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Issue Date: 01 December 2009

Case No.: 2009-SOX-00042

In the Matter of

JUAN PEREZ
Complainant

v.

H&R BLOCK, INC.
Respondent

ORDER DISMISSING MATTER FOR LACK OF JURISDICTION

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"), 18 U.S.C. § 1514A, and its implementing regulations, 29 C.F.R. part 1980. This provision 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 under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l), or companies that are required to file reports under Section 15(d) (15 U.S.C. § 78o) of that statute.

At issue in the present matter is whether there is jurisdiction under the Act to allow the Complainant's claim to proceed against the Respondent, which is the parent company of a subsidiary where the Complainant was employed.

Background and Procedural History:

On August 1, 2008, Juan Perez ("Complainant") filed a Complaint with the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") against H&R Block, Inc., ("Respondent') under Section 806 of the Act.

In his OSHA complaint, the Complainant asserted that the Respondent is a publicly traded corporation subject to Section 806 of the Act, and that he "began working for Respondent" in August 2005. The Complainant alleged that the Respondent terminated him after he reported tax fraud by a tax preparer to the human resource manager. The Complainant asserted that, as a result of fraudulent tax returns, most of which were the work of the tax preparer against whom he had complained, the "IRS [Internal Revenue Service] can and probably will impose severe penalties on Respondent substantially affecting Respondent's shareholders." The Complainant sought relief that included (among other things) reinstatement; back pay and other compensation to make him whole; various orders prohibiting the Respondent from violating the whistleblower protection provisions of the Act and mandating other actions; compensatory and consequential damages; and attorney's fees.

On March 10, 2009, after investigation, the Secretary of Labor, acting through her agent, the Regional Administrator for OSHA, issued Findings and ordered the complaint dismissed. The Administrator dismissed the complaint based on his finding that the preponderance of the evidence indicated that the Complainant did not engage in protected activity under the Act. Additionally, the Administrator found that the Respondent, H&R Block, Inc., was covered by the Act in that it is a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) and is required to file reports under Section 15(d) of that statute (15 U.S.C. §78o(d)). The Administrator also found that the Complainant was employed by H&R Block, Inc., and therefore is an employee covered under 18 U.S.C. § 1514A, the whistleblower protection provisions of the Act.

On March 30, 2009, the 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). Therefore, the Administrator's findings are not binding on my decision, and it is proper for me to determine, *sua sponte*, whether there is jurisdiction over this matter.

By Order dated April 10, 2009, I directed the parties to file statements on (among other things) the following issues: whether the parties are properly identified and designated; and whether the Respondent is a company that registers securities under Section 12 or files reports under Section 15(d) of the Securities Exchange Act of 1934 [and, accordingly, is subject to 18 U.S.C. § 1514A]. In his response, the Complainant asserted that the Respondent, H&R Block, Inc., was properly identified, and that the Respondent was subject to 18 U.S.C. 1514A. He attached, as directed in my Order, a copy of his complaint to OSHA, which averred he was an employee of H&R Block, Inc. In its response, the Respondent asserted that the entity that

employed the Complainant, H&R Block Enterprises, Inc., subsequently H&R Block Enterprises LLC, is not a company that is subject to 18 U.S.C. § 1514A.

Subsequently, on May 1, 2009, I issued an Order that (among other things) directed the parties to submit materials for my consideration on the following issues: whether the Respondent, H&R Block, Inc., was correctly designated, and if not, what entity is the proper Respondent; and whether the proper Respondent is an entity subject to 18 U.S.C. § 1514A. The parties submitted matters in response to my Order.

In his submission, the Complainant conceded that he was employed by H&R Block Enterprises, but asserted that "nearly every aspect of his employment was intertwined with, if not controlled by" the Respondent, H&R Block, Inc. Complainant's Response of June 29, 2009 at 2. Complainant stated that during his employment there was no distinction between the two entities; that he received direction from management employed by the Respondent; that he worked with persons who were direct employees of the Respondent; and that he was held out to the public as an employee of the Respondent. Id. Moreover, the Complainant asserted, his employment contract, or "District Field Management Agreement" (See Exhibit 1, of the Complainant's October 12, 2009 brief in response to the Show Cause Order), required that he conduct business in accordance with the Respondent's "Code of Business Ethics and Manuals." Id. at 2. The Complainant submitted this District Field Management Agreement, as well as excerpts of the Respondent's 2008 10-K report, to support his position.

In its response, the Respondent averred that it did not employ the Complainant or affect the terms and conditions of his employment, and also asserted that the entity that did employ the Complainant was not the Respondent's agent with regard to the Complainant's employment. Respondent's Response of June 30, 2009 at 1. The Respondent also stated that the Complainant's supervisors were not employees of the Respondent (but rather of H&R Block Enterprises, Inc.) and that the Respondent did not exercise control over the Complainant. In support of its position, the Respondent submitted affidavits from an officer of the Respondent and an officer of H&R Block Enterprises, the entity that employed the Complainant. The Respondent also submitted a copy of the Complainant's District Field Management Agreement, and a copy of the notice terminating the Complainant's employment.

By Order dated July 15, 2009, I directed the parties to show cause why this matter should not be dismissed for lack of jurisdiction, and suspended action on the parties' pending motions pertaining to discovery, which included the Respondent's Motion for a protective order, filed on June 19, 2009, seeking relief from what the Respondent characterized as the Complainant's excessive discovery requests. I also suspended the hearing, pending resolution of the jurisdictional issue.

On July 28, 2009, the Complainant filed a Motion to allow discovery limited to the issues raised in my Show Cause Order of July 15, 2009, stating: "Without the ability to engage in discovery, Complainant will not be afforded a full opportunity to receive information that is solely in the Respondent's possession in regards to the issues raised in the show cause order." On August 4, 2009, the Respondent filed an opposition to the Claimant's Motion, claiming that the Claimant had ample time to engage in discovery on jurisdictional issues, and had not done so.

The Respondent also stated that the discovery requests the Claimant already presented did not address the jurisdictional issue. On August 10, 2009, I issued on Order which granted limited discovery on the issue of jurisdiction, and directed the parties, upon completion of discovery, to respond to my previous order to show cause why this matter should not be dismissed for lack of jurisdiction.

On October 12, 2009, Complainant submitted a Brief in Response to the Show Cause Order of August 10, 2009. In his response, the Complainant asserted that there is jurisdiction under the Act as: (1) the purpose of the Act is allow derivative liability so that a parent company is not able to escape liability by hiding behind the acts of its subsidiaries; (2) the Complainant's employer acted as an agent of the Respondent regarding his employment; and (3) that from a common-law agency perspective, the "integrated enterprise" test should be used to determine if a parent company is liable for acts of the subsidiary.[1]

On October 13, 2009, the Respondent submitted a response to the Show Cause Order which stated that the matter should be dismissed for lack of subject matter jurisdiction. The Respondent asserted that it did not employ the Complainant, nor did the Complainant's employer, H&R Block Enterprises LLC, act as the Respondent's agent with respect to his employment. The Respondent also stated that the Complainant has not established that the Complainant's employer and the Respondent functioned as an integrated enterprise with respect to his employment, and that "Complainant has not provided evidence or persuasive argument" to show cause why this matter should not be dismissed for lack of subject matter jurisdiction. Respondent's Response to Show Cause Order at 1, 3 (hereinafter "Respondent's Response").

Discussion:

Actions brought under 18 U.S.C. § 1514A are governed by the burdens of proof set forth at 49 U.S.C. § 42121(b). 18 U.S.C. § 1514A(b)(2)(C). This provision requires a complainant to allege and later prove, by a preponderance of the evidence, that he was an employee of an employer subject to the Act. 49 U.S.C. § 42121(a); Simpson v. United Parcel Serv., ARB No. 06-065 (ARB: Mar. 14, 2008), slip op. at 5; see also Kukucka v. Belfort Instrument Co., ARB Nos. 06-104, 06-120 (ARB: Apr. 30, 2008), slip op. at 4.

The general corporate law principle holds that parent companies are not *ipso facto* liable for the actions of their subsidiaries. United States v. Bestfoods, et al., 524 U.S. 51, 61-63 (1998). When assessing the relationship between a parent and subsidiary companies for liability of the parent company based on the acts of the subsidiary, liability will only be extended in an area where the parent has exerted its influence or control. Id. at 59.

The Congressional Record pertaining to the Act states that the purpose of Section 806 is to "provide whistleblower protection to employees of publicly traded companies . . . when they

[1] The Complainant referred to the "integrated enterprise" test as an "integrated employer" test, citing Pearson v. Component Technology Corp., 247 F.3d 471, 485 (3rd Cir. 2001). Complainant's October 12, 2009 brief in response to the Show Cause Order at 2, 6 (hereinafter "Complainant's Response").

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, who sponsored the Act, stated he wanted to "make very clear that [the Act] applies exclusively to public companies – that is, to companies registered with the Securities and Exchange Commission. It is not applicable to the [private] companies, who make up the vast majority of companies across the country." 148 Cong. Rec. S7350, 7351 (July 25, 2002).

In general, Administrative law judges and district courts have construed Section 806 as applying only to publicly-traded companies. See Reno v. Westfield Corp., Inc., 2006-SOX-00030 (ALJ: Feb. 23, 2006); Goodman v. Decisive Analystic Corp., 2006-SOX-00011 (ALJ: Jan. 10, 2006); Minkina v. Affiliated Physician's Group, 2005-SOX-00019 (ALJ: Feb 22, 2005); Felszar v. Am. Medical Ass'n., 2007-SOX-00030 (ALJ: June 13, 2007); Brady v. Calyon Sec (USA), 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005); but see Walters v. Deutsche Bank AG, 2008-SOX-70 (ALJ: March 23, 2009). However, in Klopfenstein v. PCC Flow Technologies Holdings, Inc., the Administrative Review Board ("Board") 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 respondent who is covered under the Act as an 'officer, employee, contractor, subcontractor or agent" of such a company." Klopfenstein, 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.[2]

Agency and whether a subsidiary is an agent of a public parent for the purpose of the Act's coverage:

The Administrative Review Board has held that § 806 of the Act does not automatically include non-public subsidiaries of public companies. See Flake v. New World Pasta Co., ARB No. 03-126 (ARB: Feb. 25, 2004). The Board has held that a non-public subsidiary of a publicly held parent company may be subject to 18 U.S.C. 1514A, if the evidence establishes that it acted as the agent of its publicly held parent. Klopfenstein v. PCC Flow Technologies Holdings, Inc., ARB No. 04-149 (ARB: May 31, 2006), slip op. at 13-15. The Board also has concluded that a determination of whether an agency relationship exists should be analyzed pursuant to common law principles. Id. In Andrews v. ING North America Insurance Corp., ARB No. 06071 (ARB: Aug. 29, 2008) the Board again held that a non-public subsidiary is not covered by the Act unless the parent company is a covered company and the subsidiary or its employee acted as its agent within the meaning of the Act. The Board stated: "[n]othing 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

[2] The Board remanded the matter to the administrative law judge to assess whether the privately-held subsidiary was an agent of the public parent company. Klopfenstein at 16.

the employee protection provision." Andrews at 4 (citing Klopfenstein at 13-14)(emphasis in original).

The Board's decision in Klopfenstein offered the following guidance to determine whether a subsidiary is an agent of a public parent for the purpose of coverage under § 806 of the Act:

> Whether a particular subsidiary or its employee is an agent of a public parent for purposes of the SOX employee protection provision should be determined according to principles of the general common law of agency. General common law principles are set forth in the Restatement of Agency, a "useful beginning point for a discussion of general agency principles." 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. The function of the ALJ is to ascertain whether these factual elements are present.

Klopfenstein, at 14.

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 Board 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. § 1514A(a). In applying the common law of agency in making a determination of liability of a subsidiary, the Board found that it did not "need to… define the degree of congruence required between a subsidiary" when substantial evidence supported the conclusion that the non-public subsidiary acted as the public parent's agent for the purpose of discharging an employee, by enforcing the parent's employment policy when it recommended his termination. See Klopfenstein II, ARB No. 07-021, 07-022, (ARB: August 31, 2009)(Final Decision and Order Following Remand).

Direction on whether a subsidiary is an agent has also been discussed by the courts, in the context of federal labor-related policies, using the "integrated enterprise test," which addresses the potential responsibility of a parent company for the activities of a subsidiary. See Pearson v. Component Technology Corp., 247 F.3d 471, 485 (3rd Cir. 2001). The intent of the test is to focus on labor relations and economic realities, rather than corporate formalities, to determine whether a parent corporation and its subsidiary are both liable for statutory violations. Id. at 486. The integrated enterprise test was developed to determine whether multiple corporate entities could both be considered proper defendants in employment discrimination cases even if one of

them did not directly employ the plaintiff. See Rogers v. Sugar Tree Prods., Inc., 7 F.3d 577, 582 (7th Cir. 1993). This test will be discussed further below.

The Complainant's District Field Management Agreement

In regard to common law agency principles, the Complainant asserts that there were numerous aspects of his work environment and conditions of employment that were directly affected by the Respondent. The Complainant states that the Respondent's control over his work environment is evidenced by the Complainant's District Field Management Agreement.[3]

The Complaint alleged that the District Field Management Agreement ("Agreement"), which states the Complainant: "shall conduct business in accordance with the law, the H&R Block, Inc., Code of Business Ethics and Conduct, and the Manuals," demonstrates how the Respondent directly affected the conditions of the Complainant's employment. Complainant's Response, Exhibit 1 at 2. The Complainant also asserts that compliance with this "Code of Business Ethics and Conduct" was a condition of his employment, and that by binding him to a code of conduct, the Respondent was acting as the Complainant's employer. Complainant's Response at 5.

Further, the Claimant asserted, that from the plain wording of the Agreement, the Respondent is included in the Definition of "Block," a term used to refer to certain companies in the Agreement. I note that the Agreement states in pertinent part: "The Parties acknowledge that for the purposes of this Agreement, "Block" means the Company, its parent, and all "Blockbranded" affiliates and subsidiaries (i.e., those with 'H&R Block" or "HRB" in their name) excluding H&R Block Financial Advisors, Inc. and H&R Block Mortgage Corporation." Exhibit 2, in the Complainant's October 12, 2009 brief in response to the Show Cause Order at 2. The Complainant alleged that the provisions of the Agreement which require that the Complainant "(1) will be trained in Block's methods of operations; (2) shall conduct business for and interact with Block's clients; and (3) shall be given access to confidential business information of Block," as well as the provision that the Complainant will protect "Block's confidential business information" during his employment and for a period of two years after ending employment, are also evidence of the Respondent's control over the terms of his employment. Complainant's Response at 5; see also Complainant's Response, Exhibit 1.

In assessing whether an agency relationship exists because of the Respondent's alleged control over the Complainant's work environment, as evidenced by the Complainant's District Field Management Agreement, I must determine whether the Respondent was involved in decisions relating to the complainant's employment. As the Board has recognized, to be covered under the Act, the subsidiary employer 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. The Complainant asserted that the requirement that he adhere to the Respondent's code of business ethics and conduct demonstrates control over his work environment. However, I note that he has failed to allege that anyone at the

[3] This document was submitted as Exhibit 1, in the Complainant's October 12, 2009 brief in response to the Show Cause Order.

parent corporation knew of or participated in decisions regarding his employment and termination. Despite his assertions regarding that his District Field Management Agreement affected his employment, the Complainant has not shown that his employer became an instrumentality for enforcing the Respondent's policies. See Klopfenstein II, ARB No. 07-021, 07-022, (ARB: August 31, 2009).

I find, therefore, that, in regard to common law agency and any effect that the Complainant's District Field Management Agreement had on his work environment and conditions of employment, there is not substantial evidence to support the conclusion that the Complainant's employer, a non-public subsidiary, acted as the public parent's agent for the purpose of controlling the Complainant's employment, when it discharged him.

Respondent's Employee Stock Purchase Plan

The Complainant also asserts that Respondent controls benefits that through an Employee Stock Purchase Plan ("ESPP"), which, through, "direct involvement by [Respondent] certainly indicates that they are controlling aspects of Complainant's benefits." Complainant's Brief in Response to the Show Cause Order at 6.

The Complainant alleges that the Respondent controls the benefits that are available to him through its ESPP, because the plan states that "collectively H&R Block, Inc. ('Block') and such subsidiaries shall be referred to as the 'Company'," and because an individual must submit both an enrollment and withdrawal the form to "the Company." Exhibit 3 of the Complainant's Brief in Response to the Show Cause Order. The Complainant states that this direct involvement by the Respondent indicates that it is controlling aspects of the Complainant's benefits.

The Respondent, citing Burke v. WPP Group, PLC, et al., 2007-SOX-00016 (ALJ: May 8, 2008), asserts that the actual receipt of stock shares does not specifically suggest any relationship between the holder of the shares and the issuing company. The Respondent further states that, despite the Burke holding suggesting that the issuing of stock options may be sufficient to establish an agency relationship, the Complainant has not established that he did in fact receive stock options of Respondent's stock.

Section 423 of Title 26 of the Internal Revenue Code ("IRC") states in pertinent part:

> For purposes of this part, the term "employee stock purchase plan" means a plan which meets the following requirements: (1) the plan provides that options are to be granted only to employees of the employer corporation or of its parent or subsidiary corporation to purchase stock in any such corporation…

26 I.R.C. § 423(b).

This provision allows a public company to establish an ESPP to enable its employees, and the employees of the employer corporation or its parent or subsidiary corporation, to purchase, on a regularly and recurring basis, limited amounts of the company's discounted stock. There is 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, of either the parent corporation or a subsidiary, as a form of compensation. Such a transaction does not make the receiver of stock an employee of the company whose stock was issued, but merely a stockholder.

The issue here is whether the Respondent, the parent corporation in this matter, controls the Complainant's benefits through its use of the ESPP. As the IRS specifically allows for benefits of either employees of the parent corporation or a subsidiary, an employer does not necessarily hold out that participants of the program are its employees for benefits purposes. Based on the evidence of record, I am not satisfied that the Complainant has established, by a preponderance of evidence, that he either received stock options from the Respondent as a result of his employment, or that the Respondent's ESPP, in this case, would present the requisite level of control to constitute an agency relationship between the Respondent and its subsidiary, the employer of the Complainant.

Complainant's Other Assertions

In addition, the Complainant alleged that the Respondent affects his employment to the extent that it necessary to confer jurisdiction under the act, as the Respondent requires that the Complainant "be trained in Block's methods of operations;… conduct business for and interact with Block's clients; and… be given access to confidential business information of Block," as well as binding the Complainant to the provision that the Complainant will protect "Block's confidential business information" during his employment and for a period of two years after ending employment. Complainant's Response at 5; see also Complainant's Response, Exhibit 1. The Complainant also claims that the Respondent reaps the benefits of his contact with its clients, and controls what he can do with information that is learned throughout the course of his employment. See Complainant's Response at 5-6.

The Complainant's allegations of the Respondent's conduct are generalizations. Though he cites to a myriad of cases which discuss how liability is generally extended to a parent company for its control and influence of a subsidiary's employment decisions and work environment, he does not provide any specific facts to demonstrate how the Respondent's particular and individual alleged conduct shows an agency relationship under a common law agency standard. I find that the Complainant fails to demonstrate the existence of any agency relationship between the Respondent and his employer (the Respondent's subsidiary), in matters pertaining to his employment. As stated above, in regard to both the application of the Complainant's District Field Management Agreement, and the Respondent's ESPP program, the Complainant has not demonstrated the requisite factors relevant in assessing whether an agency relationship exists; specifically, that the Respondent was involved in any decisions affecting the complainant's employment, or actually did exert control over the Complainant's actions.

The Integrated Enterprise Test:

In his response, the Complainant averred his employer, H&R Block Enterprises LLC, and the Respondent are an "integrated employer."[4] Citing Merten v. Berkshire Hathaway, Inc., 2008-SOX-00040 (ALJ: October 21, 2008), the Complainant argued that an "integrated enterprise" test should be applied to determine the issue of jurisdiction. He also asserted, citing Pearson v. Component Technology Corp., 247 F.3d 471 (3rd Cir. 2001), and Merten v. Berkshire Hathaway, 2008-SOX-40 (ALJ: Oct. 21, 2008), that aside from the strict adherence to common-law agency principles, this tribunal should consider the integrated enterprise test because of its prior consideration by the courts.

The integrated enterprise test was developed to determine whether multiple corporate entities could both be considered proper defendants in employment discrimination cases even if one of them did not directly employ the plaintiff. See Rogers v. Sugar Tree Prods., Inc., 7 F.3d 577, 582 (7th Cir. 1993). This test was initially developed by the National Labor Relations Board as "a sort of labor-specific veil-piercing test." Pearson v. Component Technology Corp., 247 F.3d 471, 485-86 (3rd Cir. 2001). The intent of the test is to focus on labor relations and economic realities, rather than corporate formalities, to determine whether a parent corporation and its subsidiary are both liable for statutory violations. Id. at 486.

In determining whether an integrated enterprise exists, Courts evaluate four factors: (1) functional integration of operations; (2) centralized control of labor or employment decisions; (3) common management; and (4) common ownership or financial control. See 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. Romano v. U-Haul International, 233 F.3d 655, 666 (1st Cir. 2000). 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). The court in Pearson emphasized that "[n]o single factor is dispositive" and the final determination depends on all the evidence and circumstances of the case. Pearson at 486. The integrated enterprise test has been expressed as a means to ultimately determine "whether the two companies operated at arm's length. Id. at 491.

Thus far, the issue of the integrated enterprise test as a means to determine an agency relationship between a parent and subsidiary has not been raised to the Board. Nevertheless, because the Complainant has applied the integrated enterprise test as a means to determine an agency relationship between a parent and subsidiary in this case, I will consider the arguments that the Complainant has made in regards to the test and its application to his complaint.

[4] See FN 1.

The integrated enterprise test in the 7th Circuit:[5]

In consideration of whether the integrated enterprise test is appropriate to determine whether an employer is liable under the single employer theory in the context of Sarbanes-Oxley, and because the integrated enterprise has not been addressed by the Board, it may be useful to look at how the 7th circuit determines derivative liability of a parent for its subsidiary in other labor and employment contexts, such as employment discrimination claims under Title VII of the Civil Rights Act of 1964.

The integrated enterprise test often arises in the context of employment discrimination cases under Title VII, and the integrated enterprise analysis is equally applicable (and has in fact been applied) to the full range of federal employment discrimination statutes. See Sharpe v. Jefferson Distrib. Co., 148 F.3d 676 (7th Cir. 1998) (Title VII case). Consideration of the integrated enterprise test and its use may come from the fact that subsequent employment discrimination statutes share Title VII's remedial purposes as well as similar if not identical definitions of employer. Compare 42 U.S.C. § 2000e(b) (setting forth Title VII's definition of employer), with Age Discrimination in Employment Act, 29 U.S.C. § 630 (1994) ("ADEA") (defining employer almost precisely the same as in Title VII).

The Seventh Circuit has previously noted, in discussion of its adoption of the integrated enterprise test, that the test invokes the Erie doctrine and certain choice of law principles, and that "an unresolved choice-of-law question lurks behind [integrated enterprise based] employment discrimination cases." Sharpe at 678 (7th Cir. 1998); see also Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The court in Sharpe further stated:

> The second assumption is that federal common law determines when two firms are treated as a single employer. Many a case applies to the employment-discrimination laws (Title VII, the ADA, the ADEA, and so on) the same approach the National Labor Relations Board uses to determine whether multiple corporate entities should be treated as one employer. See Rogers v. Sugar Tree Products, Inc., 7 F.3d 577, 582-84 (7th Cir.1993). But an unresolved choice-of-law question lurks behind the NLRB cases, see NLRB v. International Measurement and Control Co., 978 F.2d 334 (7th Cir.1992), and therefore behind the employment-discrimination cases too… we approach the case, as the parties do, on the assumption that a federal common law of employment relations supplies the rule of decision--but without foreclosing attention to this subject in the future.
>
> When deciding that [a parent and its subsidiary] are not a single employer the district judge used a list of factors recapitulated in Rogers, 7 F.3d at 582: whether the firms have closely related operations, common management, centralized control of labor relations, and common ownership.

[5] Discussion of general common-law agency principles and the integrated enterprise test are specific to the 7th circuit as the Complainant's place of employment, according to his Occupational Safety and Health Administration ("OSHA") complaint, was Chicago, IL.

Sharpe at 678.

The 7th Circuit no longer applies the integrated enterprise test to Title VII claims. Worth v. Tyer, 276 F.3d 249 (7th Cir. 2001); See also Papa, 166 F.3d at 941-43. In Papa, the court addressed the application of the integrated enterprise test in the context of determining whether affiliated corporations were proper defendants under Title VII even if they did not meet the minimum employee requirements of Title VII ("tiny employer exception"). See Papa at 939. The court stated in Papa that the "integrated enterprise" test was too amorphous to be applied consistently, and held that inconsistencies made it difficult for a corporation to determine when it could be held liable for the actions of its affiliate. Papa at 940-42. Therefore, the court held that the "integrated enterprise" test should be abrogated in Title VII cases. See id. at 941-43. Rejecting the integrated enterprise test, the court also stated that the principles governing affiliate liability should apply "across the full range of American law." Worth v. Tyer, 276 F.3d 249 (7th Cir. 2001).

Interrelation of Operations and Involvement in Day-to-Day Affairs

The first factor, interrelation of operations, relates to a parent corporation's involvement in its subsidiary's day-to-day affairs. It has been described as "ultimately focus[ing] on whether the parent corporation excessively interfered with the business operations of its subsidiary, that is whether the parent *actually exercised* a degree of control beyond that found in the typical parent-subsidiary relationship. Lusk v. Foxmeyer Health Corp., 129 F.3d 773, 778 (5th Cir. 1997) (emphasis in original). Examples of this sort of interrelation include shared employees, services, records, office space, and equipment, commingled finances, and handling by the parent of subsidiary tasks such as payroll, books and tax returns. See Romano at 667.

The Complainant asserts that his employer, H&R Block Enterprises, and the Respondent performed shared marketing and advertising through the website "www.hrblock.com." The Complainant states that there are no separate websites for any of the Respondent's subsidiaries, and that significant career information on job postings listed on this website advertise work with "H&R Block," and do not distinguish between any of the subsidiary companies and the Respondent. The Complaint has submitted as evidence examples of job postings from this website (See Exhibits 6-10, of the Complainant's October 12, 2009 brief in response to the Show Cause Order).

The Complainant also asserts that the use of the statement "Preparing America's Taxes since 1955," on the website could not refer to H&R Block Enterprises, as records filed with Missouri Secretary of State show that H&R Block Enterprises did not exist until 1999, whereas the Respondent was created in 1955 (See Exhibits 11-12, of the Complainant's October 12, 2009 brief in response to the Show Cause Order). Ultimately, Complainant asserts there is no distinction between the Respondent and H&R Block Enterprises LLC, as evidenced by the material on the cited website. The Respondent responds by stating that it is a holding company that does not conduct business with consumers directly, and the fact that there is no separate website for the Respondent is not evidence of "shared marketing and advertising," but rather of the fact that it has nothing to market or advertise.

Additionally, the Complainant asserts that there is a comingling of the finances of H&R Block Enterprises LLC, and the Respondent, which is based upon the Respondent's use of terminology, such as "we," "our," "us," and "the Company" in its 10-K report (Complainant's Response, Exhibits 13).[6] The Complainant states that the 10-K report is evidence of the intent of the Respondent to consider all of its employees, and subsequently employees of its subsidiaries, as part of one "family". Complainant's Response at 9. The Respondent alleges that use of such terms in its 10-K report is insufficient to establish any actual commingling of finances, or even demonstrate that it considers revenues of its subsidiaries to be aggregated.

The Complainant's argument regarding the first factor is based upon his assertion that the Respondent and his employer shared marketing and advertising through a website, shared a corporate address, and shared revenue and employees. However, the record does not establish which of the relevant parties (Respondent or Complainant's employer) has ownership and control of the above-cited website, and to what end or purpose this website it utilized. Nor does the assertion that use of the specified terminology in the 10-K report demonstrate specific instances of the Respondent's influence or control in regards to revenue or comingled finances.

In reviewing the evidence and argument presented concerning this first element of the integrated enterprise test, or that interrelation of operations and involvement in day to day affairs, I find nothing in the record to support a finding that the respondent, as the parent, *actually exercised* a degree of control beyond that found in the typical parent-subsidiary relationship. Which of the companies, parent or subsidiaries, is using and controlling the website and for what purpose has not been sufficiently demonstrated by the record. In fact, as the record demonstrates, copyright of the material and design of the website appears to belong to a company, HRB Digital LLC.[7] Therefore, I find that use of marketing and advertising phrases and terminology as shown by the Complaintant does not demonstrate the requisite excessive interference with the business operations of its subsidiary by the Respondent.

As well, non-specific references to the parent's family of companies by use of ambiguous terminology in its 10-K report, by itself, is not demonstrative of any comingling of finances. The voluminous 10-K report seems to reflect only the required statement of the Respondent's aggregate financial operations for itself, as a holding company, and all of its constituent subsidiaries, to the United States Securities and Exchange Commission. However, this report, which is required pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)), does not necessarily reflect that financial operations are handled singularly or shared by itself and any other specific entity. I find no indication, in the report, that the Respondent, as a publicly-held parent, comingled any monies or shared any financial operations or resources with the subsidiary in question.

[6] A Form 10-K is an annual report required by the U.S. Securities and Exchange Commission (SEC) that gives a comprehensive summary of a public company's performance.

[7] I note that exhibits 6-9, which are printouts of job listings from http://careers-hrblock.icims.com/jobs, each contain a copyright which reads: "Copyright © 2009 HRB Digital LLC. All Rights Reserved."

Therefore, I find that the evidence and argument presented by the Complainant in regard to the first prong does not either demonstrate definitive and specific instances of day to day control or interference by the Respondent in the day-to-day affairs of the Complainant's employer.

Common Management

The second factor of the integrated enterprise test regards common management. This factor requires inquiry into whether the parent and subsidiary corporations share common officers and managers. See Frank v. U.S. West, Inc., 3 F.3d 1357 (10th Cir. 1993). Courts have found evidence of common management where the same person served as president of two corporations, and where family members were shareholders, officers and directors of both corporations. See Baker v. Stuart Broadcasting Co., 560 F.2d 389, 392 (8th Cir. 1977).

In regard to this factor, the Complainant alleges that there are officers and managers common to the Respondent and his employer, H&R Block Enterprises, and that such overlap is sufficient to demonstrate the common management requirement of this element. The Complainant asserts that the President of his employer, H&R Block Enterprises, is an "officer/director" of the Respondent. See Exhibits 14 (Response to the Complainant's Requests for Admission #18), of the Complainant's October 12, 2009 brief in response to the Show Cause Order. The Complainant alleges that the Vice President and Treasurer, as well as two assistant treasurers of his employer, are also "officers/directors" of the Respondent. See Exhibits 15 (Affidavit of Brian Schmidt), of the Complainant's October 12, 2009 brief in response to the Show Cause Order. Finally, the Complainant states that the President and CEO of the Respondent is also an "officer/director" of H&R Block Enterprises. See Exhibits 16 (Responses to the Complainant's Interrogatories 23 and 23), of the Complainant's October 12, 2009 brief in response to the Show Cause Order.

The Respondent asserts that there is very little overlap between the management structure of H&R Block Enterprises LLC, and that of H&R Block, Inc. Respondent states: "notwithstanding the Treasurer/Controller and two Assistant Treasurers, only one of H&R Block Enterprises LLC's thirty five officers and directors is also an officer or director of H&R Block, Inc." Respondent' Response of June 30, 2009 at 5. The Respondent further states that the Complainant has not even alleged that any officer or director of the Respondent participated in the decision not to renew his contract.

I find that the Respondent's assertion is not relevant to the analysis of this factor. Even though the Complainant has not alleged that any officer or director of the Respondent participated in the decision not to renew his contract, demonstrating such is not required under the integrated enterprise test. The Complainant must only show the parent and subsidiary corporations share common officers and managers. Although not particularly demonstrative of anything other than commonality, the Complainant has established that at least 4 individuals are officers or directors of both the Respondent and its subsidiary, H&R Block Enterprises LLC. Indeed, the Respondent has conceded that the Treasurer/Controller, and two Assistant Treasures, and one other of H&R Block Enterprises LCC's thirty-five officers and directors is also an officer or director of the Respondent. Although the record does not reflect to what extent such

managerial overlap is demonstrative of excessive control, I find that the Complainant has, at a minimum, shown that the Respondent and its subsidiary share common officers and managers.

Centralized Control of Labor Relations

The third factor, often cited as the most important factor of the integrated enterprise test, is the centralized control of labor relations. See Romano at 666. The court has stated that the "critical question is what entity made the final decisions regarding employment matters related to the person claiming discrimination? A parent's broad general policy statements regarding employment matters are not enough to satisfy this prong. To satisfy the control prong, a parent must control the day-to-day employment decisions of the subsidiary." Frank at 1363. In Frank, the court found no evidence of centralized control over labor relations where the evidence offered by the plaintiff employee included only broad policies established by the defendant parent corporation and adopted by its subsidiaries. Id. In particular, the court characterized the parent corporation's establishment of general policy, guidelines, and an identity statement, as "broad general policies that in no way evidence an attempt by [the parent] to exercise day-to-day control over employment decisions." Id.

The Complainant asserts that the Respondent is clearly involved in controlling employees of H&R Block Enterprises LLC. The Complainant asserts that, by his signed Agreement, he is bound to act in accordance with the Respondent's code of conduct. See Exhibit 1, Complainant's October 12, 2009 brief in response to the Show Cause Order. He also states that he is further controlled by the Respondent as he was: "… trained in Block's methods of operations;… conducted business for and interacted with Block's clients; and… was given access to confidential business information of Block which he was required to keep confidential during and after his employment." Complainant's October 12, 2009 brief in response to the Show Cause Order at 10. Finally the Complainant argues that the Respondent controlled the terms of his employment, as evidenced by a number of initiatives that the Complainant was required to take part in.[8] See Exhibit 17 (a May 2007 e-mail from Respondent's CEO, Mark Ernst), of the Complainant's October 12, 2009 brief in response to the Show Cause Order.

The Respondent states that it does not exercise day-to-day control over its subsidiaries' employees, and it did not exercise control over the Complainant's schedule and/or work performance, or otherwise treat the Complainant as an employee. Respondent' Response at 5-6; see also Affidavit of Bret G. Wilson, Exhibit A, Respondent's June 30, 2009 Response to my Order of May 1, 2009, ¶ 9. Further, the Respondent asserts that the Complainant has not shown or claimed that any officer or director of the Respondent engaged or participated in the decision not to renew his contract and that none did so. Respondent' Response at 6.

[8] The initiatives discussed in Mr. Ernst's e-mail include: the "H&R Block Behaviors for Leaders and Associates: developed in support of our mission, strategy and values;" the "Quarterly Leadership Series: [t]o support leadership development in our Block Behaviors, and to address key gaps from our Associate Survey results…;" and, the "Leadership Objective and Measures for FY08." See Exhibit 17 (a May 2007 e-mail from Respondent's CEO, Mark Ernst), of the Complainant's October 12, 2009 brief in response to the Show Cause Order.

Because the most important factor of the integrated enterprise test is the centralized control of labor relations, the Complainant must establish whether the Respondent made the final decisions regarding employment matters related to Complainant, and whether the Respondent had control of the day-to-day employment decisions of the subsidiary. As the court states in Frank, a parent's broad general policy statements regarding employment matters are not enough to satisfy this prong. In regard to the Complainant's Field Management Agreement, I find no evidence of centralized control over labor relations, as this proffered evidence includes only broad policies, in the form of a code of conduct, established by the Respondent, and adopted by the Complainant's employer, H&R Block Enterprises LLC, which, like the adopted broad policies of the parent company in Frank, do not constitute specific control of day-to-day employment. See Frank v. U.S. West, Inc., 3 F.3d 1357, 1363(10th Cir. 1993). I find that the Respondent's policies and code of conduct, as exhibited in his Management Agreement, do not demonstrate any specific control over the final decisions regarding employment matters related to the Complainant, nor do they dictate how the Complainant should specifically do his job.

Also, in regard to the centralized control of labor relations, the Complainant asserted that he was trained in the Respondent's methods of operations; that he conducted business for and interacted with the Respondent's clients; and, that was given access to confidential business information of the Respondent. In regard to this portion of the Complainant's argument, I would presume that a company is free to adopt any methodology in order to train its employees, and this would not necessarily demonstrate the control of the entity that developed the methodology, as such is the purview of management. Further, the extent to which the Complainant conducted business for and interacted with the Respondent's clients is not documented or established in the record. And finally, there is no specific argument or support in the record which establishes that his confidentially agreement with his Employer is demonstrative of the control of the Respondent over the day-to-day or final employment decisions regarding the Complainant. For these aforementioned reasons, I find that the Complainant's training, interaction with clientele, and access to confidential information, do not establish the requisite centralized control of the day-to-day employment decisions over his employer by the Respondent. Therefore, the Complainant cannot establish this factor of the integrated enterprise test.

Common Ownership

The fourth factor of the integrated enterprise test relates to common ownership. The Complainant asserts that his employer, H&R Block Enterprises LLC, is "a wholly owned subsidiary of a wholly owned subsidiary of a wholly owned subsidiary" of the Respondent. The Respondent asserts that there is no common ownership of the Complainant's employer by the Respondent, as the Respondent is a publicly-held corporation, and the Complainant's employer is both privately held and an indirect subsidiary owned by successive subsidiaries.

Despite the Respondent's assertions, the record reveals that that the Complainant's employer is a wholly owned subsidiary of the Respondent. Because the Complainant's employer, as a subsidiary of the parent, is wholly owned by the Respondent (and such ownership is not shared with any other entities despite an indirect ownership by other subsidiaries in succession), this type of ownership demonstrates common ownership. However, I note that such common ownership is not fully dispositive of an integrated enterprise, and presently, because of the

degree of separation of the entities' indirect ownership relationship, as the record reflects, there is also evidence that such ownership is at "arm's length." See Pearson at 491.

Conclusion

The Complainant asserts that the Respondent, the public parent company, is liable under Section 806, for the conduct of his employer, the non-public subsidiary, as the two companies operated as an integrated enterprise. However, I find he has not presented sufficient evidence or argument to either meet his burden to show an integrated enterprise. The Complainant has provided documentary evidence which he purports demonstrates the existence of an integrated enterprise, and specifically, centralized control of employment decisions. However, I find that he has failed to present evidence or argument sufficient to demonstrate a genuine issue of fact as to whether the Respondent exercised centralized control of employment matters with his employer, H&R Block Enterprises LLC, such that the companies are an integrated enterprise. The evidence before me shows that the Complainant's employer and the Respondent are not an integrated enterprise.

In summary, although the evidence establishes and I have found that the Complainant has shown that the Respondent and his employer, Respondent's subsidiary, share common officers and managers, the record does not reflect the Respondent's control of its subsidiary, the Complainant's employer.

As set forth above, the Complainant bears the burden to establish that jurisdiction exists under the Act. Based on the matters before me, including the parties' pleadings, prior filings, and most recent submission, I find that Complainant has alleged no facts that would tend to support a finding that his employer, H&R Block Enterprises, or any employees of that entity, acted as agent of the Respondent, H&R Block, Inc., as is necessary to establish jurisdiction. Additionally, I have also found that Respondent and Complainant's employer, H&R Block Enterprises LLC, are not an integrated enterprise.

In viewing all of the evidence and the factual inferences in the light most favorable to the Complainant, I find that Complainant has failed to show that the Respondent exercised control over, participated in, or influenced the decisions of the Complainant's employer in relation to his employment. Therefore, the Complainant is unable to establish that he is a covered employee or that his employer was a covered employer under the whistleblower protection provisions of Section 806 of the Act. Accordingly, on this basis, I dismiss this matter for want of jurisdiction. See Savastano v. WPP Group, PLC, ARB No. 07-00034 (ARB: July 18, 2007).

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, Suite S-5220, 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).