Purcell

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

CARRI S. JOHNSON,

COMPLAINANT,

v.

SIEMENS BUILDING TECHNOLOGIES, INC. and SIEMENS AG,

RESPONDENTS.

ARB CASE NO. 08-032

ALJ CASE NO. 2005-SOX-015

DATE: APR 15 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER REQUESTING ADDITIONAL BRIEFING BY THE PARTIES AND INVITING AMICI CURIAE

This case arises under the whistleblower protection provisions of section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (section 806, SOX, or Act), 18 U.S.C.A. § 1514A (Thomson/West Supp. 2009), and its implementing regulations at 29 C.F.R. Part 1980 (2009). On appeal to the Administrative Review Board, this case presents the issue whether an employee of a subsidiary of a publicly held company[1] may bring an action against a non-public subsidiary under section 806.

STATUTORY AND REGULATORY FRAMEWORK

Congress enacted the SOX to protect investors and enhance public disclosure by improving the quality and transparency of financial reporting and auditing. To further the the Act's interests, section 806's whistleblower protection provision prohibits a "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company" from discharging, demoting, suspending, or in any other manner discriminating

[1] For simplicity, we refer to a company registered under section 12 or required to file under section 15(d) of the Exchange Act as a "publicly held" or "publicly traded" company.

against an employee in the terms and conditions of employment because that employee engaged in protected activity under section 806.

An employee engages in protected activity under section 806 when he or she provides information to a person with supervisory authority, to a member of Congress, or to a federal agency regarding any conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any Securities and Exchange Commission (SEC) rule or regulation, or any federal law provision relating to fraud against shareholders. Employees are also protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed, or about to be filed, relating to a violation of the aforementioned fraud statutes, SEC rules, or a federal law relating to fraud against shareholders. 18 U.S.C.A. § 1514A(a)(2).

Under SOX's implementing regulations, an employee is defined as "an individual presently or formerly working for a company or company representative . . . or an individual whose employment could be affected by a company or company representative." 29 C.F.R. § 1980.101. A "company representative" is defined as "any officer, employee, contractor, subcontractor, or agent of a company." *Id.* "Company" is defined as a company with a class of securities registered under section 12 or required to file under section 15(d) of the Securities Exchange Act of 1934. *Id.*

DISCUSSION

This cases presents the issue whether the Act applies to a subsidiary of a publicly held corporation. Notwithstanding the Board's decision in *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*,[2] ALJs and the courts have struggled with this question, resulting in a variety of diverging and conflicting opinions. Opinions discussing coverage of subsidiaries have spanned the spectrum from universal coverage for subsidiaries to no coverage for subsidiaries.

In one of the early SOX coverage cases, the Board embraced common law agency theory in holding a subsidiary of a parent company liable as an agent of the publicly held parent company under section 806. *Klopfenstein I,* ARB No. 04-149, slip op. at 13-16. The Board again applied agency theory in *Andrews v. ING North America Ins. Corp.*, ARB No. 06-071, ALJ Nos. 2005-SOX-050, -051 (ARB Aug. 29, 2008).

Following *Klopfenstein I*, the ALJs have varied in their applications of agency theory under section 806. *See e.g., Perez v. H&R Block, Inc.*, ALJ No. 2009-SOX-042 (ALJ Dec. 1, 2009); *Savastano v. WPP Group, PLC*, ALJ No. 2007-SOX-034 (ALJ July 18, 2007). *See also, Teutsch v. ING Group, N.V*, ALJ Nos. 2005-SOX-101, -102, -103, slip op. at 4 (ALJ Sept. 25, 2006) (refusing to consider subsidiaries and parents one entity). *Compare Walters v. Deutsch*

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[2] ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006) (*Klopfenstein I*), *on remand* (ALJ Oct. 13, 2006) (finding a subsidiary an agent where common managers involved in termination decision), *aff'd* ARB No. 07-021, -022, ALJ No. 2004-SOX-011 (ARB Aug. 31, 2009) (*Klopfenstein II*).

Bank AG, ALJ No. 2008-SOX-070 (ALJ Mar. 23, 2009) (noting problems with several agency applications under section 806).

While ALJs have discussed several agency factors, a common theme for those embracing agency theory is to require that the parent company knew of the employee's protected activity or participated in the adverse action affecting the terms and conditions of the whistleblower's employment for the subsidiary to be considered an agent of the parent company and thus covered under section 806. *See Mara v. Sempra Energy Trading, LLC*, ALJ No. 2009-SOX-018, slip op. at 12 (ALJ Oct. 5, 2009); *Carciero v. Sodexho Alliance, S.A.*, ALJ No. 2008-SOX-012, slip op. at 17 (ALJ Feb. 19, 2009); *Johnson v. Siemens Building Tech., Inc.*, ALJ No. 2005-SOX-015, slip op. at 5 (ALJ Nov. 27, 2007).

In lieu of or in conjunction with an agency test, ALJs have also applied a separate test, the integrated enterprise or single employer test, to section 806 cases involving subsidiaries. *Carciero*, ALJ No. 2008-SOX-012; *Merten v. Berkshire Hathaway, Inc.*, ALJ No. 2008-SOX-040 (ALJ Oct. 21, 2008). Courts have used the integrated enterprise test in the labor and employment context to find a parent and its subsidiaries a single enterprise. The controlling factors of the integrated enterprise test are: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. *Radio & Television Broadcast Tech. Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255 (1965); *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761 (5th Cir. 1997). Courts have held that a complainant need not establish all four factors to satisfy the test. In traditional labor and employment cases, to remedy some form of discrimination or labor law violation, courts have treated the third factor (centralized control of labor relations) as the most important factor.[3]

Morefield v. Exelon Servs., Inc., ALJ No. 2004-SOX-002 (ALJ Jan. 28, 2004), one of the first section 806 cases to address the issue of subsidiary coverage, held that subsidiaries were covered within the purpose of the Act without resort to either the integrated enterprise test or agency theory. The ALJ reasoned:

> A publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units; and Congress insisted upon accuracy and integrity in financial reporting at all levels of the corporate structure, including the non-publicly traded subsidiaries. In this context, the law recognizes as an obstacle no internal corporate barriers to the remedies Congress deemed necessary. It imposed reforms upon the publicly traded company, and through it, to its entire corporate organization.
>
> Under these circumstances, the scope of Sarbanes-Oxley whistleblower protection tracks the flow of financial and

[3] The integrated enterprise test also has its critics. *See Papa v. Katy Indus.*, 166 F.3d 937 (7th Cir. 1999) (rejecting the integrated enterprise test for "employer" under Title VII); *Worth v. Tyer*, 276 F.3d 249 (7th Cir. 2001).

> accounting information throughout the corporate structure and remains as permeable to the internal "corporate veils" as the financial information itself. I conclude that employees of non-public subsidiaries of publicly traded companies are covered by the whistleblower protection provisions of Sarbanes-Oxley.

Slip op. at 4-6.

While ALJs initially departed from *Morefield*'s broad categorical inclusion of subsidiaries, most recently, in *Walters v. Deutsch Bank AG*, ALJ No. 2008-SOX-070, the *Morefield* approach has been reconsidered. In *Walters*, the ALJ discussed the SOX's legislative history, the relationship between employment law and securities law, and relevant section 806 cases before ultimately adopting a *Morefield*-type coverage to find a Deutsch Bank subsidiary a covered employer under section 806.

In the absence of a clear definition of coverage under section 806, the courts, too, have varied in their interpretation of whether, and to what extent, privately owned subsidiaries of publicly held corporations will be deemed liable under the SOX. *See e.g., Lawson v. FMR LLC*, No. 08-10466, 2010 WL 1345153 (D. Mass. Mar. 31, 2010) (liability based on agency); *Malin v. Siemens Med. Solutions Health Servs.*, 638 F. Supp. 2d 492 (D. Md. 2008); *Rao v. Daimler Chrysler Corp.*, No. 06-13723, 2007 WL 1424220 (E.D. Mich. May 14, 2007) (subsidiary held liable under section 806 as parent company's agent); *Brady v. Calyon Sec. (USA),* 406 F. Supp. 2d 307 (S.D.N.Y. 2005) (discussing application of agency test). *But see Trusz v. UBS Realty Investors,* No. 3:09cv268, 2010 WL 1287148 (D. Conn. Mar. 30, 2010) (liability assessed under integrated enterprise test).

REQUEST FOR ADDITIONAL BRIEFING

Given the variations and conflicts in interpretation and analysis of SOX whistleblower liability in cases in which the complainant is an employee of a privately owned subsidiary of a publicly held corporation, the Board will review the question of subsidiary coverage taking into consideration all legal theories that have been suggested by this Board, the ALJs, the courts, and any other theories advocated by the briefs filed in response to this Order.

The Board requests additional briefing from the Complainant and Respondent, as well as briefing from the Assistant Secretary for Occupational Safety and Health, from the Securities and Exchange Commission, and amici curiae, addressing the issue of subsidiary coverage, taking into consideration the various approaches, tests, and interpretations that the courts, ALJs, and the ARB have applied, and identifying the test and/or analysis the party or amicus curiae deems particularly appropriate under SOX, and addressing as necessary, the following questions:

> (1) Is a subsidiary categorically covered under section 806 (*e.g., Morefield/Walters*)? If so, does the level of ownership of the subsidiary play a factor in that coverage?

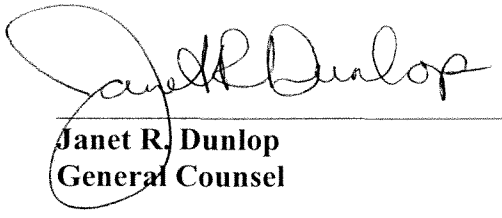
(2) Under SOX's whistleblower protection provision, must a non-publicly held subsidiary respondent be an agent of a publicly held company? What are the factors under a section 806 agency test?

(3) Is the integrated enterprise test applicable to section 806? If so, should the Board consider the "centralized control of labor relations" the most appropriate factor?

(4) Is there any other theory under which you contend that subsidiaries would be covered under section 806? If so, explain.

All briefs shall be filed and received by the Administrative Review Board on or before **July 15, 2010.** Reply briefs may be filed and shall be received by the Board on or before **August 4, 2010. Absent a demonstration of extraordinary circumstances precluding the timely filing of the briefs as ordered, the Board will grant no extensions of time for briefs filed pursuant to this order.**

FOR THE ADMINISTRATIVE REVIEW BOARD:



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