



**Issue Date: 17 April 2006**

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CASE NO.: 2005 SOX 105

In the Matter of

**JOHN AMBROSE**  
Complainant

v.

**U.S. FOODSERVICE, INC. &  
ROYAL AHOLD N.V.**  
Respondents

Appearances: Ms. Deborah Thompson Eisenberg, Attorney  
Mr. Daniel F. Goldstein, Attorney  
Ms. Staci J. Krupp, Attorney  
For the Complainant

Ms. Connie N. Bertram, Attorney  
Ms. Patricia Exposito, Attorney  
For the Respondent U.S. Foodservice, Inc.

Mr. G. Stewart Webb, Jr., Attorney  
For Respondent Royal Ahold N.V.

Before: Richard T. Stansell-Gamm  
Administrative Law Judge

**APPROVAL OF MOTIONS FOR SUMMARY DECISION,  
DISMISSAL OF AMENDED COMPLAINT &  
HEARING CANCELLATION**

Pursuant to a Continuance Order and Revised Notice of Hearing, dated January 13, 2006, I have set a hearing date of April 24, 2006 for this case in Washington, D.C. As previously agreed by the parties, on March 20, 2006 I received from the Respondents their respective Motions to Dismiss.<sup>1</sup> On April 5, 2006, I received Complainant's opposition to the Motion to Dismiss. And, on April 11, 2006, I received the replies from the Respondents.

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<sup>1</sup>Counsel for Respondent, Royal Ahold N.V., submitted a revised Motion to Dismiss on April 11, 2006 to incorporate the deposition transcripts which had just recently been completed.

## **Background**

On February 24, 2005, through counsel, Mr. Ambrose filed a complaint with the Secretary of Labor, through the Regional Administrator, Occupational Health and Safety Administration (“OHSA”), alleging a violation of the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, (Public Law 107-204), 18 U.S.C. § 1514A (“Act” or “SOX”). In his complaint, Mr. Ambrose alleged that U.S. Foodservice, Inc. (“USF”) had suspended and eventually terminated his employment in retaliation for his internal reports of insider trading and testimony before the Securities and Exchange Commission (“SEC”). On July 21, 2005, the Regional Administrator dismissed the complaint. Through counsel, on August 19, 2005, Mr. Ambrose submitted a timely appeal and the case was forwarded to the Office of Administrative Law Judges for a hearing. Presently, I have set a hearing date of April 24, 2006 for this case in Washington, D.C.

On September 20, 2005, I received a Motion to Amend the initial complaint under 29 C.F.R. § 18.5 (e) and Fed. R. Civ. P. 15 to include Royal Ahold, N.V., (“Royal Ahold”)<sup>2</sup> as a named respondent. On October 21, 2005, I approved the amended complaint under 20 C.F.R. § 18.5 (e), as a matter of right since the Complainant had first filed the amendment with OHSA in May 2005 prior to the July 2005 conclusion of its investigation of Mr. Ambrose’s original complaint.

## **Parties’ Position**

### Respondent - Royal Ahold

In its motion, Royal Ahold asserts Mr. Ambrose’s amended SOX whistleblower complaint should be dismissed for two reasons.

#### *SOX Employee*

Mr. Ambrose’s complaint should be dismissed because he is not an employee protected by SOX since he was not employed by a publicly-traded company or a company that is required to file with the U.S. Securities and Exchange Commission (“SEC”). Mr. Ambrose was solely and exclusively employed by USF, which is neither publicly-traded nor required to submit applicable SEC filings. Further, although Royal Ahold is listed on the New York Stock Exchange and required to file with the SEC, the company did not participate in or manage either the employment relations with USF generally or Mr. Ambrose specifically, including his termination. Consequently, it was not his employer.

Additionally, Royal Ahold and USF are separate and distinct corporate entities. Insufficient commonality of management exists between USF and Royal Ahold to warrant holding the publicly-traded parent company liable for the actions of its non-publicly-traded subsidiary. Royal Ahold does not directly own USF. In the relevant time period, 2004, neither

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<sup>2</sup>According to Respondent’s counsel, Royal Ahold, N.V. is the aka for Koninklijke Ahold N.V., a publicly-traded entity based in the Netherlands.

company shared common officers or directors. Instead, Royal Ahold's role in the relationship consisted of indirectly owning stock of USF through intermediary corporations, including Ahold USA, Inc. and Ahold USA Holdings, Inc. As a separate business, USF has its own bank account, payroll system, accounting policies, internal controls, employee benefits programs, ethics program, and human resources departments. Although Royal Ahold provided an on-line SOX training program to its affiliate companies and their employees, USF had its own separate ethics program.

With limited exceptions for the senior executive level, USF renders its own personal decisions without direction or input from Royal Ahold. Although Royal Ahold was consulted about USF CEO's direct reports, the CEO actually determined the selections. When USF implemented a new field organization, no officer of Royal Ahold mandated the change or directed how the new organization should be staffed. As a result, the amended complaint should be dismissed due to lack of jurisdiction.

Concerning the joint representation of Royal Ahold and USF before the SEC by an outside counsel, Mr. Alfieri had only a few contacts with a Royal Ahold representative and did not discuss the termination action with that individual. Mr. Alfieri queried the SEC about any objection to USF proceeding with its termination action based solely on the request of USF.

In his opposition to the Motion to Dismiss, the Complainant has not presented any evidence to establish a genuine issue of material fact. He has not established that he was a SOX protected employee or that Royal Ahold should be held liable as his joint employer. His allegations of Royal Ahold's involvement, standing alone, do not establish a contradiction with the facts presented by Royal Ahold. Additionally, contrary to Complainant's assertion, employees of subsidiaries of publicly-traded companies are not automatically SOX protected employees. Instead, specific facts showing commonality between the parent publicly-traded company and the employee's subsidiary must be present to impose joint liability on the parent company and its subsidiary. Further, the core management members of USF who dealt with Mr. Ambrose are not "employees" or "agents" of Royal Ahold.

#### *Timeliness*

Assuming the 90 day statute of limitations for filing a SOX whistleblower complainant started on December 2, 2004, Mr. Ambrose's amended complaint against Royal Ahold is untimely because he did not notify Royal Ahold of his complaint prior to the expiration of the 90 day complaint filing requirement. In particular, Royal Ahold had no notice within 90 days of Mr. Ambrose's termination that he had initiated a SOX whistleblower complaint. In fact, even USF was not notified of Mr. Ambrose's complaint until it received notice from OSHA on March 9, 2004, after the expiration of the 90 day period. Even if USF's knowledge of the complaint could be imputed to Royal Ahold, the notice was still untimely.

In his response to the Motion to Dismiss, other than an assertion of timeliness, the Complainant has failed to show either actual or constructive notice of his complaint within the requisite 90 day time period. The undisputed facts establish that Royal Ahold and USF are two

separate corporate entities which do not have a shared identity. As result, even if USF received timely notice of the complaint, its knowledge cannot be imputed to Royal Ahold.

#### Respondent - USF

For several reasons, USF believes a summary decision in its favor should be granted under 29 C.F.R. § 18.40.

#### *SOX Employee*

Mr. Ambrose's complaint should be dismissed because he has failed to demonstrate after months of extensive discovery that he qualifies for protection under SOX as an employee of a publicly-traded company. Mr. Ambrose was employed by USF which is not a covered employer under SOX since the company is neither publicly-traded nor required to make the requisite filings with the SEC. Mr. Ambrose's status as an employee of a subsidiary of a publicly-traded company is legally insufficient to invoke the employee protection provisions of SOX.

Likewise, no legal basis exists for concluding that Mr. Ambrose was employed by USF's publicly-trade parent company, Royal Ahold. Mr. Ambrose was solely employed by USF and not Royal Ahold. Royal Ahold had no involvement in the employment actions taken by USF. The companies do not share the requisite commonality of management to impose derivative liability on Royal Ahold for USF's alleged SOX violations.

#### *Protected Activity*

The first element of a prima facie case of a viable whistleblower complaint is that the Complainant engaged in a protected activity. Under SOX, one of the protected activities is a report by an employee of conduct he reasonably believes constitutes a violation of the specified SOX provisions. The reasonableness of the belief must be evaluated objectively and substantively. Mr. Ambrose's reference to the USF CEO in 2004 about insider trading did not constitute a protected activity because it was unreasonably based on a vague comment by a co-worker in 2000 about moving 401 (k) funds. Mr. Ambrose never investigated the substance of that comment and failed to mention any concern for over four years. Consequently, since Mr. Ambrose failed to present evidence sufficient to establish a principal element of his prima facie case, no genuine issue of material fact remains.

In his response to the Motion to Dismiss, Mr. Ambrose asserts that USF's reaction to his insider trading complaint demonstrates the reasonableness of his concern. However, USF's actions were principally driven by the pending SEC investigation such that it forwarded both the anonymous complaint and Mr. Ambrose's e-mail to the USF CEO to the SEC. Additionally, while some courts have considered a company's response in determining whether an allegation was reasonable, the fact a company responds to a complaint with an investigation does not establish that the complaint was reasonable.

### *Timeliness*

Mr. Ambrose filed his SOX complaint with OSHA on February 24, 2005. Since a SOX compliant must be filed within 90 days of an adverse employment action, no complaint relating to an employment action which occurred prior to November 26, 2004 (90 days prior to February 24, 2005) is timely under SOX. Thus, Mr. Ambrose's complaints relating to USF's refusal to sell products to his restaurant, his suspension, surveillance, and purported derogatory comments, which occurred prior to November 26, 2004 are time-barred. Additionally, the decision not to sell products to Mr. Ambrose's restaurant and the surveillance were not actions that adversely affected the terms and conditions of his employment with USF.

Although Mr. Ambrose was terminated on December 2, 2004, that termination "flowed from" an earlier suspension decision. The suspension decision and not the final result of that decision represents the trigger for the 90 day complaint filing requirement. Consequently, since Mr. Ambrose did not file his SOX complaint within 90 days of his suspension, his complaint is untimely. Mr. Ambrose's other collateral concerns about other actions which occurred after November 26, 2004 do not involve adverse personnel actions under SOX.<sup>3</sup>

### *Causation*

A critical element in a prima facie whistleblower claim is that the employer had knowledge of the alleged protected activity. Since the Division President who terminated Mr. Ambrose had no knowledge of his claimed protected activities, Mr. Ambrose is not able demonstrate adverse employment action was taken in retaliation for his SOX protected activities. The Division President decided to terminate Mr. Ambrose before he became aware of Mr. Ambrose's report of insider trading which led to the SEC inquiry. Speculation that the decision maker must have known of the protected activity is insufficient. Similarly, temporal proximity is not a proper basis to infer retaliation when a non-retaliatory basis for the adverse action existed.

### *Non-Retaliatory Basis for Termination*

Even if Mr. Ambrose were able to meet the prima facie evidentiary requirements, his claim would nevertheless fail because USF had a valid, non-retaliatory basis for terminating Mr. Ambrose and would have taken the same adverse employment action even in the absence of a SOX protected activity. Finding Mr. Ambrose's decision to have another associate cover for him to be the last straw, the Division President decided to terminate Mr. Ambrose's employment. Thus, even if Mr. Ambrose's customers praised his performance, his employer believed Mr. Ambrose had crossed the line in having another associate cover for him while he tended to his restaurant's business. Similarly, while USF had bestowed awards and accolades upon Mr. Ambrose, those honors occurred prior to his acquisition of his restaurant and the specific problems that led to his termination. Finally, although USF did not terminate Mr. Ambrose for

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<sup>3</sup>I note that in my October 24, 2005 Approval of Amended Complaint & Denial of Motion to Dismiss Due to Untimeliness, I already considered and rejected this argument. Specifically, since the suspension stated it was due to a "pending investigation," I concluded that USF had not yet communicated to Mr. Ambrose its final determination on the status of his employment. That final determination was rendered on December 2, 2004 and Mr. Ambrose subsequently filed his initial SOX complaint within 90 days.

earlier disruptive behavior, the company did counsel him on several occasions about his behavior and issued a final warning letter in October 2003 concerning any further infractions of company policy. Although Mr. Ambrose improved following the letter, by July 2004, he was again behaving unprofessionally.

### Complainant

The Respondents' Motions to Dismiss should be denied because: a) Mr. Ambrose's amended complaint sets out sufficient facts to establish jurisdiction under SOX; and, b) after Mr. Ambrose engaged in SOX protected activity, the Division President terminated his employment, using as pretext his involvement with a restaurant.

### *SOX Employee*

The Respondents' jurisdictional basis for dismissal fails for three reasons. First, the plain language of the entire SOX statute and its stated purpose extend whistleblower protection to employees of subsidiaries of publicly-traded companies, when the parent company and subsidiary are integrally related for SOX and SEC filing purposes. Through 2000, USF was a publicly-traded company. In 2000, Royal Ahold purchased USF and USF became a wholly-owned subsidiary of Royal Ahold. In subsequent criminal and SEC investigations concerning USF's fraudulent accounting practices, both Royal Ahold and USF were represented by the same law firm. During the investigation, Royal Ahold and USF had interests in common. USF is an integral component of Royal Ahold's business, representing 31% of its net sales in 2004. Royal Ahold was concerned it could be held accountable for USF's activities. Further through its training programs, Royal Ahold encouraged employees to raise their concerns through specific procedures.

Second, Mr. Ambrose is a SOX covered employee because he worked for a company representative of a Royal Ahold. Following the SEC investigation, Royal Ahold exerted "extensive influence and control over USF." In particular, Royal Ahold hand picked the new USF CEO and approved members of his executive team. Royal Ahold also established an advisory board and audit committee for USF.

Third, under traditional agency principles Royal Ahold is vicariously liable for USF's impermissible retaliatory actions. Both the outside counsel employed by Royal Ahold and USF's Chief Human Resource Officer played a role in Mr. Ambrose's termination.

### *Prima Facie Case*

Mr. Ambrose has established a prima facie case of retaliation under SOX which warrants a hearing on the merits.

### Protected Activities

By internally reporting his reasonable and objective concerns about insider trading and testifying before the SEC, Mr. Ambrose engaged in SOX protected activities. Specifically, in

2000, Mr. Ambrose heard the son of then USF CEO state that his father advised him to move his 401 (k) holding into USF stock due to the pending sale of the company. At that time, Mr. Ambrose was not familiar with insider trading. However, through Martha Stewart's trial in March 2004 and the USF's educational efforts conducted following revelations of accounting fraud in 2003, Mr. Ambrose "learned what 'insider trading' meant" and "realized" the comment he had heard involved insider trading. Mr. Ambrose then expressed his awareness to the Altoona Division Vice President and his District Manager. However, when Mr. Ambrose met with the USF CEO in February 2004, he focused on improvements for the company. In April 2004, Mr. Ambrose posted his concern on a rumors website and advised his District Manager who encouraged him to report his concerns to company Check-In Line. Mr. Ambrose remained reluctant since the former CEO and his son remained powerful in the company. Further, both the present Division President and the Vice President for Human Resources had close ties with the former CEO. However, in July 2004, after the former CEO "had been removed from USF," Mr. Ambrose "developed the courage" to call the Check-In Line and report the insider trading, identifying himself as an employee of the Altoona Division.

USF treated Mr. Ambrose's complaint seriously. USF's General Counsel sent the report to Royal Ahold's Corporate Governance Counsel. USF also forwarded the report to outside counsel who was jointly representing USF and Royal Ahold before the SEC; that attorney in turn forwarded the report to the SEC.

In August 2004, due to his belief that the Division President was treating him differently due to his Check-In complaint, Mr. Ambrose also sent an e-mail to the USF CEO concerning potential mismanagement and insider trading. Again, USF took his complaint seriously. The CEO forwarded it to several corporate level executives. In turn, the e-mail was forwarded to Royal Ahold's corporate counsel and outside counsel to who provided it to the SEC.

In mid-September 2004, Mr. Ambrose was advised that the SEC wanted to interview him. He was represented by an outside law firm. The legal bill was paid by Royal Ahold. On October 20, 2004, Mr. Ambrose testified before the SEC. The hearing involved questions about his allegations of insider trading.

#### Knowledge

Since USF advised the Altoona Division of its investigation of Mr. Ambrose's complaints, the Division President was aware of his protected activities. Additionally, the Division President had constructive knowledge of his protected activities because the USF Office of Ethics in the corporate level above the president and Mr. Ambrose's District Manager, who indirectly reported to the Division President, were aware of Mr. Ambrose's protected activities. Additionally, USF's apparent change in attitude about Mr. Ambrose having someone cover his calls and his restaurants demonstrates knowledge of his protected activities by division executives.

## Adverse Personnel Actions

In addition to taking the readily identifiable adverse action of termination on December 2, 2004, USF also engaged in other retaliatory adverse actions which included blacklisting his restaurant, placing him under surveillance, and interfering with his subsequent employment. In particular, USF had both Mr. Ambrose and his family watched, followed, and videotaped for a month and a half. The surveillance harmed his reputation with co-workers and disrupted his work at the restaurant. In December 2004, USF employees advised Mr. Ambrose's former customers that he had been terminated by the "Ethics Board." Additionally, although one USF salesperson agreed sell products to Mr. Ambrose for his restaurant in November 2004, a corporate level executive later instructed the salesperson to stop selling products to Mr. Ambrose. At that time, Mr. Ambrose's sole employment was his restaurant. Consequently, USF's refusal to sell him products represented interference with his subsequent employment. Finally, USF had made false accusations about him to at least two potential future employers.

## Causation

Due to the close temporal proximity between Mr. Ambrose's protected activities and the adverse actions, the requisite causal nexus is established. The termination decision was made two months after his initial Check-In call, six weeks after his insider trading e-mail to the USF CEO, and one week after he had been scheduled to meet with the SEC. Causation is further demonstrated by USF's discussion of his whistle blowing and SEC testimony within the same context as his termination and by evidence of management anger and hostility towards Mr. Ambrose.

## Pretext

The purported basis for his termination, having another salesperson cover his customers, is pretextual. As background, Mr. Ambrose was not the purported problem employee portrayed by the Respondents. In 2004, Mr. Ambrose was the division top salesman in 2004, generating over \$12 million in sales and earning approximately \$250,000 in commissions. Over the course of several years, Mr. Ambrose received numerous awards and recognition for his exceptional performance. Mr. Ambrose's customers regarded him as the best salesman they knew.

The prior infractions presented by the Respondents were isolated incidents in 2001 and 2003 regarding one large account and a dispute between USF corporate level and local salesmen. Thus, the stated claim that Mr. Ambrose was spiraling out of control in mid-July 2004 only strengthens the pretext case because that is the timeframe he engaged in protected activities.

Concerning the restaurant, Mr. Ambrose's District Manager supported the venture. USF never directed Mr. Ambrose not to pursue the restaurant ownership and expressed no concern about the restaurant until late July 2004 after the Division President "learned" that Mr. Ambrose "had a potential opportunity at the corporate level of USF."



The stated policy about substitute coverage was unwritten, previously unpublished and un-enforced. In his 15 years with USF, Mr. Ambrose never heard of a policy that required supervisor approval before one territory manager could cover for another.

In reaching his termination decision based on a “last straw,” the Division President did not inquire of Mr. Ambrose whether the purported covering allegations were true. Mr. Ambrose had asked an associate to cover his calls only one day while he attended a licensing hearing for his restaurant.

Additionally, the Respondents have failed to present clear and convincing evidence that they would have terminated Mr. Ambrose absent his protected activity. In particular, the Division President’s reliance on an unwritten policy against unapproved coverage by other salesman is not believable. Additionally, up until the time of the protected activities, USF continued to treat Mr. Ambrose as one of its top performers and gave him a favorable performance report in March 2004.

### **Discussion, Findings, and Conclusions of Law**

For the reasons set out below, and upon consideration of the parties’ positions and supportive affidavits, I conclude Mr. Ambrose’s amended complaint must be dismissed because he is not an employee protected under the whistleblower provisions of SOX.

Both Royal Ahold and USF assert dismissal of Mr. Ambrose’s complaint is warranted because he is not a SOX protected employee. That assertion represents a jurisdictional challenge. Although 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, does not contain a section pertaining to such a motion to dismiss, 29 C.F.R. § 18.1 (a) indicates that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. In turn, FED. R. CIV. P. 12 (b) (1), addresses a motion to dismiss for lack of subject matter jurisdiction. The courts recognize two approaches in considering a 12 (b) (1) motion.<sup>4</sup> The first consideration of a 12 (b) (1) motion is whether the pleading, or complaint, on its face is sufficient. In reviewing a “facial” motion to dismiss, the allegations in the complaint are considered to be true.

The second consideration under 12 (b) (1) concerns a factual evaluation of the complaint. In this “factual” analysis, no presumption of truthfulness applies to the allegations in the complaint.

Since both parties presented supportive affidavits, I address the jurisdictional issue under the factual analysis. In that regard, the following facts related to jurisdiction are undisputed:<sup>5</sup>

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<sup>4</sup>See *Ohio National Life Insurance Co. v. United States*, 922 F.2d 320 (6th Cir. 1990).

<sup>5</sup>In a footnote to my October 21, 2005 order approving the amended complaint, I anticipated that a hearing would be warranted to resolve “disputed” facts concerning the business relationship between Royal Ahold and USF. However, based on several months of discovery, and as presented in several volumes of documents and depositions accompanying the motions and response, facts about the basic business relationship between the two companies are not in contention. While I also indicated in the footnote that I proceeded to fully adjudicate the other case after approving the motion to dismiss due to the uncertainty associated with SOX jurisdiction, I also now emphasize that in the prior case I had already conducted the hearing and, pre-hearing, the parties had raised genuine issues of

1. USF is a wholly-owned subsidiary of Royal Ahold. Royal Ahold is a publicly-traded company. USF has its own personnel, payroll system and financial accounts. Prior to his selection as CEO of USF, Mr. Benjamin met with corporate officers of Royal Ahold.

2. Throughout Mr. Ambrose's employment, USF provided his payroll checks and employee benefits, including health and insurance coverage. His W-2s identified USF as his employer. Mr. Ambrose identified himself as an employee of USF. All his business expenses were paid by USF. Mr. Ambrose's supervisory chain ran from Mr. Cristofano, District Manager, to Mr. Counsman, Director of Sales, Altoona Division, to Mr. Alianiello, Altoona Division President, to Mr. Ickes, head of the Northeast region, to USF corporate headquarters. Mr. Ambrose also had contact with USF President and CEO Mr. Benjamin, Executive VP and General Counsel, Mr. Eberhardt, Chief Ethics and Compliance Officer, Ms. Hallberin, Regional VP human resources, Ms. Carter, VP Human Resources Altoona Division, Ms. Hearn, and outside counsel, Mr. Alfieri.

3. Mr. Alfieri represented both USF and Royal Ahold in proceedings and investigations before the SEC.

4. Royal Ahold paid the legal fees for the attorney who assisted Mr. Ambrose during his interview with the SEC.

5. In May 2004, a Check-In Line was established to permit employees to report any concerns about ethical, legal, or business issues. Through a third party vendor, Royal Ahold provided a voluntary SOX training program to the employees of its operating subsidiaries, including USF.

6. Mr. Ambrose's two insider complaints (one contained in an anonymous phone call and the other a direct e-mail to the USF CEO) were forwarded to USF General Counsel who in turn provided them to corporate counsel for Royal Ahold. He also provided the complaints to Mr. Alfieri who in turned passed them on to the SEC.

7. On October 20, 2004, Mr. Ambrose testified before the SEC.

8. The USF Altoona Division President, Mr. Alianiello, made the decision to terminate Mr. Ambrose.

With these facts in mind, I turn to the SOX whistleblower protection provisions. According to the Sarbanes-Oxley Act, 18 U.S.C. § 1514 A (a), whistleblower protection provisions apply to a company which either: 1) has a class of securities registered under section 12 of the Securities Exchange Act of 1934; or, 2) is required to file reports under section 15 (d) of the Securities Exchange Act. Specifically, no publicly-traded company, or a company required to file with the SEC, "or any officer, employee, contractor, subcontractor of such company" may discriminate against an employee for engaging in a SOX protected activity.

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material fact in regards to the parent company's active involvement with the complainant's employment in the subsidiary.

In determining whether Mr. Ambrose falls within that statutory whistleblower protection, I first find that he was not a direct employee of Royal Ahold. That is, he was not an employee of a publicly-traded company or company required to make the specified reports to the SEC.

Next, since Mr. Ambrose was instead an employee of USF, I am confronted with the legal issue of whether an employee of a wholly owned subsidiary of a publicly-traded company is protected for whistleblower activities under SOX. As the parties have ably demonstrated in their respective arguments, administrative law judges have reached contrary decisions on this issue. Emphasizing the remedial purposes of the SOX statute and persuaded by the intertwined business relationship between a wholly owned subsidiary and its publicly-traded parent company, some judges have determined the subsidiary's employees are covered under SOX to the same extent as employees of the publicly-traded parent company.<sup>6</sup> On the other hand, placing reliance on the plain language of the protection provision other judges, including myself, have concluded Congress did not extend SOX whistleblower protection to subsidiary employees.<sup>7</sup>

As I have previously indicated in other decisions, my respective colleagues' diverse interpretations of the SOX employee protection provision do not have precedence value; and, continuing to date, no definitive appellate interpretation has been established.<sup>8</sup> Again, I remain mindful of the remedial nature of the SOX statute and its employee protection provisions and the public interest in corporate integrity. Nevertheless, I continued to be persuaded by the caption Congress chose for 18 U.S.C. § 1514 A (a) – “WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.” Based on that caption, I believe the term “employee” in the employment discrimination prohibition refers to an employee of a publicly traded company. Accordingly, I conclude that legally an employee of a wholly-owned subsidiary is not an “employee” protected under SOX.

Next, since Royal Ahold is an employer covered by the SOX employee protection provisions, I have considered whether the SOX whistleblower protection nevertheless extends to Mr. Ambrose because Royal Ahold and USF are so intertwined as to represent one entity. In examining such commonality, I first note that typically a parent company is not insulated from liability for its subsidiary when the two corporate identities are used interchangeably. *United States v. Bestfoods, et. al.*, 524 U.S. 51, 61 (1998) (holding that a parent corporation could be held liable for the actions of its subsidiary where the parent significantly controls the subsidiary).

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<sup>6</sup>See *Gonzales v. Colonial Bank & The Colonial Bancgroup, Inc.*, 2004-SOX-39 (ALJ Aug. 20, 2004); see also *Morefield v. Exelon Services, Inc. and Exelon Corp.*, 2004-SOX-2 (ALJ Jan. 28, 2004); see also *Kloppenstein v. PCC Flow Technologies Holdings, Inc. and Allen Parrott*, 2004-SOX-11 (ALJ July 6, 2004).

<sup>7</sup>*Bothwell v. American Life Income*, 2005 SOX 57 (ALJ Sept. 19, 2005); *Powers v. Pinnacle Airlines*, 2003 AIR 12 (ALJ Mar. 5, 2003); *Hughart v. Raymond James & Assocs.*, 2004 SOX 9 (ALJ Dec. 17, 2004); and, *Goodman v. Decisive Analytics Corp. & Lynn Ambuel*, 2006 SOX 11 (ALJ Jan. 10, 2006).

<sup>8</sup>One case, *Minkina v. Affiliated Physicians Group*, No. 2005 SOX 19 (ALJ Feb. 22, 2005), *appeal dismissed*, (ARB July 29, 2005) was relied upon by federal district court in *Brady v. Calyon Securities*, 2005 WL 3005808 (S.D.N.Y) to find the absence of SOX coverage for an employee of an agency that conducted periodic work on behalf of a publicly traded company. However, I note that the ARB dismissed the appellate appeal in *Minkina* as untimely and consequently did not reach the merits of the administrative law judge's decision.

*See Liability of Corporation for Torts of Subsidiary*, 7 A.L.R. 3d 1343. However, liability will only be extended in an area where the parent has exerted its influence or control. *Bestfoods*, 524 U.S. at 59. Therefore, in an employment discrimination case, the parent company will only be held liable where it controlled or influenced the work environment of, or termination decision concerning, an employee of its subsidiary company.

In Mr. Ambrose's case, there are certainly indicia of interrelatedness. During its proceedings, the SEC investigated both Royal Ahold and its wholly owned subsidiary, USF. In that process, both companies were represented by the same attorney. When Mr. Ambrose presented insider trading complaints, the complaints were passed on to Royal Ahold by USF's general counsel. Royal Ahold paid Mr. Ambrose's legal fees when he participated in the SEC proceedings. And, prior to his appointment, USF's CEO had to meet with Royal Ahold executives.

However, in regards to the actual specifics of Mr. Ambrose's employment situation, Royal Ahold had at best only a non-active, informational role and exerted no control or influence over the terms, conditions, and eventually termination of his employment. Notably, USF was a completely separate business entity with its own personnel and payroll system, separate from Royal Ahold. Although the CEO of USF may have been vetted by Royal Ahold prior to his appointment, all the individuals who played an active role in Mr. Ambrose's employment and supervision were employed by USF and not Royal Ahold. In particular, the Altoona President who terminated Mr. Ambrose's employment was both geographically and organizationally far removed from Royal Ahold's executives in the Netherlands.

For essentially the same reasons, despite commonality associated with the SEC investigation and the forwarding of Mr. Ambrose's insider trading complaints to Royal Ahold, there is no indication that the USF CEO, his immediate executives, USF corporate executives, or individuals at the USF Altoona Division were actively acting as agents for, and on behalf of, Royal Ahold with respect to employment practices towards Mr. Ambrose. *See Fike v. Gold Kist, Inc.*, 514 F.Supp. 722, 727 (ND Ala. 1981). As a result, I conclude the two corporate entities had a sufficient degree of separation such that they were not one entity for consideration of the applicability of SOX. Absent such integration and because the whistleblower protection provisions of the Act apply only to Royal Ahold, a publicly-traded company, and not USF, the SOX whistleblower protections are not extended to Mr. Ambrose.

Accordingly, since the SOX whistleblower protection provisions are not applicable to Mr. Ambrose, the Respondents' Motions for Summary Decision on the basis of lack of jurisdiction must be granted.<sup>9</sup> Correspondingly, the hearing scheduled for April 24, 2006 is cancelled.

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<sup>9</sup>Since I have granted the motions on jurisdictional grounds, I have not addressed the other purported reasons for dismissal.

## ORDER

The Respondents' Motion for Summary Decision are **GRANTED**. The Amended Complaint of Mr. John Ambrose is **DISMISSED**. The April 24, 2006 hearing is **CANCELLED**.<sup>10</sup>

**SO ORDERED:**

**A**  
RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Date Signed: April 14, 2006  
Washington, D.C.

**NOTICE OF APPEAL RIGHTS:** This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).

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<sup>10</sup>As part of the proceedings, the parties have submitted two sealed envelopes, which to date, I have not accepted. Since I did not need to consider the sealed contents in reaching my jurisdictional decision, the two sealed envelopes will be returned to counsel.