**U.S. Department of Labor**

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, Louisiana 70433

(985) 809-5173
(985) 893-7351 (FAX)

**Issue Date: 15 September 2006**

**CASE NO.: 2006-SOX-89**

**IN THE MATTER OF**

**KEITH LOWE,**
**Complainant**

**vs.**

**TERMINIX INTERNATIONAL COMPANY, LP,**
**Respondent.**

# RULING ON MOTION TO DEEM ADMITTED AND MOTION FOR SUMMARY DECISION

## PROCEDURAL BACKGROUND

This matter involves a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (the Act)[1] and the regulations promulgated pursuant thereto[2] brought by Complainant Keith Lowe against Respondent, The Terminix International Company, L.P. (Terminix).

On or about 6 Oct 05, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA). Complainant filed objections to OSHA's subsequent report and demanded a formal hearing. In a conference call with counsel for both sides on 1 Jun 06, I noted the 180 period had expired and asked Complainant's Counsel if Complainant intended to file his cause of action in district court. He indicated that he did not. Respondent's Counsel stated he intended to file a motion for summary decision based on jurisdictional grounds. I informed Complainant's Counsel that upon

[1] 18 U.S.C. § 1514A *et seq.*
[2] 29 C.F.R. Part 1980.

receipt of said motion he would have two weeks to respond. The parties agreed to an 11 Oct 06 hearing date, with interim procedural deadlines to be agreed upon by the parties. A notice of hearing was issued setting the hearing for 11 Oct 06 and all discovery to be completed by 8 Aug 06.

On 17 Jul 06, Respondent filed a motion for summary decision, arguing that it was not a publicly held company subject to the Act. On 22 Jul 06, Complainant requested a two week extension to respond to the motion for summary decision. Respondent objected to any extension and a conference call with counsel for both sides was held on 02 Aug 06. During the call, Complainant's Counsel also asked that the discovery deadlines be extended to allow limited discovery on the issues raised in the motion for summary decision. Respondent's Counsel objected to any extension.

The parties were granted an extension of time to propound interrogatories, request for admissions, and requests to produce documents relative to the issues raised in the motion for summary decision. 07 Aug 06 was set as the deadline to propound limited discovery requests and responses were due within fifteen days after the requests were served. Complainant was also ordered to file his response to the summary decision motion by the later of 14 Aug 06 or five days after receipt of responsive discovery materials from Respondent.

On 7 Aug 06, Respondent served Complainant requests for admissions and interrogatories. The same day, Complainant served Respondent interrogatories, requests for admissions and requests to produce. Discovery responses were therefore due on 22 Aug 06. Respondent issued its responses and objections on 16 Aug 06. Complainant did not respond to Respondent's discovery requests, but on 21 Aug 06, filed a motion to compel Respondent to comply with its requests. A conference call with counsel for both parties was initially set for 22 Aug 06, but was moved to the next day (over Respondent's objection) to accommodate Complainant's Counsel's schedule. No part of the lengthy conference call involved any discovery requests made by Respondent or lack of responses thereto by Complainant. In fact, the Court was unaware that Respondent had propounded any discovery requests to Complainant. The parties only addressed each of the disputed items concerning requests propounded by Complainant to Respondent.[3]

On 28 Aug 06, Respondent filed a motion to deem the request for admissions admitted based on Complainant's failure to respond to the requests. Respondent further asked the Court to bar Complainant from opposing the motion for summary decision or alternatively, to bar Complainant from offering any evidence either in support of such

[3] The judicial memorandum summarizing the conference call and decisions made therein is attached.

opposition or at the formal hearing. Complainant filed his responses to both the motion to bar and the motion for summary decision on 30 Aug 06. On 6 Sep 06, Complainant filed a motion requesting that the Court consider staying its decision pending the decision of the ARB in *Ambrose v U.S. Foodservice*.[4] Respondent opposes any stay.

## ISSUES

In its current setting, the case presents two issues:

Whether Complainant's failure to respond to Respondent's request for admissions is sufficient to deem those facts as admitted and, if so, whether Complainant should be prohibited from either opposing the motion for summary decision or offering any evidence.

Whether a genuine issue of material fact exists that would allow Complainant to prevail on the jurisdictional question presented in Respondent's motion for summary decision.

## RESPONDENT'S REQUESTS FOR ADMISSIONS

Proceedings under the Act are conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges.[5] Those rules allow for the use of requests for admissions in the discovery process.[6] In situations not controlled by those rules, any statute, or any executive order, the Rules of Civil Procedure for the District Courts of the United States apply.[7]

Parties served with requests for admissions must object in good faith or adequately respond. Failure to respond in a timely fashion results in deeming those matters admitted.[8] The proper procedure for withdrawing or amending admissions, made by virtue of a failure to respond, is by motion to withdraw or amend.[9] While the regulations are silent on the matter of withdrawal or amendment of admissions, they are provided for in the Federal Rules.[10]

Courts have discretion whether to permit amendment or withdrawal of admissions within the bounds of a two-part test. The test requires that the presentation of the merits of an action be served by allowing withdrawal or amendment. In addition, the party obtaining the admissions must not be prejudiced in its presentation of the case by the

[4] A.R.B. Case no. 06-096.
[5] 29 C.F.R. §1980.107(a).
[6] 29 C.F.R. §18.20.
[7] 29 C.F.R. §18.1(a).
[8] 29 C.F.R. §18.20(b).
[9] *U.S. v. Kasuboski*, 834 F.2d 1345 (7th Cir. 1987).
[10] F.R.C.P. 36(b).

withdrawal.[11] The prejudice contemplated by the test is not simply that the party who initially obtained the admission will have to convince the finder of fact of its truth. Instead, it relates to the difficulty a party may face in proving its case because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions.[12]

In this case, Respondent served 12 requests for admissions on Complainant on 7 Aug 06. The request noted that Complainant had 15 days to answer the request and a failure to do so would result in the matters being deemed admitted. Complainant's Counsel thanked Respondent's Counsel for reminding him that the deadline for propounding discovery was that day and responded by sending Respondent Complainant's discovery requests. Nonetheless, Complainant has neither responded nor objected to the request for admissions.

In his response to Respondent's motion to bar opposition or evidence, Complainant's Counsel states that on 22 Aug 06, the date his responses were due, he had until midnight to respond. In addition, he states that he had "substantially finished" preparing those responses, but a power outage caused the computer to lose his responses. He also states that he intended to raise the issue during the next day's telephonic conference, but determined that due to the length of that conference and the fact that some issues had been resolved and others made moot, his responses were "not crucial to that stage of the process." He further states that he asked Respondent's Counsel to e-mail a digital version of the discovery request to allow him to restore his data, but he never received an answer from Respondent's Counsel. Complainant's Counsel concludes by stating that he therefore thought any discovery issues were either resolved or moot.

Neither side conducted any discovery until Respondent filed a motion for summary decision and even then, the first mention of discovery was a request during the 2 Aug 06 conference call, to extend the original discover deadline date of 8 Aug 06. Complainant's Counsel did not mention during the 23 Aug 06 discovery conference that he had inadvertently lost the responses to Respondent's request for admissions that had been due the day before. His assessment that those responses were not crucial appears to be a reflection of his determination that this motion would be decided on the narrow grounds that a subsidiary is by definition part of its holding entity under the Act, even in the absence of any evidence of agency or common management.[13]

[11] *American Auto. Ass'n (Inc.) v. AAA Legal Clinic of Jefferson Crooke*, 930 F.2d 1117 (5th Cir. 1991).
[12] *Brook Village North Associates v. General Elec. Co.*, 686 F.2d 66 (1st Cir. 1982).
[13] Although Complainant notes that he does not waive any argument regarding whether the record creates a genuine issue of fact as to agency or commonalty, his brief in response to the motion for summary decision focuses exclusively on the theory that subsidiary status alone is sufficient to invoke jurisdiction.

In any event, Complainant has failed to establish good cause why he should be allowed to withdraw his admissions to those matters deemed admitted by virtue of his failure to respond, object, or in any way bring the Court's attention to his administrative problems until now. Consequently, the matters are deemed admitted. However, Respondent cites no law that stands for the proposition that admitting matters prevents a party from opposing a motion or offering other matters in support of that opposition. Of course, Complainant may not offer any evidence to rebut the matters he has already admitted, but he is otherwise entitled to oppose the motion for summary decision.[14]

## RESPONDENT'S MOTION TO DISMISS ON JURISDICTIONAL GROUNDS

The regulations incorporate, by reference, procedural rules for hearings conducted under the Act. "Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges codified at subpart A, part 18 of title 29 of the Code of Federal Regulations."[15]

Parties are allowed to seek a summary decision without a full hearing.[16] They are entitled to a summary decision if:

> the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.[17]

> Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.[18]

[14] In any event, Complainant has not offered any matters in support of his opposition.
[15] 29 C.F.R. § 1980.107(a) (2003).
[16] 29 C.F.R. § 18.40 (2003).
[17] 29 C.F.R. §§ 18.40(d), 18.41(a) (2003).
[18] 29 C.F.R. § 18.40(c) (2003).

In a motion for summary disposition, the moving party has the burden of establishing the "absence of evidence to support the nonmoving party's case."[19] In reviewing a request for summary decision, all of the evidence must be viewed in the light most favorable to the nonmoving party.[20]

The issue here is whether there is a genuine issue of material fact that Respondent falls within the jurisdiction of the Act. The jurisdictional language provides that the Act applies to any "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company . . . "[21] Complainant does not suggest and there is no dispute that Respondent itself is not a company with a class of securities registered under section 12 of the Securities Exchange Act, or that is required to file reports under section 15(d) of that act.[22]

In support of its motion for summary decision, Respondent originally offered a number of documents,[23] including the Form 10-K of Respondent's holding company (ServiceMaster), an affidavit from Respondent's director of human resources, e-mails, and a letter from Complainant. Respondent now adds the admissions discussed above. Based on those materials, Respondent argues that there is nothing that creates a genuine issue of material fact that would allow the conclusion that Respondent comes within the jurisdiction of the Act.

A publicly held company does not have to be named as a respondent and it is possible for a privately held subsidiary of a publicly held company to fall within the Act.[24] In order to proceed under those circumstances, the complainant must establish an agency relationship "according to principles of the general common law of agency."[25]

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[19] *Wise v. E.I. DuPont De* Nemours *and Co., 58 F.3d 193* (5th Cir. 1995).
[20] *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).
[21] 18 U.S.C. §1514A(a).
[22] For convenience, I will refer to such companies as "publicly held."
[23] As this is a de novo review, I gave no consideration to the OSHA decision itself.
[24] Complainant on a number of occasions indicated a desire to add ServiceMaster as a party to this proceeding. Respondent's position was that such a question was between ServiceMaster and Complainant, and Respondent could not speak for ServiceMaster. I ruled that Complainant would have to properly serve ServiceMaster so it could be heard on whether it objected to being joined and wished to raise as an objection a failure to timely complain or that it had not be afforded the OSHA informal investigation process. Claimant's Counsel indicated his client was reluctant to spend the resources necessary for formal service. In any event, no notice of such service has been received by the Court. Complainant eventually filed an OSHA complaint against ServiceMaster and moved that the Court stay this case until the cases could be consolidated. I denied that request.
[25] *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, 2004-SOX-11 (ARB May 31, 2006).

In his answer to the motion, Complainant indicates that Respondent's written submissions are factually misleading and notes that he is unable to respond fully because of the accelerated pace and limited scope of discovery.[26] Although he disclaims waiving the issue in a footnote, he never addresses the theory of agency or points to anything in the record that would create a genuine issue of material fact that an agency relationship existed between Respondent and ServiceMaster. Instead, Respondent notes that the record as presented will allow the Court to address the issue of whether Respondent's status as a privately held subsidiary of a publicly held company alone is sufficient to bring Respondent within the Act.

I find the record insufficient to create a genuine issue of material fact upon which a fact finder could determine that an agency relationship, according to principles of the general common law of agency, existed between Respondent and ServiceMaster.[27]

The remaining issue is the exclusively legal question on which Complainant focuses --whether the privately held subsidiary of a publicly held company is subject to the Act. The section title refers to employees of publicly traded companies. The operative terms in the language of the Act are company, officer, employee, contractor, subcontractor, and agent. For Complainant's interpretation to prevail, a privately held subsidiary of a publicly held company would have to be considered to become one with that company or be an officer, employee, contractor, subcontractor, and agent of that company.

The statute does not include a specific "definitions" section defining any of those operative terms. However, none of the terms appear to be patently ambiguous. The common meaning ascribed to the term company does not include for general legal purposes subsidiaries. The general principle of corporate law is that a parent corporation is not liable for the acts of its subsidiaries and the absence of language specifically demonstrating congressional intent to depart from that principle is a significant factor in interpreting a statute, even in the context of a clear Congressional intent to fashion a broad remedy.[28] The Act contains no such language. The inclusion of a reference to subsidiaries in another section of the statute, when combined with the absence of the term in the whistleblower section, is more likely evidence of an intent to not include subsidiaries in the whistleblower section, than an indication that Congress assumed that the uncommonly broad interpretation would be given to the word "company." I do not find grounds to apply the broad gloss that Complainant endorses and include subsidiaries within the operative terms.

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[26] Complainant conducted no discovery until he was confronted with Respondent's motion for summary decision and required an extension of the discovery deadline. That would lead one to conclude that even without discovery he believed he had sufficient evidence to make a *prima facie* case, including agency, if that were his theory.

[27] The finding would have been the same had I not considered the admissions.

[28] *U.S. v. Bestfoods*, 524 U.S. 51 (1998).

Also significant is the fact that I am bound to the precedent established by the ARB, which appears to have implicitly addressed this issue. In *Klopfenstein,* [29]the complainant named the privately held subsidiary of a publicly held company. He did not name the publicly held company. The ALJ dismissed the case on jurisdictional grounds, finding that the complainant did not name a publicly held company, or officer, employee, contractor, subcontractor, or agent thereof. The Board remanded the case to examine whether the record established that the private subsidiary acted as the parent's agent, because nothing in the law "gives [a] reason to conclude that a subsidiary, or an employee of a subsidiary, cannot *ever* be a parent's agent for purposes of the employee protection provision."[30] The Board disavowed addressing the converse issue presented in this case, whether under the Act, the subsidiary is always an agent of or one with the parent. The Board noted that in light of its decision, it did not need to discuss whether a non-public subsidiary of a public parent would always be covered under the Act. Nevertheless, the Board could have held that the agency factual issue was rendered moot by the subsidiary's legal unity with the parent under the Act. That it did not do so is consistent with the clear language of the Act.

I find that there is no genuine issue of fact that would allow Respondent to come within the jurisdiction of the Act.

## COMPLAINANT'S MOTION TO STAY DECISION PENDING THE BOARD DECISION IN *AMBROSE*

Complainant suggests that I withhold this decision until the Board issues its ruling in *Ambrose*. While the case is similar in that it involves a respondent which is a privately held subsidiary of a publicly held parent, the ALJ weighed evidence of integration and commonality. *Ambrose* does not present the issue as discretely as this case does and the Board may well issue an opinion based on the integration and commonality, rather than the narrow issue presented here. While I do not agree with Respondent that the two cases necessarily present different issues,[31] I believe they are sufficiently dissimilar to make a stay inappropriate.[32]

[29] 2004-SOX-11.
[30] *Id.* at 13 (emphasis in original).
[31] The solicitor's amicus brief in *Ambrose* has a section dedicated to the issue in this case.
[32] However, given the very narrow issue and assuming the briefs on appeal will be very similar to the arguments on motion, Complainant may elect to seek expedited hearing on appeal and request consolidation with *Ambrose*.

## RULING AND ORDER

The motion for Summary Decision is **Granted** and the Complaint is **Dismissed**.

**So ORDERED.**

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**PATRICK M. ROSENOW**
**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).