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Issue Date: 13 October 2006

CASE NO.: 2004-SOX-11

IN THE MATTER OF

KEITH A. KLOPFENSTEIN,
Complainant

v.

PCC FLOW TECHNOLIGIES HOLDINGS, INC. and ALLEN PARROT,
Respondents

DECISION AND ORDER ON REMAND

Background

Following the formal hearing on April 5-6, 2004, a Decision and Order issued in this case on July 6, 2004, denying the relief sought by Complainant. The Complainant appealed and almost two years later the Administrative Review Board issued a scolding Decision and Order on May 31, 2006, reversing my ruling and remanding Complainant's complaint for further proceedings. Both parties were granted until September 6, 2006, to file briefs in support of their respective positions on remand and each has now done so.

In addition to the record and the arguments of the parties, in my original Decision and Order I made thirteen (13) findings of stipulated facts and twenty-five (25) findings of facts as well as set out the testimony of the trial witnesses, all of which I adopt and rely on in rendering this remand decision.

Discussion and Findings on Remand

I. Coverage

Because Complainant had chosen not to file his complaint against a publicly traded corporation, I found the two parties Complainant named were not covered under the Act.[1] In reversing my findings, the ARB determined a public traded corporation need not be sued in order to bring an action under this Act so long as the Complainant names at least one respondent who is covered under the Act as an officer, employee, contractor, sub-contractor or agent of such a public entity.[2]

According to the Board, to determine whether a subsidiary or its employee is an agent of a public parent corporation for purposes of the Act, the question must be determined according to the common law principles of agency which require manifestation by the principal that the agent acts on its behalf and understanding that the principal is in control.

Restatement (Third) of Agency:[3]
§ 1.01 Agency Defined:

Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

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

[1] Complainant was employed by limited partnership, PCC Flow Technologies, LP (Flow Products), a partnership owned by PCC Flow Technologies Holdings, Inc. (Holdings), who in turn was owned by the publicly traded parent company, Precision Castparts Corp. (PCC). Complainant brought his complaint only against Holdings and Parrott, a Vice-President of Flow Products.

[2] On remand, the Board suggested I could determine Complainant's motion to add PCC as a party, but no such argument was made by Complainant in his remand brief, and thus I view the motion abandoned.

[3] Restatement (Third) completely replaced Restatement (Second) of Agency which was first published in 1958.

> 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). It is important to define the concept of "dealing" broadly rather than narrowly. For example, a principal might employ an agent who acquires information from third parties on the principal's behalf but does not "deal" in the sense of entering into transactions on the principal's account. In contrast, if a service provider simply furnishes advice and does not interact with third parties as the representative of the recipient of the advice, the service provider is not acting as an agent.

The Board observed that Wayne Robbins, the person who made the ultimate determination to terminate Complainant, was both President of Holdings and Executive Vice-President of PCC. As Executive Vice-President of PCC, the Board concluded Robbins was the general agent of PCC and "almost certainly an agent of PCC with regard to the termination of Klopfenstein's employment." Coupled with his role as President of Holdings, where he was "'undisputedly within the class of employer organization officials who may be treated as the organization's proxy,'" the Board found it "hard to imagine that Holdings was not PCC's agent for purposes of the termination of Klopfenstein's employment." Viewed in light of the Board's remarks, I will follow their findings and hold Holdings was an agent of PCC for purposes of this action and thus covered under the Act. I do not find, however, that to be the status of Parrott.

Holdings

Revenue recognition discrepancies were first discovered by an employee of PCC's finance department, Debbie Kramer, who had been sent to Flow Products'

office to reconcile the in-transit inventory discrepancies.[4] Kramer first reported the potential revenue recognition concerns to her boss, Shawn Hagel, PCC Vice President and Corporate Controller. Pursuant to instructions from Hagel, Kramer informed Parrott of her plans to investigate and then renewed her focus on the in-transit recognition issue. Based on these initial allegations, Michael Jasperson, CFO of Holdings, instructed Parrott to lead a team in investigating the revenue recognition discrepancies. (The team included Kramer and Eva Flores from Flow Product's Human Resources department.) Parrot subsequently wrote a report stating that Complainant had directed an "unauthorized change in procedure" that was not disclosed to senior management.

Parrott's report was presented to Jasperson, Wayne Robbins, Executive Vice President of PCC and President of Holdings, and John Lilla, Holding's Vice President of Human Resources and Risk Management. Meetings were held between Robbins, Jasperson, Lilla, Parrott, Flores and Kramer in which Complainant was confronted with the information obtained in the report. After this meeting, Jasperson, Lilla and Robbins met to discuss the situation. Jasperson recommended that Robbins terminate Complainant, but Lilla was hesitant. Robbins thus instructed Lilla to conduct an independent investigation before taking action against Complainant. Following his investigation, Lilla too found that the revenue recognition discrepancies had taken place as a result of Complainant's management style and practices. The decision to terminate Complainant was confirmed, and Robbins and Lilla informed Complainant of this decision.

Under these facts and general common law principles of agency, Holdings does appear to be the agent of PCC with regard to the termination of Complainant. As discussed above, Holdings and PCC had overlapping officers and employees. Kramer was an employee of PCC, but was working in conjunction with Flow Products to investigate the revenue recognition allegations. Kramer reported to Hagel, PCC Vice President and Corporate Controller, and Hagel instructed Kramer to report her findings to Parrott. It was PCC's policy that had allegedly been altered by Complainant; however, it appears from the record that it was Holdings, through Jasperson (Holdings CFO) that was taking the lead in deciding whether or not to terminate Complainant. Jasperson made the initial recommendation to terminate Complainant, and Robbins, Executive Vice President of PCC and

[4] It should be noted that the in-transit inventory discrepancies, first noticed by Complainant on or about November 2002, were previously known by the Finance Department and had been reported by Mike Kerr. Upper management for Holdings and PCC as well as outside auditors, were aware of the problem and had stated that it needed to be addressed.

President of Holdings, agreed with this recommendation. However, because Lilla, another Holdings officer, was hesitant, Robbins instructed him to conduct further investigation into the incident before taking any action. Based upon Lilla's investigation, which confirmed Parrott's findings, Robbins made the decision to discharge Complainant.

PCC made the ultimate decision to terminate Complainant though Holdings lead the investigation into possible revenue recognition violations and it was Holdings' employees that actually informed Complainant of his termination. Obiously, PCC and Holdings were working together to determine the appropriate action to take with regard to Complainant and with the authority and consent of PCC, Holdings carried out the decision to discharge Complainant. Therefore, based on the evidence presented, I find that Holdings was acting as PCC's agent when it investigated and eventually terminated Complainant.

Findings:

1. Wayne Robbins, the President of Holdings and Executive Vice President of PCC, on the recommendation of Michael Jasperson, the Vice President of Finance of Holdings – and with the concurrence of Mark Donegan and Bill Larson, the Chief Executive Officer and Chief Financial Officer respectively for PCC – made the decision to terminate Klopfenstein based on information contained in an investigation report prepared by Respondent Allen Parrott, the Vice President of Finance for Flow Products and verified by John Lilla's investigation. Robbins and John Lilla, Holdings' Vice President of Human Resources, communicated the decision to Klopfenstein. No person who held a position only with Flow Products participated in the firing decision, including the President of Flow Products, Mike Clute, to whom Klopfenstein reported.

2. Robbins testified that Klopfenstein was terminated for changing a company policy concerning recognition of revenue on international shipments. Flow Products was expected to comply with PCC's revenue-recognition policy which required recognition of revenue only after title (risk of loss) was passed to the customer. Jasperson was responsible for ensuring that employees of Flow Products were complying with the policy. In consultation with Larson, Jasperson directed and oversaw the investigation by Parrott, Kramer and Flores into possible violations of that policy at Flow Products.

3. Klopfenstein's employment with Flow Products could be and was in fact affected by Holdings (through Robbins and Jasperson) acting on PCC's behalf

and subject to PCC's direction in investigating suspected violations of PCC's revenue-recognition policy. Holdings in addition agreed to act on PCC's behalf and subject to PCC's direction in terminating Klopfenstein's employment with Flow Products for violations of PCC's revenue-recognition policy.

4. Holdings acted as PCC's agent in directing and overseeing the investigation of possible violations of PCC's revenue-recognition policy and in terminating Klopfenstein's employment with Flow Products for violation of PCC'S policy.

5. Based on these facts and the Board's ruling, as an agent of a publicly traded parent company, PPC, Holdings is covered under the Act.

Parrott

Michael Jasperson, CFO of Holdings, instructed Parrott to lead a team in investigating the revenue recognition discrepancies that Kramer, an employee of PCC, had initiated. Based on the facts stated above, it is obvious that PCC and Holdings management had some degree of interaction and intermingling with regard to their dealings with Flow Products. While it was Holdings management that instructed Parrott to investigate the revenue discrepancies, Parrott's report was prepared and presented to management from both PCC and Holdings. Also, as the Board stated in its remand, there is evidence in the record that Hagel (PCC's Vice President and Corporate Controller) was directly managing Parrott with regard to the investigation. In conducting his investigation, it could therefore be argued that Parrott was acting as an agent of both PCC and Holdings.

As stated previously, it is often said that agency requires three parties, the principal, the agent and a third party, and as the Board has seemed to imply a broad interpretation of the principals of agency, in the case of Parrott's investigation, it could be argued that the requisite "third party" were those that Parrott had to interview and question, including Claimant, in order to complete his investigation and report. However, what is missing is any evidence that Parrott "dealt" with these parties by entering into a transaction on the principals' behalf.[5] Instead,

[5] Generally, agency law anticipates the agent "dealing" with a third party based on the authority granted by the principal. While Parrott did have to question some individuals and review shipping records in order to complete his investigation, this does not amount to "dealings" with third parties, as nothing was contracted, agreed to or represented on behalf of the principals that could bind or otherwise alter a legal relation of the principals.

Parrott was simply a gather of the facts and a messenger reporting his findings to the principal. There is nothing in the record to indicate that Parrott had any authority to bind either PCC or Holdings, the principals, based on his investigation.

Nevertheless, even if Parrott was acting as the agent of PCC for purposes of his investigation, in order to be covered under the Act, an individual must "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." Based on the evidence presented, it does not appear that Parrott had any authority or influence over the decision to fire Complainant. While he did prepare a report which involved Complainant, Parrott was instructed to do this by PCC and Holding's management. There is nothing in the record to indicate that Parrott fabricated his investigative findings or slanted them so as to have Complainant fired. The ultimate decision to terminate Complainant, the action leading to this claim, was made by Jasperson, Lilla and Robbins. In fact, Lilla, himself, conducted an independent investigation to verify that firing Complainant was the appropriate action. His findings confirmed those of Parrott, Kramer and Flores. The decision to fire Complainant was carried out by Lilla and Robbins. Parrott himself testified that he recommended against firing Complainant.

The in-transit inventory discrepancies, noticed by Complainant on or about November 2002, were previously known by the Finance Department and had been reported by Kerr. Upper management for Holdings and PCC, as well as outside auditors, were aware of the problem and had stated that it needed to be addressed. The concern was actually in the process of being addressed and remedied, by Kramer, when the revenue recognition problems were discovered by Kramer. It does not appear that Complainant was broadcasting information that was not already known, and thus, there does not seem to be a motive for Parrott to take retaliatory action against Complainant based on Complainant's concern regarding the in-transit inventory discrepancies.

In conclusion, even if Parrott arguably was acting as an agent of PCC in conducting his investigation and preparing his report, which I do not find, there is not sufficient evidence that Parrot discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against Complainant in response to Complainant's concerns about the in-transit inventory. To the contrary, Parrott simply reported the results of the investigation. An investigation whose results were participated in by Kramer and Flores and subsequently verified by Lilla's own independent investigation.

Findings:

1. Directed by Michael Jasperson, the Vice President of Finance of Holdings, in consultation with Bill Larson, Chief Financial Officer of PCC, Allen Parrott, Flow Products Vice President of Finance, following the information uncovered by Kramer, was instructed to investigate revenue violations.

2. Parrott was not given any authority to "discharge, demote, suspend, threaten, harass or any manner discriminate against an employee in the terms and conditions of employment."

3. Parrott was but part of a team charged with investigating recognition issues at Flow Products along with Deborah Kramer and Eval Flores, Director of Human Resources at Flow Products. Parrott made no recommendation as to the action to be taken as a result of the report.

4. Parrott, Kramer and Flores did nothing more than gather information. There is no evidence that Parrott's "influence" affected the terms of Complainant's employment. To the contrary, Parrott recommended Complainant not be terminated.

5. Subsequent to the March 21, 2003, meeting confronting Complainant with Parrott's report, Lilla, "to be fair", performed his own independent investigation prior to concluding Complainant should be terminated for violation of PCC policy.

6. While Parrott knew of Complainant's expressions of in-transit inventory concerns there is no evidence he revealed that knowledge to the persons who terminated Complainant or employees whom he interviewed during the investigation.

7. Other than Complainant's unsupported allegations, there is no evidence that Parrott himself intended to "target" Complainant or deter Complainant from making protected disclosures. In fact, when Parrott commenced his investigation he stated his "real hope was that it would prove that it did not happen."

8. Parrott is not a proper party to this action.

II. Termination

I previously found that Complainant's termination was legitimate because he violated revenue-recognition policies. I also found the termination was not motivated by any concerns Complainant expressed about in-transit inventory discrepancies. In reversing these findings, the ARB found I had applied the wrong legal standard stating that under the Act "the correct standard is whether protected activity was a contributing factor in Complainant's termination."

Although the Board chastised me for applying the wrong legal standard and remanded the issue of Complainant's termination for further analysis under the standard of whether protected activity was a contributing factor in his termination, my determination remains the same. At page 18 or my original Decision and Order I found and do so again:

> Based upon the foregoing, it is my finding that Complainant's termination came about for the legitimate, non-pretextual reason that he violated revenue recognition policies, and there has been insufficient evidence offered to demonstrate that the motivation to terminate was discriminatory and based upon any concerns Complainant expressed about in-transit inventory discrepancies. In other words, from the evidence it appears that the same unfavorable personnel action would have been taken in the absence of any protected behavior on Complainant's part.

In order to arrive at a different result, Complainant would have me ignore the credible evidence presented by Respondents in favor of circumstantial evidence which I find insufficient to support the conclusion that Complainant's in-transit inventory concerns were a contributing factor in his termination.

It is Complainant's argument that "…even if Parrott and Kramer and Jasperson and Robbins and Lilla could each pass a polygraph test when denying that Klopfenstein's protected activity was a factor in their decision…the result would be far less reliable evidence of what factors directed…" their actions. In so arguing, Complainant suggests "five strands of circumstantial evidence": 1) temporal proximity, 2) disparate treatment, 3) falsity of proffered reasons, 4) material misrepresentation of facts and 5) contradictory explanation of discharge.

TEMPORAL PROXIMITY. Although Complainant had previously footnoted his alleged concerns involving the in-transit inventory discrepancy, in his

last three weekly reports, in March 2003, Complainant noted more forcefully the "difference in in-transit must be reconciled." It is those reports upon which Complainant relies in urging he demonstrated the temporal-proximity of events. In doing so, however, Complainant ignores the fact that Mike Kerr, who remains employed, raised the same concerns earlier, and Complainant ignores the independent event of the revenue recognition violation for which he was terminated.

Kramer was assigned as early as February 2003, the task of reconciling the in-transit inventory, and it was only during this investigation she discovered from shipping and receiving employees the revenue recognition policy violations which eventually gave her investigation new direction.

According to Kramer's credible testimony, in February 2003 she heard rumors from Mike Kerr about revenue recognition violations which involved shipments sent out on Sunday only to be later returned. Based on this information, Kramer got permission from her boss, Shawn Hagel, to investigate further and in so doing she and Kerr visited Coast Crating. It was the inventory she found there that led to Parrott's involvement and the investigation. In other words, the independent revenue recognition event explains the action that resulted in Complainant's termination, not Complainant's concern over in-transit inventory which was already in the process of being addressed. Kramer testified without contradicting that she had no suspicion of Complainant at the outset of her inquiry nor was she told to direct an investigation toward Complainant.

DISPARATE TREATMENT. It is also Complainant's assertion that the fact other employees were not terminated demonstrates disparate treatment. Both Jasperson and Robinson credibly testified that Complainant acknowledged he had changed the international revenue recognition policy without authorization; and based on Lilla's testimony and notes, Complainant acknowledged that he implemented a change to provide recognition on international shipments once they left the facility, not when crated by the freight company and the risk of loss transferred to the customer. In other words, as revealed by the investigation, revenue was recognized prematurely at offsite crating companies in violation of PCC policy.

The investigation focused on three individuals, Complainant, Jeff Conley and John Hotz. Conley, according to Lilla, was not the person in charge of shipping and he convinced Lilla that he did not "understand the implications of some of these transactions." Likewise, Hotz was not directly involved with

shipping directions and he too pled lack of understanding and training. By contrast, after meeting with Complainant on March 21, Lilla testified he conducted his own and further investigation in April and came away convinced Complainant "directed and fostered an attitude, and atmosphere that allowed violation of the revenue recognition policy, no doubt about it."

I accept Lilla's testimony as credible as to why Complainant, not the others, was dealt with more harshly.

FALSITY OF REASONS. Complainant contends that Parrott produced an investigative report falsely accusing Complainant. The investigative report contained a section entitled "Flow Products Inventory Issues Reviewed," and concluded Complainant had created a phantom material location, concealed the risk, and directed subordinates, George, Patterson and Myers to mislead and create "bogus" work orders.

In support of the facts presented by Parrott is the testimony of Complainant's subordinates. George acknowledged she was not "upfront" nor cooperative when she met with Parrott and Kramer, though she told others she knew things that could bring Complainant down. Patterson testified about use of her computer and Complainant's direction to move inventory from one location to another. She also testified that Dixon was upset about month's end close outs of unfinished jobs which she was asked to do. She described Complainant as abusive. Dixon testified that Myers, at Complainant's direction, told her to post close out jobs that were neither billed nor shipped in order to inflate numbers. In other words, the report prepared was not without basis, and was substantiated by Lilla who chose to conduct his own investigation to verify the conclusions reached.

PRETEXT, MISREPRESENTATION AND CONTRADICTIONS. As an additional thread of circumstantial evidence, Complainant accuses the reasons given for his termination as being pretextual, referring to the "falsity" of the reasons. However, as previously discussed, I do not accept the reasons as false. The mere fact that Lilla testified about his concerns involving Complainant's management style does not weaken the stated motive behind Complainant's termination, i.e. his violation of revenue recognition policy. Neither do I find contradictory or misleading the explanation for Complainant's firing given the Texas Workforce Commission by Lilla. Lilla testified that he had explained orally the violation of policy to the Commission as well as Complainant's management approach and he did not try to further explain to the Commission in writing the revenue recognition issue per se because "its not a simple thing to explain and

understand." Apparently, Complainant must have thought likewise, for he too told the Commission when he filed for benefits he was terminated because of a "difference in management policy and style."

Findings:

1. The decision to terminate Complainant was made by Robinson, Jasperson and Lilla.

2. No evidence exists that Robins, Jasperson or Lilla knew of Complainant's concerns over in-transit inventory discrepancies at the time of his termination.

3. At trial Complainant admitted that he did not believe that the "discrepancy" in the in-transit inventory account amounted to fraud. He had made no mention of the the in-transit account issue on the monthly inventory reports for February and March, 2003, which he submitted to the President of Flow Products, Mike Clute. Neither did Complainant make mention of the in-transit inventory being an issue on the PCC – 2003 Ethics Questionnaire he signed on March 4, 2003. Complainant did not mention anything about in-transit inventory during his meeting on March 21, 2003, with Robbins, Lilla and Jasperson. Nor did Complainant mention in-transit inventory in the telephone conversation with Robbins and Lilla on April 7, 2003, at the time he was informed of his discharge.

4. The reason for Complainant's termination was his change in revenue recognition policy so revenue would be prematurely recognized on shipments once they left the facility, rather than after they were crated and shipped.

5. The totality of circumstance urged by Complainant are not reliable of the single interpretation Complainant wishes to give them. Rather, I accept the credible testimony of Robbins, Jasperson and Lilla as clear and convincing evidence that the sole reason for Complainant's termination was the violation of PCC's revenue recognition policy. No other activity on Complainant's part (specifically his in-transit inventory concerns) was a contributing factor that affected in any way that decision.

III. Remaining Issues

In a footnote, the Board acknowledged "the prima facie case generally becomes irrelevant after a full hearing has been held…." Accordingly, and since

29 C.F.R. § 1980.109 specifically states "relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of any protected activity, I find any remaining issues on remand to be moot.

Conclusion

Not raised until a month post-termination, Complainant wishes me to accept his allegations that Parrott's displeasure with him led to his termination. To accept Complainant's position, I would have to ignore his culpability, Parrott's credible testimony that he was not out to have Complainant terminated nor did he inform anyone of Complainant's concerns over in-transit inventory, Kramer's credible testimony that she launched the premature revenue recognition inquiry which led to Complainant's termination herself and with no suspicion about Complainant and Lilla's credible testimony that before agreeing to Complainant's termination, he too conducted his own investigation to confirm the correctness of Parrott's report. I am unwilling to do as Complainant wishes, and I find the clear and convincing evidence to be that Complainant's expression of in-transit inventory concerns was not a contributing factor in his termination.

ORDER

Complainant's complaint is hereby **DISMISSED.**

So ORDERED this 13th day of October, 2006, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail

communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

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

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