 of Sarbanes-Oxley provides that no publicly traded company,[10] "or any officer, employee, contractor, subcontractor or agent of such company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" for (1) providing information the employee reasonably believes constitutes a violation of section 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders or for (2) participating in a proceeding alleging such violations. 18

[9] Rule 56(c) provides that summary decision shall be rendered "if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c).

[10] Publicly traded companies are companies with a "class of securities registered under Section 12 of the Securities Exchange Act of 1934," or a company that "is required to file reports under Section 15(d) of the Securities Exchange Act of 1934…" 18 U.S.C.A. §1514A.

U.S.C.A. § 1514A(a). The question presented in this matter is whether Respondent Fidelity is a covered employer under Section 806 of the Act, thereby making Zang a covered employee.

B. Parties' Contentions

The parties acknowledge that Respondents Fidelity are not publicly held companies but rather are privately owned companies. However, Complainant contends that Respondent Fidelity is a covered employer as either a contractor or agent of Respondent Fidelity Funds, the publicly traded companies, or that Respondent Fidelity and Respondent Fidelity Funds are an integrated enterprise. Zang contends that the "plain meaning" of the statutory phrase "any officer, employee, contractor, subcontractor or agent of such company" protects "all persons potentially in a position to report shareholder fraud or other violations of SEC rules – including the employees of contractors and agents of public companies." Zang Supp. Opp. at 30. The Complainant argues that construing Section 806 to exempt privately owned investment advisers, such as Respondent Fidelity, from coverage creates a significant loophole that Congress intended to close in promulgating the Sarbanes-Oxley Act. Zang Supp. Opp. at 32.

Respondents assert that Respondents Fidelity are privately held entities and are not covered under SOX as contractors or agents of Respondent Fidelity Funds, nor are Respondents Fidelity and Respondent Fidelity Funds an integrated enterprise. Respondents argue that under the Investment Company Act of 1940 and the Investment Advisers Act of 1940, which govern the mutual fund industry investment advisers such as Fidelity, and investment companies such as Fidelity Funds are separate and distinct entities and that Congress did not intend to amend the statutory and regulatory scheme covering the mutual fund industry. Resp Supp Reply at 5-6. Respondents assert that the statutory phrase at issue simply lists the "various actors who are prohibited from discriminating against employees of publicly-traded companies." Resp. Supp. Reply at 14 (citations omitted). Resolution of the question of coverage depends upon the meaning of the statutory language of Section 806 which provides no publicly traded company, "or any officer, employee, contractor, subcontractor or agent of such company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee." 18 U.S.C.A. §1514A(a).

Complainant's construction of Section 806 makes the provision a general whistleblower provision applying to public companies but also to any privately owned company having a contract or having any type of agency relationship with a publicly traded company. This is an exceptionally broad reading of Section 806.[11] Had Congress intended such an expansive

[11] In *Brady v. Calyon Sec. (USA)*, 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005) the District Court stated that Section 806's reference to "any officer, employee, contractor, subcontractor, or agent of such company" simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of a covered employer" citing *Minkina v. Affiliated Physicians Group*, No. 2006-SOX-19, at 6 (ALJ Feb. 22, 2005), appeal dismissed (ARB July 29, 2005). The District Court continued stating "[t]he Act makes plain that neither publicly traded companies, nor anyone acting on their behalf, may retaliate against qualifying whistleblower employees. Nothing in the Act suggests that it is intended to provide general whistleblower protection to the employees of any employer whose business involves acting in the interests of public companies." The Court went on to reject the notion that the Sarbanes-Oxley Act's "use of the word 'agent,' adopted a general whistleblower protection provision governing the employment relationships of any privately-held employer….that has ever had occasion, in the normal course of its

application of Sarbanes-Oxley's whistleblower provision it would have plainly said as much. On the other hand, Respondents reading of the provision as simply a list of other actors prohibited from discriminating against employees of publicly traded companies appears to be inconsistent with the Department of Labor's Administrative Review Board's ("ARB") decision in *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB 04-149, ALJ No. 2004-SOX-11 (ARB May 31, 2006). In *Klopfenstein*, the ARB held that a non public subsidiary of a publicly held company may be covered by the whistleblower provision of Sarbanes-Oxley if the subsidiary is an agent of the public company with regard to employment matters.

C. Interpretation of Section 806

As the Complainant and Respondents both contend that the "plain meaning" of the statutory language and the legislative history of Section 806 supports their conflicting constructions of the statute, it is appropriate to consider other language in the provision, other provisions of the same statute, the legislative history and any decisions construing and applying the statutory provision in an attempt to discern the intent of Congress. *See* Zang Supp. Opp at 29-37; Resp. Supp. Reply at 6-12.

Section 806 of the Act is titled "Whistleblower Protection For Employees of Publicly Traded Companies." The title suggests that Section 806 applies only to publicly traded companies. While the title of a provision is not controlling as to its meaning, it provides some insight into Congressional intent in terms of the employees to whom Congress intended to provide whistleblower protection.

A basic rule of statutory construction is that words and phrases should not be parsed in isolation. **National Bank of Or. v. Independent Ins. Agents of Am., Inc.** 508 U.S. 439, 453, 113 S.Ct. 2171, 2182 (1993). The courts and the ARB have held that in interpreting a statute "a court must not be guided by a single sentence or member of a sentence but instead must look to the law as a whole and to its object and policy." **National Bank of Or** . 113 S.Ct. at 2182. *See also, OFCCP v. Keebler,* ARB No. 97-127, ALJ No. 1987-OFC-20 (ARB Dec. 21, 1999).

In applying this rule, it may be helpful to examine other provisions of the same statute in an effort to discern the reach of the Section 806. Other provisions of Sarbanes-Oxley explicitly apply to individuals who may not be employees of publicly traded companies, suggesting that Congress understood the parameters of Section 806. For example, in Section 307 Congress enacted an attorney professional responsibility provision which required the Securities and Exchange Commission to promulgate rules "in the public interest and for the protection of investors" establishing minimum standards of conduct for attorneys appearing and practicing before the Commission *in any way* in the representation of issuers. (emphasis supplied). This provision requires attorneys to report evidence of material breach of securities law or breach of fiduciary duty by a company or its agent. Section 307 is broadly worded and covers any and all "attorneys appearing and practicing before the Commission in any way in the representation of issuers." The provision applies any time an attorney appears before the SEC on an investment

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business, to act as an agent of a publicly traded company…" 406 F. Supp 2d at 318. As the plaintiff was an employee of a non publicly traded company, the District Court dismissed the Sarbanes-Oxley claim.

company's behalf and thus this provision is intended to have wider application as a means of protecting investors.

Similarly, Section 406 requires the SEC to implement regulations requiring issuers to establish a code of ethics for senior financial officers, including the principal financial officer, the comptroller or principal accounting officer or persons performing similar functions. Thus, Congress created a functional test under Section 406 in establishing a code of ethics for senior financial officers of issuers in an effort to protect investors. In contrast, Section 806 does not utilize a functional test. This suggests that Congress intended the two provisions to operate independently.

In addition, when enacting Sarbanes-Oxley, Congress was certainly aware of investment advisers and investment companies, and the way in which the majority of the mutual fund industry operates, yet it did not specifically refer to these entities in Section 806, but it did make specific reference to investment companies and investment advisers in other provisions of Sarbanes-Oxley. For instance, Section 405 exempts investment companies registered under Section 8 of the Investment Company Act of 1940 from specific provisions of Sarbanes-Oxley; Section 201(a) includes investment advisers in amendments to the 1934 Act; and Section 604(b) titled Investment Advisers amends the Investment Advisers Act. [12]

The legislative history may also provide insight to Congress' intent in promulgating a specific statute. The Congressional Record states that the purpose of Section 806 of the Act is to "provide whistleblower protection to employees of publicly traded companies . . . when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent," and to "protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." 148 Cong. Rec. S7420, 2002 WL 1731002 (daily ed. July 26, 2002). Senator Sarbanes, a key sponsor of the Act, stated he wanted to "make very clear that [SOX] applies exclusively to public companies – that is, to companies registered with the Securities and Exchange Commission. It is not applicable to the pr[ivat]e companies, who make up the vast majority of companies across the country." 148 Cong. Rec. S7350, 7351 (July 25, 2002).

However, Complainant argues that the legislative history shows Congress was concerned with "the opportunity for a contractor of a publicly traded company to retaliate against its own employee who blows the whistle on a publicly traded company's violation of an SEC rule." (Zang Supp. Opp. at 30-31). Zang relies upon comments in the legislative history discussing "The aftermath of Enron's collapse and the cover up" which noted attempts by various whistleblowers in the Enron situation including a partner in Arthur Andersen, the accounting

[12] Investors are protected against fraud and conflicts of interest by other statutes and regulations. For example, the mutual fund industry is specifically regulated by the Investment Company Act and the Investment Advisers Act of 1940 which recognize that investment companies and investment advisers are separate. 15 U.S.C. §80b-1, *et seq.* Additionally, the SEC has promulgated rules and regulations governing the mutual fund industry under the Investment Advisers Act.

firm, noting the Andersen partner "was removed from the Enron account when he expressed reservations about the firm's financial practices in 2000." S. Rep. No. 107-146, S. Rep. No. 146, 107th Cong., 2nd Sess. 2002 (May 6, 2002) at 5. While Congress discussed the situation of the Arthur Anderson employee, Sarbanes-Oxley addressed Congress' concern over the role accountants played in the Enron collapse by including several provisions specifically addressing accountants and accounting firms including mandating the creation of standards of conduct, sharpening requirements for accounting firms in performing audits, and establishing significant penalties for non compliance.[13] Therefore, Zang's assertion that the investing public will be left unprotected unless Section 806 applies to privately-held investment advisers is overstated.

Initially, several administrative law judges and district courts construed Section 806 as applying only to publicly-traded companies. *Reno v. Westfield Corp., Inc*. 2006-SOX-00030 (ALJ Feb. 23, 2006) at 3 ("merely being a contractor or agent of a publicly traded company is not enough to impose liability"); *Goodman v. Decisive Analystic Corp.*, 2006-SOX-00011 (ALJ Jan. 10, 2006) 9-10(dismissed complaint by employee of non public company providing consulting services to public companies, stating employees of private contractors and subcontractors of publicly traded companies not covered by SOX whistleblower provision.); *Minkina v. Affiliated Physician's Group*, 2005-SOX-00019 (AlJ Feb 22, 2005) at 6 (rejecting employee of non public company's assertion of coverage as based upon non-public company's contracts with public companies, holding language referring to "any officer, employee, contractor, subcontractor or agent of such company" simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of a covered employer."); *Felszar v. Am. Medical Ass'n.,* 2007-SOX-00030 at 3 (ALJ June 13, 2007) (non-public organization's contracts with public companies insufficient to establish coverage under Section 806); *Brady v. Calyon Sec (USA),* 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005)(district court concluded that Section 806's reference to "any officer, employee, contractor, subcontractor, or agent of such company" simply lists the actors who are prohibited from discriminating on behalf of a covered employer.)

However, in *Klopfenstein*, the ARB rejected an interpretation of Section 806 that would "require a complainant to name a corporate respondent that is itself 'registered under §12 or…required to file reports under §15(d),' so long as the complainant names at least one

[13] Section 101 creates a Public Company Accounting Oversight Board (Board) to oversee the audit of public companies in order to protect investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies whose securities are sold to and held by or for public investors. The Board is required to adopt auditing, quality control, ethics, independence, and other rules or standards addressing the preparation of audits for issuers under Section 103. Section 104 provides for inspections of registered public accounting firms. Section 105 directs the Board to set up procedures for the investigation and discipline of registered public accounting firms and associated persons of such firms. *See also* Section 2(9) which defines "person associated with a public accounting firm" broadly to include "any individual proprietor, partner, shareholder, principal, accountant or other professional employee of a public accounting firm, or any other independent contractor or entity that, in connection with the preparation or issuance of any audit report shares in the profits of" or "is compensated from the firm" or participates as agent or otherwise on behalf of such accounting firm in any activity of that firm." Section 201 prohibits auditors from providing other named services to any issuer contemporaneously with the audit, in order to remove any conflicting financial incentive accounting firms may have in providing both audit services and non audit services to the same company. Under Section 107, the Securities and Exchange Commission possesses oversight and enforcement authority over the Board.

respondent who is covered under the Act as an 'officer, employee, contractor, subcontractor or agent' of such a company." *Klopfenstein*, ARB No. 04-149 at 13. The ARB went on to hold that a non public subsidiary of a publicly-traded parent company may be subject to the whistleblower provision of the Act if it acted as an agent of the public parent company in employment matters. *Id*. at 13-14.[14] I am bound by the precedent established by the ARB's *Klopfenstein* decision.

Respondent Fidelity argues that *Klopfenstein* is inapposite as it involved a parent-subsidiary relationship and the employees of the public parent were involved in the decision to terminate the complainant. Although *Klopfenstein* involved companies with a parent/subsidiary relationship, the ARB construed and applied the term "agent" included in the coverage provision of Section 806 of the Sarbanes-Oxley Act. The initial question then is whether the rationale in *Klopfenstein* is appropriately applied in circumstances where the non public and the publicly held entity are not subsidiary/parent corporations, but are separate entities whose businesses may have an agency relationship.

The general corporate law principle holds that parent companies are not *ipso facto* liable for the actions of their subsidiaries. *United States v. Bestfoods*, 524 U.S. 51, 61, 63 (1998); *Rao*, 2007 WL 1424220 at 8-9. Nonetheless, as *Klopfenstein* directs, a parent corporation may be liable for the actions of its subsidiary if the subsidiary is acting as the agent of the parent with regard to the allegedly retaliatory employment action. Similarly, although investment companies and investment advisers are separate entities, I discern no policy rational for limiting the ARB's holding in *Klopfenstein* to situations involving a subsidiary and parent. Therefore, I must evaluate the parties' assertions and evidence to determine whether Zang has shown either that Respondent Fidelity is an agent of Respondent Funds and was acting on behalf of Respondent Funds when it terminated his employment, or has demonstrated that there are material facts in dispute on this issue.

D. Is Respondent Fidelity an Agent of Respondent Fidelity Funds?

As noted, the ARB has construed Section 806, holding that a non public subsidiary of a publicly held company *may* be covered under the whistleblower provisions of Sarbanes-Oxley if the subsidiary is an agent of the public parent company. *Klopfenstein* ARB 04-149 at 14-15.[15] In determining whether a particular subsidiary is an agent of a public parent for purposes of the Sarbanes-Oxley Act's anti-discrimination provision, the ARB instructs that principles of general common law of agency are applied. *Klopfenstein*, ARB 04-149, slip op. at 14. The ARB stated

[14] The ARB remanded the matter to the administrative law judge to assess whether the privately-held subsidiary was an agent of the public parent company.

[15] In *Klopfenstein*, the ARB did not address the district court's decision in *Brady v. Calyon Securities (USA), et al.* 406 F. Supp. 2d 307, 318-319 (S.D.N.Y. 2005). In *Brady* the Court dismissed a SOX claim by a research analyst who worked for a privately owned subsidiary of a publicly-held company. The District Court rejected the complainant's claim that as a research analyst at an investment bank, his employer acted as "agents and/or underwriters of numerous public companies." *Id.* at 318. The Court stated that [t]he mere fact that defendants may have acted as an agent for certain public companies in certain limited financial contexts related to their investment banking relationship does not bring the agency under the employment protection provisions of Sarbanes-Oxley…." *Id*. at 318-319.

"[a]lthough [agency] 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.'" *Klopfenstein,* ARB 04-149 at 14, citing Rest. 2d Agen. §1(1), comment b.[16] Factors relevant in assessing whether an agency relationship exists include whether there are overlapping officers between the two companies and whether the principal was involved in decisions relating to the complainant's employment. *Id.* at 15; *see also, Rao v. Daimler Chrysler Corp.* 2007 WL 1424220 (E.D. Mich) (May 14, 2007) slip op. at 5 (granting summary decision dismissing SOX complaint as plaintiff failed to allege anyone at parent corporation knew of or participated in decisions regarding his employment). However, the ARB has also recognized that "to be covered under the Act, of course, an individual must not only be an agent of a public company, but also must "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." *Klopfenstein,* ARB 04-149 at 16, citing 18 U.S.C.A. §15.14A(a).

First, Zang argues that the management contracts between Respondent Fidelity and Respondent Fidelity Funds, as well as the fiduciary duty Respondent Fidelity as an investment adviser, owes Respondent Funds the investment company, under securities laws, establishes agency. However, with regard to the management contracts, the contracts specifically provide that "[t]he Adviser (Respondent Fidelity) shall, in acting hereunder, be an independent contractor. The Adviser shall not be an agent of the Portfolio." Resp. Supp. Reply Ex 4 ¶1(c)(2); Ex 5 ¶1(c)(2). This provision demonstrates that Respondent Funds did not intend Respondent Fidelity to operate as its agent, but rather as an independent contractor. Pursuant to the management contracts, Fidelity provides investment advisory services to the Funds including, acting as investment adviser to the funds, directing the investments of the funds, furnishing all necessary personnel for servicing the investments of the funds. The contracts also provide that the "investment policies and all other actions of [each fund] are and shall at all times be subject to the control and direction of the Fund[s]' Board of Trustees." Resp Supp. Reply Ex 4 at ¶ 1(a). Under terms of the management contracts, it is Respondent Fidelity that determines how many employees are needed to service the investments of the funds, which individuals are hired, the compensation paid and the work assignments. Nothing in the management contracts reflects that Respondent Fidelity Funds plays a role in decisions related to who is hired, the

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[16] Restatement (Third) completely replaced Restatement (Second) of Agency which was first published in 1958. The definition of agency referenced above by the ARB also appears in Restatement (Third) (§ 1.01 Agency Defined) along with comments providing:

> Comments: (c) Elements of agency: As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has the right to control the actions of the agent. Agency thus entails inward-looking consequences, operative as between the agent and the principal, as well as outward-looking consequences, operative as among the agent, the principal, and third-parties with whom the agent interacts. Only interactions that are within the scope of an agency relationship affect the principal's legal position.
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> * * * *

Not all relationships in which one person provides services to another satisfy the definition of agency. It has been said that a relationship of agency always "contemplates three parties - the principal, the agent, and the third party with whom the agent is to deal." 1 Floyd R. Mechem, A Treatise on the Law of Agency §27 (2d ed. 1914).

compensation rate or any other matter related to employment of Respondent Fidelity employees. In providing these investment advisory and management services, Respondent Fidelity functions as an independent contractor as Fidelity is in control of how it provides the services contracted for, subject only to compliance with investment policies the Respondent Funds Board establishes for each fund.[17]

With regard to the fiduciary duty investment advisers owe investment companies under federal securities statutes, the parties agree that Respondent Fidelity owes a fiduciary duty to the Respondent Funds. Zang's assertion that this fiduciary duty requires Fidelity to act in the interest of the Funds at all times, and that therefore, when Fidelity considers whether to discharge a Fidelity employee who services a Fidelity Fund, it is acting on behalf of and in the interest of Fidelity Funds is an oversimplification. Owing a fiduciary duty does not mean that every action Respondent Fidelity takes is an action by the Respondent Funds. *Productive Automated Sys. Corp. v. CPI Sys. Inc*., 61 F3d 620, 621 (8th Cir. 1995). To establish Respondent Fidelity is a covered employer as an agent of Respondent Fidelity Funds, Complainant must establish that Respondent Fidelity was acting on behalf of Respondent Funds with regard to employment matters involving Fidelity employees including taking adverse action against him.

In attempting to show that Respondent Funds exercised control of employment matters at Respondent Fidelity, Zang asserts that Fidelity acts as the Funds agent with respect to employment matters, and that the Fund Board influenced the terms and conditions of his employment. Zang contends that because Stephen Jonas, the retired executive director of Respondent Fidelity, was also an "interested" trustee on the Fidelity Fund Board of Trustees, testified that he "was trying to do the best thing [he] could for …the Funds all the time" that there is a genuine issue of material fact tending to show Respondent Fidelity makes personnel decisions as an agent of the Fidelity Funds and acts in the best interests of the Funds. Zang Supp. Opp. at 14-15, 17; Resp. Supp Reply Ex 3 at 13-15, 17 (Jonas Dep.). However, this is a selective and incomplete reading of Mr. Jonas' testimony. Indeed, Mr. Jonas stated that personnel actions were specifically within his responsibility as head of Respondent Fidelity but that personnel actions have never been acted upon by the Respondent Fidelity Funds Board of Trustee in its oversight role. *Id.* at 104. Mr. Jonas stated explicitly that the day-to-day activity of the Fidelity employees was not subject to the direction or control of Respondent Funds' Board of Trustees. These day-to-day actions in which the Respondent Funds Board played no role, included the selection of fund managers, what the research staff was, which sectors or industries a Fidelity employee was assigned to, the individuals hired as traders, how Fidelity shared information, compensated its staff, specifics regarding incentives, and resource allocation. *Id.* at 110. Mr. Jonas' testimony on this point was not contradicted. Respondent Fidelity's Rule 30(b)

[17] In support of his agency assertion, Zang points to the provision of the management contracts, which state that Respondent Fidelity is to provide certain management services which require Fidelity "on behalf" of the Respondent Funds and "subject to the supervision of the Respondent Funds Board of Trustees' to "supervis[e] relations with, and monitor the performance of custodians, depositories, transfer and pricing agents, accountants, attorneys, underwriters, brokers and dealers, insurers and other persons in any capacity deemed to be necessary or desirable…" Resp. Supp. Reply at Ex 4 ¶1(b). This function is also performed as an independent contractor under the express terms of the contract for services between Fidelity and the Fidelity funds. Even if Respondent Fidelity is deemed an agent of Respondent Funds with regard to this provision of the management services contracts, Respondent Fidelity is not covered by Section 806 unless the agency involves control of or participation in employment matters affecting employees of Respondent Fidelity.

witness, Dana Lombari, Vice President of Fidelity's human resources department, confirmed Jonas testimony by stating that the Fund's Trustees did not participate in "decision-making regarding individual employees" and had "no role in the discipline of [Fidelity] employees." Resp. Supp. Reply, EX 1 at 155:7-9 and 130:9-12.[18]

Zang also points to the August 2005 Semi-Annual Report which indicates the Respondent Fidelity Funds Board had discussions with Respondent Fidelity throughout the year over the research, fund performance and compliance with internal policies related to gifts and entertainment, as evidence that the trustees participated in a process that led to a reorganization at Fidelity. Zang Supp. Opp. at 17-18. The Semi-Annual Report further states the Fidelity Funds Board noted with favor Fidelity's recent reorganization of its senior management team and plans for additional resources for investment research, and participated in the process that lead to those changes. *Id*. The testimony of Fidelity's Rule 30(b) witness, Ms. Lombardi, shows however, that Respondent Funds was not responsible for the reorganization, but that the reorganization decision was made by officials and senior management of Respondent Fidelity. Resp. Supp. Reply Ex 1 at 71:5-10. She explained that the Fund Board and Fidelity had ongoing discussions regarding both parties' dissatisfaction with the performance of the Fidelity Funds, but that the management changes in 2005 were not made at the suggestion or request of the Fund Board. Mr. Rathberger, the Respondent Funds Rule 30(b) witness, testified in conformity with Ms. Lombardi's statements as he said the Fund Board of Trustees did not make a request for change in management, but rather listened to Fidelity's plan to improve matters. Resp. Supp. Reply, Ex 2 at 65:4-22, 66:1-17. In light of the corporate witnesses' uncontradicted testimony regarding the interaction/discussions between Respondent Fidelity and Respondent Funds on the investment performance results referred to in the annual report, the annual report does not raise an issue of material fact suggesting that Respondent Funds exercised control over employment matters at Respondent Fidelity.

The Complainant next contends that because the Board/Trustees of Respondent Funds can elect and remove officers of the Respondent Funds and because all Respondent Fund officers are employees of Fidelity, that Respondent Funds have the authority to effect the terms and conditions of employment of Fidelity employees. This argument is not persuasive. The declaration of trust provides that the Fidelity Funds Board elects and removes officers of the various funds. The officers are proposed by Respondent Fidelity, but must be approved and elected by the Respondent Fund Board. The officer positions are simply honorary positions that carry with them no specific duties or day-to-day responsibilities. Resp. Supp. Reply, Ex 2 at 147:16-18, 150:22, 151:1-22, 156:2-21. These honorary officers are appointed annually by the Board. Based on this evidence, I find that the Board's annual election of some Fidelity employees to honorary officer positions in the Funds which carry no day-to-day responsibilities or specific duties does not affect the terms and conditions of employment of Fidelity's employees.

[18] Nor does the Congressional testimony of Marvin Mann, a former independent trustee of Fidelity Funds, suggest that Respondent Fidelity was acting as Respondent Funds agent when it terminated the Complainant. In his testimony, Mr. Mann explained that the independent trustees were required to independently analyze fund performance in their oversight role. In performing this duty, the Trustees would on occasion meet with the portfolio managers of the different funds. However, this does not show that Respondent Funds were involved in or controlled the employment decisions of Fidelity. Indeed, Mr. Mann explicitly stated that the Trustees "should not be involved in the day-to-day management affairs of the company." Resp. Supp. Reply, Ex 6 at 3.

Complainant next argues that officers of Respondent Funds influenced the terms and conditions of his employment. There is no dispute that Mr. Jonas, who was executive director of Respondent Fidelity and an interested Trustee of Respondent Funds, approved Zang's termination. Under his theory that Mr. Jonas had a fiduciary duty to act in the interest of Respondent Funds, Zang argues Mr. Jonas was acting in furtherance of this duty when he approved Zang's termination. However, this argument is wide of the mark. Mr. Jonas wore two hats, he was the senior management official at Respondent Fidelity and he was also an interested Trustee of Respondent Funds. The Complainant's argument obfuscates the separate responsibilities Jonas had in the two positions. The fact that Mr. Jonas was both the senior executive at Respondent Fidelity and a trustee of the Fidelity Fund Board does not mean that every action he took as executive director of Fidelity can be attributed to the Funds. As discussed above, Mr. Jonas's testimony that his approval of Complainant's discharge was sought and provided in his position as an executive and officer of Respondent Fidelity and not as a Trustee of Fidelity Funds was not refuted by Complainant.[19]

A portion of the compensation awarded to Respondent Fidelity analysts and portfolio managers is determined based upon a portfolio manager ("PM") survey. Zang Supp Opp. at Ex 42. The PM survey is completed by portfolio managers and rates each research analyst, including Complainant. *Id.* at Ex 38, Nos. 14, 15. Portfolio managers are Fidelity employees. As noted, some portfolio managers also serve as honorary officers of specific Fidelity Funds. The participation of Fidelity portfolio managers, some of whom may also be honorary officers of specific Fidelity Funds, in the PM survey of Zang's performance, does not establish that officers of Fidelity Funds influenced the terms of his employment. The Portfolio Managers participated in the PM survey as employees of Fidelity. There is no evidence that their honorary positions as

[19] Zang makes similar arguments with regard to the actions of several other individuals who were direct employees and management officials of Respondent Fidelity, and who may also have been officers of one or more of the Fidelity Funds or Fund Board members. Specifically, Zang assertion that John McDowell, senior vice-president at Respondent Fidelity Management and Research Company, received a copy of a written warning given to Zang in McDowell's capacity as Vice President of Fidelity Trend Fund, was put to rest by Ms. Lombardi. She stated that Mr. McDowell received a copy of Zang's written warning from Ms Collins who reported to him in her capacity as group leader of Equity Research at Fidelity. As McDowell had responsibility for equity investments at Respondent Fidelity, he was informed in the normal chain of management command of the decision to issue Zang a warning. Resp. Supp. Reply Ex 1 at 124:15-20. In addition, Zang contends that Mr. Greer, senior vice president, Equity Research and Asset Allocation at Fidelity, who was also selected as vice president of Fidelity Funds Select and Asset Allocation funds, made the decision to terminate him and as an officer of two Fidelity mutual funds this shows the Fidelity Funds exercised control over his employment. Again, Zang attempts to combine the two separate positions Mr. Greer held. The fact that Mr. Greer's duties as Vice President of Equity Research and Asset Allocation at Fidelity would include authority to terminate Zang or other Fidelity employees, does not mean that actions he took in this position may be attributed to him in his position as an officer of two Fidelity Funds. In his initial opposition to summary decision, Zang also contended that two letters he received from Edward C. Johnson, 3d, who was Chief Executive Officer of Respondent Fidelity and an interested trustee of the Fidelity Funds regarding Zang's entitlement to a bonus and incentive shares in FMR Corp. establish that the Fidelity Funds Board is involved in employment matters regarding Fidelity employees. The letters from Johnson were sent to Zang in Johnsons' capacity as head of Respondent Fidelity and at least one lists Johnson's Fidelity titles. Again, the fact that an individual involved in either an adverse or positive employment decision affecting Zang or any other Fidelity employee, may hold both a management position at Respondent Fidelity and a position as an officer of one of the Fidelity Funds or trustee of Respondent Fidelity Funds' Board, does not establish that the Funds controlled Zang's employment.

officers in a specific Fidelity Fund conferred authority upon them to act on employment matters involving Fidelity employees.

After careful consideration of the parties' arguments and the evidence submitted, I find that Zang has failed to show there is a question of material fact in dispute as to Respondent Funds control or participation in employment decisions involving Respondent Fidelity employees.

E. Is Respondent Fidelity a Contractor of Respondent Fidelity Funds?

There is no dispute that Respondent Fidelity has a management and investment services contract with Respondent Fidelity Funds. Congress did not define the term "contractor" when it enacted Section 806 of the Act. *Blacks' Law Dictionary* defines the terms as "one who contracts to do work or provide supplies for another." 7th ed (St. Paul: West Pub Co., 1999) 327. The Department of Labor's ARB has not had occasion to determine the nature of a contractual relationship which may be sufficient to demonstrate coverage as a contractor for purposes of the whistleblower provisions of Sarbanes-Oxley.[20] I am not persuaded that simply having a contract with a publicly traded company envelops a private company under Section 806 of the Act.[21] Even the Complainant appears to concede this point, stating that he "does not propose that this Court deem every privately-held company that has a contract with a publicly-traded company a covered employer." Zang Supp. Opp. at 9, n 13. In light of the ARB's *Klopfenstein* decision, which concluded that an agent of a publicly traded company may be a covered employer under Sarbanes-Oxley, it appears that a contractor of a publicly traded company may, in certain circumstances, be deemed a covered employer under Section 806. Upon consideration of earlier decisions considering "contractor" coverage under Section 806 and the ARB's *Klopfenstein* analytical approach to the term "agent" appearing in the same statutory phrase, I conclude that in order for a contractor of a publicly traded company to be covered under Section 806, the contractor must have been acting on behalf of the publicly traded company when it retaliated against or terminated the employee.

In support of his assertion that Respondent Fidelity is a contractor of Respondent Funds and therefore a covered employer, the Complainant makes many of the same arguments he raised in asserting coverage as an agent. As noted, Respondent Fidelity has a management contract

[20] As noted above, several administrative law judge decisions have determined that simply having a contract with a publicly traded company is not sufficient to impose liability under the whistleblower provision in Section 806 of the Act. Rather, the contractor "when discriminating against the employee must have been acting on **behalf** of the publicly traded company." *Reno*, 2006-SOX-00030, 3 (ALJ Feb. 23, 2006); see also *Goodman*,, 2006-SOX-00011, 10 (ALJ Jan. 10, 2006) (construing term "employee" as referring to employee of a publicly traded company, and stating that "the terms 'contractor' and 'subcontractor' in the provision reference two of various entities of a publicly traded company that may not adversely affect the terms and conditions of an employee of a publicly traded company."")(emphasis in orig.); *Minkina*, 2005-SOX-00019, 6 (ALJ Feb. 22, 2005) (stating Section 806's reference to "any officer, employee, contractor, subcontractor, or agent of such company" "simply lists the various potential actors who are prohibited from engaging in discrimination on behalf of a covered employer"); *Flesar v. Am. Medical Ass'n*, 2007-SOX-00030, 3 (ALJ June 13, 2007) (non public employer's contractual relationships with publicly traded company insufficient to establish SOX coverage).

[21] Such a construction of Section 806 would extend Section 806 to any private company that had a contract with a publicly traded company.

with Respondent Fidelity Funds under which Fidelity performs significant management and administrative services for the Fidelity Funds. Among the services Fidelity provides to the Funds are directing the investments of each fund in accordance with its investment objectives and providing all necessary office facilities, equipment and personnel. Complainant contends Respondent Fidelity as an investment adviser acts as a fiduciary with regard to the services it provides Respondent Funds and therefore Respondent Fidelity acts on behalf of and in the interest of Respondent Fidelity at all times. While Fidelity as an investment adviser no doubt has a fiduciary responsibility to act in the interest of Respondent Fidelity Funds, under the Investment Advisers Act as well as SEC regulations, Zang overstates the reach of the duty with regard to the application of Section 806. Thus, I conclude that the fiduciary duty Respondent Fidelity owes Respondent Fidelity Funds under SEC regulations is insufficient in and of itself to show that Fidelity's actions are the actions of the Fidelity Funds under Section 806. Under Section 806 as interpreted by the ARB, the Complainant must show that Respondent Fidelity as a contractor was acting on behalf of Respondent Fidelity Funds in employment matters, and specifically, when it terminated the Complainant's employment.

As noted in the discussion of agency above, pursuant to the management contract Respondent Fidelity as a contractor for Respondent Fidelity Funds is responsible for hiring employees under the management services contract between the parties. Fidelity makes hiring decisions, decisions related to work assignments, pay and compensation of employees and Fidelity Funds have no role in these matters as related to Fidelity employees.

Finally, Complainant's argument that because the contract requires Respondent Fidelity to prepare the Respondent Funds registration statements and shareholder reports it is necessary to protect Fidelity employees from retaliation is unpersuasive. Although Respondent Fidelity prepares shareholder reports and other public filings on behalf of Respondent Fidelity Funds, the Fidelity Funds are responsible for reviewing and certifying the public filings drafted by Fidelity employees.

F. Are Respondent Fidelity and Respondent Fidelity Funds An Integrated Enterprise

The Complainant contends that summary decision is inappropriate as Respondents Fidelity and Respondents Fidelity Funds are a single integrated enterprise. Zang Supp. Opp. at 22-29. Respondents argue that Fidelity and the Fidelity Funds are not an integrated enterprise/single employer. Resp. Supp. Reply at 33-45. The ARB has not ruled on whether the integrated enterprise analysis used in labor and employment cases, to determine whether two companies may be considered so interrelated as to constitute a single employer subject to liability under the specific statute, is appropriate for determining coverage under the Section 806's whistleblower protection provision.[22] Courts evaluate four factors in determining whether there is an integrated enterprise: (1) functional integration of operations; (2) centralized control

[22] In an amicus brief to the ARB in *Ambrose v. U.S. Foodservice, Inc*. ARB No. 06-096, ALJ No. 2005-SOX-105, the Assistant Secretary of Labor for the Occupational Safety and Health Administration argued that the Board should apply the integrated enterprise doctrine in determining Section 806 coverage of private subsidiaries of publicly-traded companies. Resp. Supp. Reply, Ex 7. The parties settled the matter before the ARB issues a decision on the merits. ARB No. 06-096, ALJ No. 2005-SOX-105 (ARB Sept. 28, 2007).

of labor or employment decisions; (3) common management; and (4) common ownership or financial control. *Radio and Television Broadcasting Tech. Local Union 1264 v. Broadcast Serv. Of Mobile, Inc*., 380 U.S. 255 (1965); *Pearson v. Component Tech Corp*., 247 F. 3d 471, 486 (3d Cir. 2001); Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico, 929 F.2d 814, 820 (1st Cir. 1991). The most important factor in employment cases is control or influence over employment matters. Courts have found centralized control where "entities share policies concerning hiring, firing, and training employees, and in developing and implementing personnel policies and procedures." *Lenoble v. Best Temps, Inc*. 352 F. Supp. 2d 237, 244 (D. Conn. 2005); *see also, Romano v. U-Haul International*, 233 F.3d 655, 666 (1st Cir. 2000).

As this matter involves employment issues, the most important factor is whether centralized control of employment decisions exists between Respondent Fidelity and Respondent Fidelity Funds. After careful consideration of the parties' submissions, I conclude that Zang has failed to sustain his burden of showing that Fidelity and the Funds are an integrated enterprise or that there are material facts in dispute with regard to this issue.

1. Centralized Control of Employment Matters

In his effort to demonstrate a factual dispute, Zang contends that the hiring of Mr. Rathgeber is an example of Fidelity and the Fidelity Funds acting as an integrated enterprise with regard to employment. Zang Supp. Opp. at 25. Mr. Rathgeber serves as the Chief Compliance Officer ("CCO") of Fidelity Funds and he is also the Vice President of Risk Oversight and Audit for Respondent FMR Corp. (Fidelity). Resp. Supp. Reply, Ex 2 at 185:19-21, 186:1-5, 18, 187:1, 5-6. Mr. Rathgeber first became head of Risk Oversight and Audit for Respondent FMR Corp. (Fidelity) in 2002. *Id*. at 185:19-21. In 2004, Mr. Rathgeber was also appointed as Fidelity Funds Chief Compliance Officer ("CCO") pursuant to the then new SEC Rule 38a-1, which required investment companies such as Fidelity Funds to appoint a CCO and to adopt procedures and practices to ensure compliance with federal securities laws.[23] *Id*. at 187:5-6. In his position as CCO of the Funds he reports directly to the Fund Board. As he holds a position with both Respondent Fidelity and Respondent Funds, the independent chair of the Fund Board Trustees along with Rathgeber's superior in his position as VP of Risk Oversight for Fidelity, provide input on his performance and compensation review. *Id*. at 34:2-3, 35:7-22, 36:1-22, 38:3-15. Mr. Rathgeber's salary is paid by Fidelity as reflected on his W-2. *Id*. at 35:1-4. The CCO position with Fidelity Funds is an appointed position. At most, Mr. Rathgeber's holding a position at Respondent Fidelity and serving as the appointed CCO for the Respondent Funds suggests that Mr. Rathgeber is employed by both Respondent Fidelity and by Respondent Fidelity Funds.

Complainant also asserts that the Fidelity Funds play "an active role in overseeing the appointment of fund managers." Zang Supp. Opp. at 19. However, this assertion is not supported by the discovery results herein. The Fidelity Fund Board approves the appointment of certain Portfolio Managers as officers of the Fidelity Funds. As discussed, these officer positions are honorary positions which carry no additional or specific responsibilities or duties and a

[23] Rule 38a-1 requires investment companies to appoint a Chief Compliance Officer ("CCO") who is responsible for investigating and reporting on the company's compliance with securities law.

Fidelity Portfolio Manager's role as officer of a Fidelity Fund did not have any effect upon the terms and conditions of his employment as a Respondent Fidelity Portfolio Manager. The Fidelity Fund Trustees do not have authority to select Fidelity Portfolio Managers and are not involved in Fidelity's employment decisions with respect to which employees would become Portfolio Managers. In addition, Fidelity's corporate witness testified that Fidelity's personnel policies applied only to Fidelity employees acting in their capacity as Fidelity employees and her testimony was not contradicted.

The evidence shows Zang was hired by Fidelity, his work assignments were made by Fidelity, his compensation and performance appraisals were determined by Fidelity employees and officials. Contrary to Zang's assertion, the evidence does not show that Respondent Funds played any role in Zang's termination from Respondent Fidelity. As noted, Mr. Jonas a trustee of Respondent Funds was also the Executive Director of Respondent Fidelity at the time of Zang's termination. While Mr. Jonas was consulted regarding the decision to terminate Zang, the undisputed evidence demonstrates he was consulted in his position as the top executive at Respondent Fidelity and not in his role as a trustee of Respondent Fidelity Funds. Therefore, the evidence does not show that the Fidelity Fund Board was involved in the decision to terminate Zang or in any matters related to his employment at Fidelity.

Mr. Zang interacted with the Board of Respondent Funds on three occasions when he participated in the annual presentation to Respondent Funds Board on the Fidelity Select Funds he managed as a Fidelity research analyst or portfolio manager. These presentations were made in the course of the Fund Board's exercise of its responsibility to oversee the performance of the Fidelity Funds. In my view, three annual presentations to the Board on the performance of the funds he managed is not sufficient to establish centralized control of employment nor does it show a question of material fact on this issue.

After considering the parties submissions, Zang has shown that with respect to Mr. Rathgeber, it can be argued that Fidelity and the Funds have jointly employed him. However, Mr. Rathgeber is the only employee with this dual employment status.[24] All other Fidelity employees are employed solely by Fidelity and the Fidelity Funds do not have any other direct employees. In light of the evidence that Zang's and other Fidelity employees' employment including assignments, discipline, pay and benefits were controlled by Fidelity and that the Respondent Funds were not involved in such employment decisions, involving Zang and other Fidelity employees, I conclude Respondent Fidelity and the Funds do not have centralized control of employment matters. I will briefly consider the other factors utilized in determining whether two companies operate as an integrated enterprise.

2. Integration of Operations

In evaluating whether there is an interrelation of operations, courts look to whether one company has influenced or interfered with the business operations of another company. *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (7th Cir. 1997). In the present matter, the Fidelity Funds do not have employees and instead must contract with other companies to handle

[24] His appointment as CCO of the Funds is a consequence of SEC Rule 38(a)-1.

investment, management and administrative services required to operate the Funds. Respondent Fidelity and Respondent Funds business relationship is governed by the management contracts. As noted, the Fidelity Fund operates independently through its Board. There is no evidence that the Fidelity Fund Board is involved in day-to-day decisions related to Fidelity's business operations.

3. Common management

The evidence does not demonstrate that Respondent Fidelity and Respondent Fidelity Funds share common management. Although some individuals held positions at both Respondent Fidelity and Respondent Funds, this does not establish common management. At the time of Zang's termination, ten of the fourteen Fund Board members were independent. This overlap between some Fund Board members and officials at Fidelity fails to show common management. *Sandoval v. The City of Boulder*, 388 F.3d 1312, 1324 (10th Cir. 2004) (no common management when city controlled two of seven seats on an organization's board). Zang also claims that an article appearing in the Wall Street Journal in which Edward Johnson, 3rd stated "[m]andating an independent chairperson is akin to requiring that every ship have two captains. I don't know about you, but if a ship I was sailing on were headed for an iceberg, I'd want one – and only one- captain giving orders" shows common management. Zang Supp. Opp. at 27, Ex 25. Johnson's article was addressing a proposed SEC rule to require that all mutual fund board chairpersons be independent. He expressed his view that an independent chairman of the board is not necessarily better than having a chairman who also has a financial interest in the fund's management company. Johnson believes that Fidelity's interests and the Funds interests are aligned, and that the appointment of the chairman of the Fund board should remain with the Board trustees and not be mandated by the SEC.[25] Underlying Johnson's position that the selection of Board chairman should remain with the Board, is the notion that the Fund Board acts independently of Fidelity. Clare Stack Richer, a Fidelity 30(b) witness, reiterated that Fidelity holds the view that the selection of the Chairman of the Funds Board should remain the province of the Funds Board of Trustees, who are free to select either an independent or interested person, and should not be mandated by the government. Resp. Supp. Reply, Ex 9 at 170:3-5.

4. Common Ownership

With regard to common ownership or financial control, Zang failed to demonstrate common ownership between Respondent Fidelity and Respondent Fidelity funds. As Zang acknowledges, mutual funds are owned by their investor shareholders and investment advisers may be privately owned. Zang Supp. Opp. at 28. The fact that Edward Johnson, 3rd holds an ownership interest in Respondent Fidelity as well as his ownership of shares issued by Respondent Fidelity Funds does not establish common ownership. Accordingly, I conclude that Complainant has failed to show either that Respondent Fidelity and Respondent Fidelity Funds are an integrated enterprise, or that there is a material fact in dispute on this issue.

In summary, viewing all of the evidence and the factual inferences in the light most favorable to the Complainant, I find that he has failed to make a showing sufficient to establish

[25] Johnson also notes that the Fund Board, which is independent, has the authority to vote him out as Chairman if he does not deliver value for shareholders.

that Respondent Fidelity acted as an agent or contractor of Respondent Fidelity Funds, or that the two entities operated as an integrated enterprise, in employment matters. Since Respondent Fidelity is not a covered employer itself, nor an agent or contractor in regard to employment matters, and Respondent Fidelity and the Funds are not an integrated enterprise, the Complainant is unable to establish that he is a covered employee under the whistleblower protection provisions of Section 806 of the Act. Consequently, I conclude that there is no genuine issue of material fact in dispute. Accordingly, the complaint must be dismissed.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts