U.S. Department of Labor

Solicitor of Labor
Washington, D.C. 20210

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The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

The Honorable Charles E. Grassley
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Chairman Leahy and Senator Grassley:

This is in response to your letter of September 9, 2008, in which you express concern regarding the Department of Labor's interpretation of section 806 of the Sarbanes-Oxley Act ("SOX"). Specifically, you state that, as the authors of SOX's whistleblower provision, you did not intend for it to be construed to exclude from its protection employees of the non-publicly traded subsidiaries of publicly-traded companies.

As discussed below, we believe that we have properly interpreted section 806 of SOX not to automatically cover all employees of non-publicly traded subsidiaries of publicly traded companies. The Department, however, has urged the Administrative Review Board ("ARB") on two occasions to apply the "integrated employer" test to claims under section 806, which would extend coverage to employees of subsidiaries of publicly traded companies where the operations are sufficiently interrelated under traditional labor and employment law doctrine. This test is significantly more expansive, and would cover many more employees of subsidiaries, than the corporate veil-piercing and agency tests that have been applied by some courts and Department administrative law judges ("ALJs").

SOX was enacted on July 31, 2002, to protect investors by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. The Act's whistleblower protection provision furthers this statutory purpose by encouraging employees of publicly traded companies to disclose information that they reasonably believe indicates federal securities violations or various forms of fraud, including fraud against shareholders. Section 806 of SOX prohibits retaliation against employees for such disclosures by 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...." 18 U.S.C. 1514A(a).

By its terms, section 806 does not expressly include subsidiaries of publicly traded companies within its coverage, nor is there any legislative history demonstrating congressional intent to cover such entities. By contrast, Congress specifically covered both publicly traded corporations and their subsidiaries in several other sections of SOX. For instance, section 301 of SOX provides that to maintain their independence, members of audit committees of public companies may not be affiliated with those companies <u>or their subsidiaries</u>. *See* 15 U.S.C. 78j-l(m)(3)(B)(ii). Section 302(a)(4)(B) requires corporate officers who sign periodic reports submitted to the Securities Exchange Commission (SEC) to design "internal controls to ensure that material information relating to the issuer <u>and its consolidated subsidiaries</u> is made known . . . particularly during the period in which the reports are being prepared." (emphasis added) 15 U.S.C. 7241(a)(4)(B). Additionally, section 402 prohibits a publicly traded company "directly or indirectly, <u>including through any subsidiary</u>" from extending credit in the form of a personal loan to any director or executive officer of the company. (emphasis added) *See* 15 U.S.C. 78m(k)(1).

It is a well-settled canon of statutory construction that "where Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (citations and quotation marks omitted). Furthermore, it is a basic tenet of corporate law that a parent corporation is not liable for the acts of its subsidiary merely because it owns the subsidiary's stock. *See United States v. Bestfoods*, 524 U.S. 51, 61, 63 (1998). Accordingly, based on the plain language of section 806, as well as these basic legal tenets, we do not believe that SOX's whistleblower provision can be construed to automatically include employees of non-publicly traded subsidiaries of publicly traded companies.

Some courts, the ARB, and some ALJs have applied the traditional tests of "piercing the corporate veil" and agency to determine coverage of subsidiaries under section 806. *See, e.g., Brady v. Calyon Securities (USA)*, 406 F. Supp. 2d 307 (S.D.N.Y. 2005); *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, No. 04-149, 2006 WL 3246904, *9-*11 (Admin. Rev. Bd. May 31, 2006); *Bothwell v. American Life Income*, 2005-SOX-57 (Sept. 19, 2005). Under these tests, however, the employee seeking protection bears an extremely heavy burden. Accordingly, to further the purposes of SOX, we have adopted the less restrictive integrated employer test derived from labor and employment law to determine whether employees of subsidiaries of publicly traded companies are protected under section 806.

The integrated employer test was first developed by the National Labor Relations Board and endorsed by the Supreme Court in *Radio and Television Broad. Techs. Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255 (1965), to determine whether two firms were sufficiently related to meet the jurisdictional minimum amount of business volume. Courts then began applying the integrated employer test in the 1970s to determine when employees of two or more corporations should be aggregated to meet the coverage threshold under Title VII. *See, e.g., Baker v. Stuart Broad. Co.*, 560 F.2d 389 (8th Cir. 1977). It is now routinely applied in cases arising under the Americans with Disabilities Act and the Age Discrimination in Employment Act, as well as other employment laws. The test also is applied under various programs administered and enforced by the Department of Labor, such as the Family and Medical Leave Act and the Worker Adjustment and Retraining Notification Act. *See, e.g.*, 29 CFR 825.104(c)(2); 20 CFR 639.3(a)(2).

Under the integrated employer test, two or more companies may be considered so interrelated that they constitute a single employer subject to liability or coverage under the particular statute. This test properly focuses on labor relations and economic realities, rather than corporate formalities, to determine whether a parent corporation and its subsidiary are both liable for statutory violations. In determining whether to treat entities as a single employer, courts generally examine whether the operations of the companies are interrelated, whether their labor or employment decisions are centrally controlled, and whether they have common management as well as common ownership or financial control. No one factor, however, is determinative. *See Pearson v. Component Tech. Corp.*, 247 F.3d 471, 486 (3d Cir. 2001).

As you are aware, the Secretary has delegated authority to investigate complaints under section 806 to the Assistant Secretary for the Occupational Safety and Health Administration ("OSHA"). *See* Secretary's Order No. 5-2007, 72 Fed. Reg. 31,160 (June 5, 2007). After OSHA investigates a complaint and issues findings, either party objecting to those findings may request a *de novo* hearing before a Department ALJ. Litigation of SOX complaints is handled by the private parties after OSHA issues its findings. The vast majority of the ALJs that have addressed the question have ruled that subsidiaries are not automatically covered under section 806 based on the language of the statute and well-settled case law. ALJ decisions are subject to review by the ARB, which has been delegated responsibility for issuing final agency whistleblower decisions on behalf of the Secretary. *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). The ARB has not yet issued a ruling addressing the coverage of employees of subsidiaries under SOX.

On behalf of OSHA, we have filed amicus briefs in two cases urging the ARB to adopt the integrated employer test for determining subsidiary coverage under section 806, rather than the more restrictive piercing the corporate veil and agency tests. We filed our first brief on this issue on September 1, 2006, in *Ambrose v. U.S. Foodservice, Inc.*, No. 06-096. The *Ambrose* case was settled by the parties before the ARB issued a decision. On March 14, 2008, we filed an amicus brief in *Johnson v. Siemens Bldg. Techs., Inc.*, No. 08-032. The *Johnson* case is pending with the Board; we are enclosing copies of our briefs which explain our legal position in greater detail.

We agree that the protection of whistleblowers is critical in furthering SOX's purposes of ensuring corporate accountability and transparency. Please rest assured that the Department of Labor remains committed to providing meaningful protection to whistleblowers to the full extent allowed by law.

Sincerely,

Greg Jacob

Gregory F. Jacob

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

In the Matter of:	
JOHN AMBROSE,	
Complainant,	
v.	ARB Case No. 06-096
U.S. FOODSERVICE, INC. and ROYAL AHOLD, NV,	
Respondents.	

BRIEF OF THE ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

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UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

In the Matter of: JOHN AMBROSE, Complainant, v. U.S. FOODSERVICE, INC. and ROYAL AHOLD, NV, Respondents.	ARB Case No. 06-096

BRIEF OF THE ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

Pursuant to 29 C.F.R. 1980.108(a)(1), the Assistant Secretary for the Occupational Safety and Health Administration ("OSHA"), through counsel, submits this brief to assist the Administrative Review Board ("ARB" or the "Board") in resolving an issue of first impression arising under section 806, the whistleblower protection provisions, of Title VIII of the Sarbanes-Oxley Act of 2002 ("SOX" or the "Act"), 18 U.S.C. 1514A. Specifically, the Board must establish the proper standard for determining subsidiary coverage of publicly traded companies under section 806 of the Act. The Assistant Secretary, who enforces section 806 and has a significant interest in how the statute is interpreted, urges the Board to adopt the "integrated employer" test -- long applied by the federal courts in various employment contexts -- to determine whether employees of subsidiaries of publicly traded companies are protected under SOX. Applying that test to the facts of this case, the Board should affirm the ALJ's ruling that the complainant was not protected by the SOX whistleblower provisions.

STATEMENT OF THE ISSUE

Whether the "integrated employer" test should apply to determine whether employees of subsidiaries of publicly traded companies are protected under the whistleblower provisions of the Sarbanes-Oxley Act.

STATEMENT OF THE CASE

1. Procedural history

U.S. Foodservice, Inc. ("USF"), which was purchased by Royal Ahold, N.V. in 2000, is an indirect, wholly-owned subsidiary of Royal Ahold, a Dutch company that trades on the New York Stock Exchange. On February 2, 2005, John Ambrose, a territory sales manager employed by USF in Pennsylvania, filed a complaint with OSHA alleging that USF terminated his employment in retaliation for his complaints to management officials about insider trading and for his testimony before the Securities and Exchange Commission ("SEC") about his allegations.

Specifically, Ambrose claimed that he informed his managers and the SEC about conversations that he had overheard in 2000 indicating that USF's then chief executive officer ("CEO") had advised his son to move his 401(k) holdings into USF stock due to the company's pending sale. OSHA dismissed Ambrose's complaint on May 3, 2005, based on a determination that USF was not a covered company under section 806, and that OSHA therefore lacked jurisdiction to investigate.

Ambrose requested a hearing before an administrative law judge ("ALJ"). He argued, inter alia, that USF is covered under section 806 because it is a subsidiary of Royal Ahold. Specifically, Ambrose argued that the plain language of Sarbanes-Oxley and its purpose extend whistleblower coverage to employees of subsidiaries of publicly traded companies.

Both USF and Royal Ahold moved to dismiss, arguing that section 806 does not automatically protect the employees of a covered company's subsidiaries. They further argued that Royal Ahold has no involvement in USF's employment actions and does not share sufficient commonality of management with USF to be liable for its subsidiary's alleged SOX violations.

On April 17, 2006, ALJ Richard T. Stansell-Gamm dismissed Ambrose's complaint He concluded that USF was not a publicly traded company under section 806 of SOX, and that Royal Ahold could not be held liable for the violations of its subsidiary. (ALJ's decision "Dec." at 12).

Ambrose filed a petition for review with the ARB, and the case was accepted for review.

2. Statement of facts[1]

a. USF is one of the largest food distributors in the United States which, at the time of Ambrose's termination, employed over 29,000 workers (Jt. Opp. Ex. 37). In 2000, Royal Ahold, through a series of intermediary corporations, acquired the outstanding shares of stock of USF, which until then was publicly traded; as a result, USF became an indirect, wholly-owned, and non-publicly traded subsidiary of Royal Ahold (Fishbune Aff. ¶ 3 (Ex. B); Whelan Aff. ¶ 3 (Ex. C); Interr. Resp. #4).

In 2003, several governmental agencies, including the SEC and the Department of Justice, initiated investigations into certain accounting irregularities and financial fraud at USF and Royal Ahold (Alfieri Decl. ¶ 3 (Ex. M)). See also SEC Litigation Release No. 18929, 2004 WL 2297417 (Oct. 13, 2004). In May 2003, the CEO of USF resigned (Interr. Resp. #5); and in

[1] This statement is based on facts of record, which consists of several volumes of documents, depositions, and other submissions to the ALJ concerning the business relationship between USF and Royal Ahold. Citations to the record include the following: "Jt. Opp. Ex." refers to exhibits attached to Complainant's Joint Opposition to the Motions for Summary Decision; Deposition testimony ("Dep.") is indicated by deponent's last name followed by the relevant page number, and is located in the Deposition Testimony Volume submitted with the Jt. Opp.; "RA Ans." refers to Respondent Royal Ahold's Answer to Complainant's First Amended Complaint; all affidavit ("Aff.") and declaration ("Decl.") citations are to those attached as exhibits to RA Ans.; "Interr. Resp." refers to Royal Ahold's Objections and Responses to Complainant's First Set of Interrogatories, attached as Ex. D to Royal Ahold's Memorandum in Support of Respondent's Motion for Summary Decision.

the fall of that year, Royal Ahold's corporate executive board appointed a new CEO (Benjamin Dep. 25; Weiser Aff. ¶ 8 (Ex. G); RA Ans. ¶ 16). Based on recommendations from USF's new CEO, Royal Ahold also approved members of the CEO's executive team (Benjamin Dep. 21, 25). When the events at issue in this case occurred, there were no common officers or directors at Royal Ahold and USF (Interr. Resp. #5).

As a parent company subject to SOX, Royal Ahold developed certain policies and procedures that each of its subsidiaries, including USF, was required to implement (RA Ans. ¶ 19). Also, as part of its overall strategy to help USF recover from previous, and to prevent further, fraudulent activity (Whelan Aff. ¶ 3), Royal Ahold required USF to submit extensive financial reports, which were incorporated into SEC filings by Royal Ahold (RA Ans. ¶ 19), and imposed upon USF stringent standards for complying with the financial integrity requirements under SOX (id. at ¶ 17).

Among the SOX-related reforms that Royal Ahold established at USF were (1) a procedure where employees anonymously could call in complaints and report irregularities in company operations (Hallberlin Dep. 25-27); (2) an informal advisory board, consisting of Royal Ahold corporate officers and one outside member, designed primarily to provide input on strategic issues related to USF's fraud-prevention controls (Benjamin Dep. 27); (3) an audit committee with the specific responsibility for reviewing USF's financial controls (id. at 44); and (4) a requirement that all USF employees attend a mandatory ethics course and that high-level employees take courses dealing with financial integrity and conflicts of interest (Interr. Resp. #8).

Royal Ahold also required USF to create a steering committee with responsibility for overseeing the implementation of SOX-related Royal Ahold policies (Benjamin Dep. 38). The committee consisted of high-level USF employees, including the chief financial officer, the chief accounting officer, and an IT representative (id. at 39). USF also created an Office of Ethics and Compliance ("OEC"). The OEC provided updates to the Royal Ahold advisory board on USF's compliance with a full spectrum of regulatory requirements, but primarily with Royal Ahold's accounting policies (Benjamin Dep. 28). USF maintained a separate accounting policy manual and was solely responsible for the development and implementation of its accounting policies (Whelan Aff. ¶ 3).

USF's chief OEC officer developed and implemented an ethics training program for USF employees (Hallberlin Dep. 41-43). No one at Royal Ahold approved the training or made any modifications to the content of the program (id. at 41; Interr. Resp. #8). The ethics training is conducted entirely by USF employees and paid for by USF (Hallberlin Aff. ¶ 4 (Ex. K)).

Neither Royal Ahold nor any of its other subsidiaries uses the training program (id.).

USF is insured through Royal Ahold's wholly-owned insurance subsidiary, Molly Ana Company, for certain losses related to USF's self-insurance and high deductible programs for general liability, workers' compensation, and commercial automobile liability (Whelan Aff. ¶ 6). Royal Ahold also provides IT services to USF through its company, Royal Ahold Information Services (id.). USF pays a fee to Royal Ahold for its insurance and IT services (id.).

USF has its own Human Resources Department and maintains its own payroll system and bank accounts separate and distinct from that of Royal Ahold (Weiser Aff. ¶ 6; Whelan Aff. ¶¶ 4, 5). USF paid Ambrose's salary and other compensation, and provided him with health, welfare, and retirement benefits (Weiser Aff. ¶¶ 3, 6). Ambrose was subject to the personnel policies developed and implemented by USF and set forth in USF's Associate Handbook (id. at 6).

USF is solely responsible for issuing disciplinary actions against any of its employees who violate its Code of Conduct or engage in financial improprieties or fraudulent activities. There is no evidence that Royal Ahold had any involvement in the employment decisions at issue in this case or in any of the personnel actions relating to Ambrose (Weiser Aff. 4; Alianiello Aff. ¶ 4 (Ex. L)).

b. Ambrose made an insider trading allegation in July 2004 (Jt. Opp. Ex. 12), which USF's general counsel forwarded to Royal Ahold officials and its outside counsel, Paul Alfieri, who was representing Royal Ahold, USF, and Royal Ahold's affiliates in connection with the government's various fraud investigations (id. Ex.'s 10, 11; Alfieri Decl. ¶¶ 2, 3). Alfieri referred the allegation to the SEC (Jt. Opp. Ex. 12). The next month, Ambrose made a similar allegation in an email to USF's CEO (id. Ex. 14) who immediately forwarded the email to USF's corporate officers (Benjamin Dep. 114-15; Jt. Opp. Ex. 15). USF's general counsel forwarded the email to Royal Ahold officials (id. Ex. 16) who, in turn, forwarded the email to the SEC (id. Ex.17,18).

Upon receipt of Ambrose's complaints, the SEC contacted Alfieri seeking Ambrose's appearance at an SEC hearing (Alfieri Decl. ¶¶ 4, 5). Alfieri made arrangements for an independent law firm to represent Ambrose in connection with his appearance before the SEC (id. at 5). Royal Ahold paid Ambrose's attorney's fees (Interr. Resp. #11).

In early November 2004, after his testimony before the SEC, USF initiated termination proceedings against Ambrose (Alianiello Aff. ¶ 5). Ambrose was terminated one month later (Id. at ¶ 6).

3. The ALJ's decision

In granting summary judgment in favor of USF and Royal Ahold, the ALJ concluded that Congress did not intend section

806 to cover the employees of subsidiaries of publicly traded companies (Dec. at 11). Relying on United States v. Bestfoods, 524 U.S. 51, 61 (1998), which held that the normal attributes of a parent-subsidiary relationship will not render the parent liable for its subsidiary's environmental violations, the ALJ concluded that USF and Royal Ahold were not so intertwined as to represent one entity for liability purposes (id. at 11-12). Rather, the ALJ stated that "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." Id. at 12. The ALJ then determined that under this test, Ambrose could not proceed with his complaint because Royal Ahold "exerted no control or influence over the terms, conditions, and eventual termination of [Ambrose's] employment," and "all the individuals who played an active role in [Ambrose's] employment and supervision were employed by USF and not Royal Ahold." Id.

ARGUMENT

THE "INTEGRATED EMPLOYER" TEST SHOULD BE APPLIED TO DETERMINE WHETHER EMPLOYEES OF SUBSIDIARIES OF PUBLICLY TRADED COMPANIES ARE PROTECTED UNDER THE WHISTLEBLOWER PROVISIONS OF THE SARBANES-OXLEY ACT.

SOX was enacted to protect investors by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. The Act's whistleblower provision furthers this statutory purpose by encouraging employees of publicly traded companies to disclose information that they reasonably believe constitute federal securities violations or fraud against shareholders. See 18 U.S.C. 1514A(a). Section 806 prohibits retaliation against employees for such disclosures by 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 . . . ." 18 U.S.C. 1514A(a); see also 29 C.F.R. 1980.101. Section 806 does not expressly include subsidiaries of publicly traded companies within its coverage.

By its terms, section 806 does not expressly include subsidiaries of publicly traded companies within its coverage, although it does include "any officer, employee, contractor, subcontractor, or agent of such company . . . ." 18 U.S.C. 1514A(a). Construing this provision, the ALJs have provided differing views as to the coverage of subsidiaries under SOX. Compare, e.g., Morefield v. Exelon Servs., Inc., 2004-SOX-2 (Jan. 28, 2004) (subsidiaries covered based on coverage of publicly traded parent); with Bothwell v. American Life Income, 2005-SOX-57 (Sept. 19, 2005) (subsidiaries of publicly traded companies not covered as employers). In Morefield, the ALJ concluded that subsidiaries of publicly traded companies are covered based on the covered status of their parent companies. The ALJ reasoned that "[a] publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units; and Congress insisted upon accuracy and integrity in financial reporting at all levels of the corporate structure, including the non-publicly traded subsidiaries." By contrast, the ALJ in Bothwell, relying on Bestfoods, 524 U.S. at 61, held that subsidiaries only can be covered by virtue of their parent companies when the "corporate veil" is pierced. See also Platone v. FLYi, Inc. (formerly Atlantic Coast Airlines Holdings, Inc.), 2003-SOX-27 (ALJ Apr. 30, 2004) (relying on veil piercing factors to find coverage) (petition for review pending, ARB No. 04-154).

1. There is no legal basis to conclude that subsidiaries of publicly traded companies are automatically covered under section 806

A basic tenet of corporate law is that a parent corporation is not liable for the acts of its subsidiary merely because it owns the subsidiary's stock. See Bestfoods, 524 U.S. at 61, 63 (holding that the normal attributes of a parent-subsidiary relationship will not render the subsidiary and parent one legal entity);[2] see also Pearson v. Component Tech. Corp., 247 F.3d

[2] At issue in Bestfoods was whether, under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), "a parent corporation that actively participated in, and exercised control over, the operations of a [wholly-owned] subsidiary, may without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary." 524

471, 484 (3d Cir. 2001) ("[M]ere ownership of a subsidiary does not justify the imposition of liability on the parent."). Consequently, courts have routinely required specific authorization from Congress before abrogating well-established principles of corporate law. See Bestfoods, 524 U.S. at 63; see also Dole Food Co. v. Patrickson, 538 U.S. 468, 476 (2003) ("The text of the [Foreign Sovereign Immunities Act] gives no indication that Congress intended us to depart from the general rules regarding corporate formalities. Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so."). Cf. Int'l Bhd. of Painters and Allied Trades Union v. George A. Kracher, Inc., 856 F.2d 1546, 1550 (D.C. Cir. 1988) ("Limited liability is a hallmark of corporate law. Surely if Congress had decided to alter such a universal and time-honored concept, it would have signaled that resolve somehow in the legislative history.").

Well-established principles of statutory construction also support the conclusion that subsidiaries are not automatically covered under section 806. SOX's whistleblower provision omits any reference to subsidiaries, even though other sections of the

U.S. at 55. The Supreme Court held that more than ownership and control were required to find a parent corporation derivatively liable. The Court reasoned that "the failure of [CERCLA] to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." Id. at 63.

Act expressly include subsidiaries within the class of regulated entities. See, e.g., section 302(a)(4)(B) (15 U.S.C. 7241(a)(4)(B)); section 402 (15 U.S.C. 78m(k)(1)).[3] It is well settled that "where Congress includes particular language in one section of the statute but omits it in another section of the same Act, . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion." Burlington Northern and Santa Fe Ry. Co. v. White, 126 S.Ct. 2405, 2412 (2006) (citing Russello v. United States, 464 U.S. 16, 23 (1983)); see also Banjo Buddies, Inc. v. Renosky, 399 F.3d 168, 174 (3d Cir. 2005).[4]

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[3] Section 302(a)(4)(B) requires corporate officers who sign periodic reports submitted to the SEC to design "internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to those officers by others within those entities, particularly during the period in which the reports are being prepared." 15 U.S.C. 7241(a)(4)(B) (emphasis added). Section 402 prohibits a publicly traded company "directly or indirectly, including through any subsidiary" from extending credit in the form of a personal loan to any director or executive officer of the company. See 15 U.S.C. 78m(k)(1).

[4] The inclusion of the term "agent" within the definition of SOX-covered companies does not reflect congressional intent to cover subsidiaries of publicly traded companies because, under common law principles, a subsidiary is not considered an "agent" of its parent corporation absent evidence that the subsidiary was conferred actual or apparent authority to act on behalf of the parent. See Fletcher v. Atex, Inc., 68 F.3d 1451, 1460-61 (2d Cir. 1995); Manchester Equip. Co. v. American Way and Moving Co., 60 F. Supp. 2d 3, 7 (E.D.N.Y. 1999); see also Restatement (Second) of Agency §14M (2003). A subsidiary nevertheless may be covered under an agency analysis based on the facts of a particular case. See, e.g., Klopfenstein v. PCC Flow Techs. Holdings, Inc., No. 04-149, 2006 WL 1516650 (ARB May 31, 2006)

2. The integrated employer test is commonly applied under other employment statutes

The integrated employer test is routinely used by federal courts in cases under labor and employment statutes in determining whether a parent corporation and its subsidiary are both liable for statutory violations.[5] The test, which was first developed by the National Labor Relations Board and endorsed by the Supreme Court in Radio and Television Broad. Techs. Local Union 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255 (1965), to determine whether two firms were sufficiently related to meet the jurisdictional minimum amount of business volume, focuses on labor relations and economic realities rather than on

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(remanding to ALJ to consider whether facts justify coverage of subsidiaries and their officers under an agency analysis).

[5] Although "veil piercing" is another test that courts use to determine whether to impose liability upon two or more affiliated corporations when circumstances dictate that corporate formalities should not control, see Pearson, 247 F.3d at 484, its use generally arises outside of labor and employment law. Veil piercing has been criticized "for employing the same formulations of the test across different contexts in which plaintiffs seek to impose liability." Id. at 485 (citations omitted). The specific factors used to determine whether to pierce the corporate veil vary from jurisdiction to jurisdiction. See Brotherhood of Locomotive Eng'rs v. Springfield Terminal Ry. Co., 210 F.3d 18, 26 (1st Cir. 2000) (federal standard for piercing corporate veil is notably imprecise and fact intensive; no litmus test in federal courts governing when to disregard corporate form). Moreover, a party seeking to pierce the corporate veil bears a heavy burden, with the inquiry generally involving whether the corporate form to be disregarded is merely a legal fiction. See Pearson, 247 F.3d at 485 (citation omitted).

corporate formalities. See Pearson, 247 F.3d at 486; Murray v. Miner, 74 F.3d 402, 405 (2d Cir. 1996).

Under the integrated employer test, two or more companies may be considered so interrelated that they constitute a single employer subject to liability or coverage under the particular statute. In determining whether to treat entities as a single employer, courts examine the following four factors: (1) the interrelation of operations; (2) centralized control of labor or employment decisions; (3) common management; and (4) common ownership or financial control. See Pearson, 247 F.3d at 486; Hukill v. Auto Care, Inc., 192 F.3d 437, 442 (4th Cir. 1999); see also, e.g., Sandoval v. The City of Boulder, Colorado, 388 F.3d 1312, 1322 (10th Cir. 2004); Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 993-94 (6th Cir. 1997). None of these factors is conclusive, and all four need not be met in every case. See Armbruster v. Quinn, 711 F.2d 1332, 1337-38 (6th Cir. 1983). Instead, a single employer determination "ultimately depends on all the circumstances of the case." Pearson, 247 F.3d at 486. Nevertheless, the centralized control of labor operations is the most important of the four factors. See Bristol v. Bd. of Cy. Comm'rs of Cy of Clear Creek, 312 F.3d 1213, 1220 (10th Cir. 2002); Romano v. U-Haul Int'l, 233 F.3d 655, 666 (1st Cir. 2000).

Use of the integrated employer test, also known as the "single employer" test, generally arises in two circumstances.

First, the test is used to impose liability on a parent corporation when its subsidiary corporation is insolvent. See Pearson, 247 F.3d at 483. Second, the integrated employer test is used in employment cases to determine when affiliated corporations of a covered employer should be viewed as one enterprise for statutory coverage purposes. Id. It is this latter use of the integrated employer test that is applicable here.

Courts began applying the integrated employer test in employment discrimination cases in the 1970s. See Baker v. Stuart Broad. Co., 560 F.2d 389 (8th Cir. 1977) (applying test to Title VII, which covers employers with 15 or more employees, 42 U.S.C. 2000e(b)). Its application to determine when the employees of two or more corporations should be aggregated to meet the coverage threshold under numerous employment laws has found wide acceptance in the federal courts. See, e.g., Morrison v. Magic Carpet Aviation, 383 F.3d 1253, 1257 (11th Cir. 2004) (applying test under Family and Medical Leave Act ("FMLA"), which covers employers that have at least 50 employees within a 75 mile radius of the worksite, 29 U.S.C. 2611(2)(B)(ii)); Childress v. Darby Lumber, Inc., 357 F.3d 1000, 1005-06 (9th Cir. 2004) (applying test under Worker Adjustment and Retraining Notification Act ("WARN Act"), which defines an employer as "any business enterprise" that employs 100 or more employees, 29 U.S.C. 2101(a)); Haulbrook v. Michelin North

America, Inc., 252 F.3d 696, 703 n.1 (D.C. Cir. 2001) (Americans with Disabilities Act ("ADA"), which, like Title VII, limits coverage to employers that have 15 or more employees, 42 U.S.C. 12111(5)(A)); Pearson, 247 F.3d at 494-95 (WARN Act); U-Haul Int'l, 233 F.3d at 665 (Title VII); Hollowell v. Orleans Regional Hosp. LLC 217 F.3d 379, 388-89 (5th Cir. 2000) (WARN Act); Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1184 (10th Cir. 1999) (Title VII); Hukill, 192 F.3d at 442 (FMLA); Swallows, 128 F.3d at 993-94 (ADA; Age Discrimination in Employment Act ("ADEA"), which covers employers employing 20 or more employees, 29 U.S.C. 630(b)); and Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240-41 (2d Cir. 1995) (Title VII).[6] But see Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 86-87 (3d Cir. 2003) ("substantive consolidation" test found under bankruptcy law is appropriate test under Title VII to determine whether entities may be considered consolidated); Papa v. Katy Indus., Inc., 166 F.3d 937, 940-44 (7th Cir.), cert. denied, 528 U.S. 1019 (1999) (applying integrated employer test to Title

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[6] The Second Circuit recently stated:

> There is well-established authority under this theory that, in appropriate circumstances, an employee, who is technically employed on the books of one entity, which is deemed to be part of a larger "single-employer" entity, may impose liability for certain violations of employment law not only on the nominal employer but also on another entity comprising part of the single integrated employer.

Arculeo v. On-Site Sales & Mktg., LLC, 425 F.3d 193, 198 (2d Cir. 2005) (citing Arrowsmith Shelbourne).

VII, ADA, and ADEA conflicts with Congress' specific intent to shield small companies from liability under those statutes).[7]

The integrated employer test also has been applied in cases that do not involve statutory small employer exemptions. See, e.g., Beverly Enters. v. Herman, 130 F. Supp. 2d 1, 22 (D.D.C. 2000) (arising under the non-discrimination and affirmative action provisions applicable to government contractors under Executive Order 11,246 (30 Fed. Reg. 12319 (1965)), section 503 of the Rehabilitation Act of 1973 (29 U.S.C. 793), and section 402 of the Vietnam Era Veterans' Readjustment Assistance Act (38 U.S.C. 4212), enforced by the Office of Federal Contract Compliance Programs). In Beverly, the court used the OFCCP's guidelines for determining whether a parent and a subsidiary are to be treated as a single entity for the purpose of imposing sanctions for violations. The OFCCP's guidelines require the agency to consider whether: (1) the parent and subsidiaries have common ownership; (2) the parent and subsidiaries have the same

[7] Ambrose's assigned offices were located in Pennsylvania, but he lived in Maryland at the time of his termination. Thus, an appeal presumably could be brought in either the Third of Fourth Circuit. See 18 U.S.C. 1514A(b)(2)(A), incorporating 49 U.S.C. 42121(b)(4)(A). The Third Circuit has applied varying tests in employment cases for determining when corporations may be considered a single employer. In Pearson, 247 F.3d at 485-90, the court applied the traditional integrated employer test. On the other hand, in Nesbit, 347 F.3d at 86-87, the court applied a "consolidated subsidiary" test derived from bankruptcy law, acknowledging as it did so that the test varies from circuit to circuit. The Fourth Circuit has adopted the integrated employer test. See Haulbrook, 252 F.3d at 703 n.1; Hukill, 192 F.3d at 442-44.

directors and/or officers; (3) the parent has de facto control of the subsidiary; (4) the personnel policies of the parent and the subsidiaries emanate from a common source; and, (5) the operations of the parent and the subsidiaries are dependent on each other. See 1972 WL 8708, 52 Comp. Gen. 145, 146 (1972) (Opinion letter of Comptroller General reciting the guidelines taken from a letter dated Feb. 26, 1971 of the Solicitor of Labor). As the court acknowledged, these guidelines are analogous to the integrated employer test. 130 F. Supp. 2d at 22.

3. The Board should adopt the integrated employer test for determining subsidiary coverage under section 806 of SOX

The Assistant Secretary urges the Board to adopt the integrated employer test for determining subsidiary coverage under section 806. Application of the integrated employer test to subsidiary coverage under section 806 would serve several significant purposes.

First, as discussed above, the integrated employer test is routinely used in employment discrimination cases to determine when affiliated corporations should be considered one entity for liability and coverage purposes.[8] Its use also is appropriate here because whistleblower provisions like the one in SOX are

[8] Use of the integrated employer test in SOX whistleblower cases thus will promote the congressional goal of consistency. See 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Senator Leahy) (section 806 "sets a national floor for employee protections in the context of publicly traded companies").

traditionally regarded as employment related. See English v. General Elec. Co., 496 U.S. 72, 83 and n.6 (1990). In English, the Supreme Court noted that enforcement of the Energy Reorganization Act's ("ERA") whistleblower provision was entrusted by Congress to the Department of Labor and not to the Nuclear Regulatory Commission. 496 U.S. at 83 n.6. Similarly, here, enforcement of Sarbanes-Oxley's whistleblower provision was entrusted to the Department and not to the SEC, the primary agency responsible for administering Sarbanes-Oxley.

Indeed, the language of section 806, limiting coverage to companies with a class of securities registered under section 12 or that are required to file reports under section 15(d) of the Securities Exchange Act of 1934, is analogous to that of other employment statutes limiting coverage in which the integrated employer test is used. For instance, the WARN Act defines an employer as "any business enterprise" that "employs 100 or more employees, excluding part-time employees" or "100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)." 29 U.S.C. 2101(a)(1). Similarly, Title VII prohibits an employer from discriminating against an employee with respect to race, color, religion, sex, or national origin, 42 U.S.C. 2000e-2(a)(1), and defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." Id. at 2000e(b). Under Executive Order 11,246, the Secretary is responsible for ensuring that "all Government contractors" not discriminate against employees or applicants for employment because of race, color, religion, sex, and national origin. In all these situations, courts have used the integrated employer test to determine whether two or more entities (typically, parent and subsidiary corporations) have integrated functions to such an extent that they are acting as a "single employer" and thus satisfy the statutory (or Executive Order) limits on coverage. Congress presumably was aware of how courts have interpreted these coverage provisions when it enacted section 806. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 379-80 (1982); see also Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."). Accordingly, nothing in section 806 justifies the use of a different approach to determine when two or more corporations will be considered a single enterprise than is used under these other enactments.[9]

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[9] Despite the widespread acceptance of the integrated employer test in a variety of employment-related contexts, the Seventh Circuit rejected the test in Papa, 166 F.3d at 940-44. The court determined that applying the integrated employer test conflicted with Congress' specific intent to shield small companies from liability under those statutes. Further, the court viewed the test as too vague to be applied consistently in the context of anti-discrimination laws. Id. at 940-42. No

A second reason for this Board to adopt the integrated employer test is that it would further the purposes of the statute. Although it is clear from the language of section 806 that Congress did not intend to automatically cover subsidiaries, adoption of the integrated employer test recognizes that where two companies are "integrated," employees of both companies should be protected if they engage in whistleblower activity. The test properly focuses on "labor relations . . . and economic realities as opposed to corporate formalities." Pearson, 247 F.3d at 486. In so doing, it reflects the "fairness of imposing liability for labor infractions where two nominally independent entities do not act under an arm's length relationship." Id. (internal quotation omitted). As we have noted, SOX was designed to ensure the accuracy and integrity of financial reporting at all levels of the corporate structure. See Sections 302(a)(4)(B) and 402 (15

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other circuit has adopted the Papa test for determining whether two corporate entities should be consolidated. Moreover, the court's concern in Papa does not apply to SOX whistleblower cases because, unlike Title VII, ADA, and ADEA, section 806 does not contain a small employer exemption. The Third Circuit has applied varying tests in employment cases. In Pearson, 247 F.3d at 485-90, the court applied the integrated employer test. In Nesbit, 347 F.3d at 86-87, the Third Circuit stated that the appropriate inquiry to determine whether entities may be considered consolidated for statutory purposes is the "substantive consolidation" test found under bankruptcy law, the factors for which, the court acknowledged, themselves vary from circuit to circuit. The "substantive consolidation" test, which has not been adopted by another circuit, appears to be slightly more restrictive than the integrated employer test and does not have labor relations as its primary focus.

U.S.C. 78j-1(m)(3)(B)(ii); 15 U.S.C. 7241(a)(4)(B); and 15 U.S.C. 78m(k)(1), respectively).

Finally, not only would adopting the integrated employer test create consistency in cases brought under SOX's whistleblower program, it also would promote uniformity among other programs administered by the Department of Labor. Such uniformity enhances compliance by employers regulated by the Department. Regulations implementing several of the Department's enforcement statutes adopt a form of the "integrated employer" test. See, e.g., the FMLA regulations at 29 C.F.R. 825.104(c)(2); the WARN Act regulations at 20 C.F.R. 639.3(a)(2); see also the OFCCP Guidelines, supra.

4. USF and Royal Ahold are not integrated employers under the four-factor test

Although the ALJ correctly concluded that a subsidiary is not covered under section 806 based solely on the covered status of its parent, the ALJ used an overly restrictive test. Specifically, to find coverage, the ALJ required a showing that the publicly traded company controlled the employment conditions of the particular employee bringing the discrimination complaint. Nevertheless, the ALJ's conclusion should be upheld because, as explained below, USF and Royal Ahold are not integrated employers.

a. Interrelation of operations. The focus of the interrelation element is whether the parent corporation "excessively influenced or interfered with the business operations of its subsidiary . . . beyond that found in the typical parent-subsidiary relationship." See Lusk v. Foxmeyer Health Corp., 129 F.3d 773, 778 (5th Cir. 1997). The ALJ determined that some "indicia of interrelatedness" was present in this case, noting that: (1) during the SEC proceedings, both Royal Ahold and USF were the subjects of the investigation; (2) both companies were represented by the same attorney before the SEC; (3) Ambrose's insider trading complaints were forwarded to Royal Ahold by USF's general counsel; (4) Royal Ahold paid Ambrose's legal fees when he participated in the SEC proceedings; and (5) prior to his appointment, USF's CEO was vetted by Royal Ahold's executives. Dec. at 11-12.

Notwithstanding these indicia of interrelatedness, the ALJ correctly concluded that the facts do not establish a business interrelation sufficient to treat two entities as a single employer. Compare, e.g., Armbruster, 711 F.2d at 1338 (finding interrelation of operations where parent company "handled" subsidiary's accounts receivable and its payroll and cash accounting, provided it with administrative backup, monitored its sales shipments, allowed subsidiary's managerial employees to use its company credit cards, and housed subsidiary's bank accounts at its headquarters); McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933-34 (11th Cir. 1987) (parent and subsidiary companies were marketed as "twins in service," and parent kept subsidiary's books and records, issued its payroll checks and paid its bills). In other words, Royal Ahold did not excessively influence or interfere with USF's business operations.

Nor is it particularly significant, contrary to Ambrose's contention (Br. at 25-26), that USF required several members of its executive team to report directly to Royal Ahold senior executives. Courts have recognized that imputing liability to a parent corporation for the subsidiary's actions cannot be justified simply because senior executives of a subsidiary have dual reporting relationships to the subsidiary and parent corporations. See, e.g., Pearson, 247 F.3d at 501 (fact that the subsidiary's chain-of-command ultimately results in the top officers of the subsidiary reporting to the parent corporation does not establish an interrelation of operations).

b. Common management. The record indicates that Royal Ahold and USF did not share common officers or board members. While Royal Ahold selected USF's new CEO and approved the CEO's executive staff, there is no evidence that once these officers were selected, Royal Ahold retained the ability to influence USF's management. See Armbruster, 711 F.2d at 1339 (finding common management where president of one company was also director and officer of the other); McKenzie, 834 F.2d at 934 (companies shared common president).

c. Centralized control of employment decisions. The circuit courts applying the integrated employer test are nearly unanimous in their view that control over employment decisions is the most important of the four factors in evaluating employer status. See, e.g., Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1244-45 (11th Cir. 1998) (control of employment decisions is crucial under the integrated-enterprise test). Nevertheless, courts differ as to the amount of control needed to satisfy this element. See, e.g., Lockhard v. Pizza Hut, Inc., 162 F.3d 1062, 1071 (10th Cir. 1998) (parent's broad policy statements regarding employment matters not sufficient to establish centralized control over labor relations; rather, parent must control day-to-day employment decisions of subsidiary); Swallows, 128 F.3d at 995 (control is authority to hire and fire, or make final decisions with regard to employment); Lusk, 129 F.3d at 777 (control depends on whether parent was the final decision-maker in connection with the employment matters underlying litigation); Hukill, 192 F.3d at 444 (control involves power to hire, fire, and supervise, as well as to control work schedules); U-Haul Int'l, 233 F.3d at 666 (control focuses on extent to which parent "exerts an amount of participation [that] is sufficient and necessary to the total employment process, even absent total control or ultimate authority over hiring decisions").[10] Regardless of the amount of

[10] Pearson suggests that the differences in how courts view

control necessary, the record establishes that Royal Ahold exercised insufficient control over labor relations at USF.

As noted above, Royal Ahold selected USF's CEO and had a voice in determining USF's upper level management. The two companies, however, maintained separate employment policies, and USF consistently maintained a separate workforce, with separate personnel and payroll operations. Nor is there evidence that Royal Ahold exerted any influence or control over Ambrose's (or any other employee's) working conditions. Finally, as the ALJ found, Royal Ahold did not approve, recommend, or suggest to USF that Ambrose be suspended or discharged. Thus, Royal Ahold did not exercise the type of control over USF's employment decisions required to establish that the companies were a single employer. Compare, e.g., Armbruster, 711 F.2d at 1338-39 (parent controlled labor relations of subsidiary where parent hired subsidiary president and plant manager, approved plaintiff's hiring and was involved in her termination); Arrowsmith Shelburne, 69 F.3d at 1241 (parent approved subsidiary's personnel status reports and all its major employment decisions, and employee of parent hired and fired plaintiff, an employee of subsidiary).

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the "control of labor" prong may result from a sliding scale, such that "if the parent has sufficiently overwhelmed its subsidiary in taking the challenged action, such a showing is sufficient to create liability; if the parent was involved to a lesser degree, there must be some demonstration of the presence of the other aspects of the integrated employer test." 247 F.3d at 487.

Ambrose suggests that Royal Ahold exercised significant management control as part of its SOX compliance efforts. For instance, Royal Ahold requires USF to submit extensive financial reports to be incorporated into SEC filings and requires USF's top officials to report to an oversight board comprised of Royal Ahold executive officers; Royal Ahold also has an audit committee with responsibility for reviewing financial controls at USF and it requires USF employees to comply with special ethics codes and attend mandatory ethics training, and initiated a company-wide financial integrity program for key personnel. See Stmnt. of Facts, supra at 5-7. While these facts indicate that Royal Ahold had some influence over the SOX compliance activities of USF's managers, Royal Ahold did not control the employment decisions at USF. Rather, these are measures necessitated by SOX's statutory requirements, see, e.g., 15 U.S.C. 78j-1(m)(4)(A) and (B); 7201(3)(A); 7241(a)(4)(B) and, thus, are the type of control typically exerted over a subsidiary by a publicly traded parent. Cf. Migrant and Seasonal Agricultural Worker Protection Act, 62 Fed. Reg. 11734, 11745 (Mar. 12, 1997) (Preamble to Final Rule) ("[W]here agricultural employers/associations undertake responsibilities solely as a result of a legal obligation unrelated to an employment relationship, those undertakings will not be considered in the joint employment analysis.").

d. Common ownership or financial control. It is undisputed that the "common ownership" factor is met in this case; USF is a wholly-owned subsidiary of Royal Ahold. Although common ownership can be evidence of an integrated employer relationship, it is "the least important factor" to consider, see, e.g., Int'l Bhd. of Teamsters v. American Delivery Serv., 50 F.3d 770, 775 (9th Cir. 1995), because common ownership is an ordinary aspect of a parent-subsidiary relationship. There is no legal authority for the "imposition of liability merely as a result of the control ordinarily exercised by a parent corporation over a subsidiary by virtue of its ownership." Pearson, 247 F.3d at 490.

In sum, examining the four factors together, USF and Royal Ahold cannot be considered a single employer under the integrated employer test. Common ownership/financial control appears to be the only prong of the integrated employer test that is met here. The operations of USF and Royal Ahold are not significantly interrelated. There is no common management between the two companies, nor does Royal Ahold control labor relations at USF. With regard to control of labor relations, USF consistently maintained a separate workforce, with separate payroll and personnel systems. Although the evidence demonstrates that Royal Ahold had a voice in the determination of USF's upper level management, there is no evidence that Royal Ahold had any additional authority over employment conditions involving USF's employees. Accordingly, the ALJ properly dismissed Ambrose's complaint for lack of coverage under section 806.

CONCLUSION

For the reasons set forth above, the Assistant Secretary respectfully requests that this Board apply the integrated employer analysis -- the proper standard for determining subsidiary liability -- to the facts of this case, and affirm the ALJ's coverage determination.

Respectfully submitted,

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ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

In the Matter of: CARRI S. JOHNSON, Complainant, v. SIEMENS BUILDING TECHNOLOGIES, INC., and SIEMENS AG, Respondents.	ARB Case No. 08-032

BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

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In the Matter of: CARRI S. JOHNSON, Complainant, v. SIEMENS BUILDING TECHNOLOGIES, INC., and SIEMENS AG, Respondents.	ARB Case No. 08-032

BRIEF OF THE ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

Pursuant to 29 C.F.R. 1980.108(a)(1), the Assistant Secretary for the Occupational Safety and Health Administration ("OSHA"), through counsel, submits this brief to assist the Administrative Review Board ("ARB" or the "Board") in resolving an issue of first impression arising under section 806, the whistleblower protection provision, of Title VIII of the Sarbanes-Oxley Act of 2002 ("SOX" or the "Act"), 18 U.S.C. 1514A. Specifically, the Board should establish the proper standard for determining subsidiary coverage of publicly traded companies under section 806 of the Act. The Assistant Secretary, who implements section 806 and has a significant interest in how the statute is interpreted, urges the Board to adopt the "integrated employer" test -- long applied by the federal courts in various employment contexts -- to determine whether employees of subsidiaries of publicly traded companies are protected under SOX. Applying that test to the limited facts of record in this case, the Board should affirm the ALJ's ruling that the complainant was not protected by the SOX whistleblower provision.

STATEMENT OF THE ISSUE

Whether the "integrated employer" test should apply to determine whether employees of subsidiaries of publicly traded companies are protected under the whistleblower protection provision of the Sarbanes-Oxley Act.

STATEMENT OF THE CASE

A. Procedural History

Siemens Building Technologies, Inc. ("SBT") hired Carri S. Johnson in February 2002 to work as a Branch Administrator of its Roseville, Minnesota branch. Respondent's Exhibits ("RX") 22. SBT is a non-publicly traded subsidiary of Siemens Corporation, which in turn is a non-publicly traded subsidiary of Siemens AG, a publicly traded company. Affidavit of Daniel Hislip ("Hislip Aff."), submitted to the ALJ as Exhibit D to Respondent's motion for judgment as a matter of law, ¶¶ 4, 6.

On March 10, 2004, SBT dismissed Johnson. RX 88. On June 8, 2004, Johnson filed a complaint with OSHA alleging that she was terminated from her position at SBT in retaliation for having reported suspected fraudulent and illegal activity in booking sales and billing customers. She alleged that this termination violated SOX's whistleblower protection provision. She named SBT in her complaint.

On November 14, 2004, OSHA dismissed Johnson's complaint on the ground that there was no reasonable cause to believe that SBT and Siemens AG had dismissed Johnson in retaliation for engaging in protected activity under SOX. Johnson requested a hearing before an administrative law judge ("ALJ"). Johnson moved to amend her complaint to add Siemens Corporation and Siemens AG. SBT moved for a summary decision, arguing that it could not be covered under SOX as a non-publicly traded subsidiary. It also moved for a summary decision on the merits.

On May 9, 2006, the ALJ granted Johnson's motion to add Siemens AG because it had been named in the proceedings before OSHA and had been served with OSHA's findings and with notices from the Office of Administrative Law Judges. The ALJ denied Johnson's motion as to Siemens Corporation because it had never been named or served as a party. The ALJ denied SBT's two motions, ruling that the law was unsettled as to the coverage of subsidiary companies, and that there were genuine issues of fact as to the merits of the claim. The ALJ held a nine-day hearing in May and July 2006.

After the hearing, the ALJ revisited the coverage question in light of the recently issued ARB decision in Klopfenstein v. PCC Flow Technologies Holdings, Inc., ARB No. 04-149 (May 31, 2006). Based on Klopfenstein, the ALJ concluded that SBT did not act as an agent of Siemens AG when it dismissed Johnson, and therefore it was not a covered entity under the whistleblower protection provision of SOX. Johnson v. Siemens Building Technologies, Inc., ALJ No. 2005-SOX-00015, at 7-8 (November 27, 2007). Accordingly, the ALJ dismissed Johnson's complaint on November 27, 2007. Id. Johnson filed a petition for review with the ARB, and the case was accepted for review.

B. Statement of Facts[1]

SBT makes its own management and personnel decisions. Hislip Aff., ¶ 7. Siemens AG is not involved in such decisions. Id. SBT's employment policies and forms are labeled as being from SBT and contain no reference to Siemens AG. Complainant's Exhibits ("CX") 320 (respectful workplace and harassment policy); RX 11 (performance improvement plan policy); RX 225 (retaliation policy); RX 88 & 168 (personnel action forms); RX 1, 2, 21 (performance review and planning forms); RX 26 (counseling report forms); RX 8 (termination checklist form).

1 The Assistant Secretary's statement of facts is limited to those facts relevant to the issue of coverage of SBT, a non-publicly traded subsidiary, and specifically the relationship between SBT and its parent company, Siemens AG. The record evidence in this regard is sparse.

The managers and supervisors at the Roseville Branch are employed solely by SBT. Tr. 1279, 1748, 2035.

SBT and its employees were solely responsible for all of the employment decisions relating to Johnson. RX 81 (offer letter to Johnson); RX 2 (performance review for Johnson); RX 3, 27 (performance improvement plan for Johnson); RX 100 (recommendation for discharge signed by Roseville branch operations manager); Tr. 1817, 1930, 2050-51, 2174.

During the period of Johnson's employment at SBT, February 2002 until March 2004, Siemens AG circulated a memorandum that stated that, as part of its compliance with SOX, employees may report violations of accounting and auditing regulations to Siemens AG's Officers for Compliance. RX 259.

C. The ALJ's Decision

Relying on Klopfenstein, the ALJ reasoned that SBT could be a covered entity under SOX only if it were acting as an agent of its parent company Siemens AG when it dismissed Johnson. ALJ No. 2005-SOX-00015 at 5. The ALJ noted that Johnson had not alleged, nor was there any evidence, that Siemens AG had knowledge of or participated in the termination decision. Id. at 5-6, 8. All of the evidence indicated that SBT was solely responsible for the decision to dismiss Johnson. Id. The ALJ also noted that SBT's personnel policies and forms were separate from Siemens AG's. Id. at 8. Furthermore, all of the people Johnson notified of the suspected fraudulent and illegal activity were SBT employees. Id. None were Siemens AG employees. Lastly, there was no evidence that SBT and Siemens AG shared common directors or managers. Id. Because the evidence indicated that SBT was not acting as an agent of Siemens AG in dismissing Johnson, the ALJ concluded that SBT was not a covered entity under SOX. Id.

ARGUMENT

THE "INTEGRATED EMPLOYER" TEST SHOULD BE APPLIED TO DETERMINE WHETHER EMPLOYEES OF SUBSIDIARIES OF PUBLICLY TRADED COMPANIES ARE PROTECTED UNDER THE WHISTLEBLOWER PROTECTION PROVISION OF THE SARBANES-OXLEY ACT.

SOX was enacted to protect investors by ensuring corporate responsibility, enhancing public disclosure, and improving the quality and transparency of financial reporting and auditing. The Act's whistleblower protection provision furthers this statutory purpose by encouraging employees of publicly traded companies to disclose information that they reasonably believe constitute federal securities violations or fraud against shareholders. See 18 U.S.C. 1514A(a). Section 806 prohibits retaliation against employees for such disclosures by 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 . . . ." 18 U.S.C. 1514A(a); see also 29 C.F.R. 1980.101.

By its terms, section 806 does not expressly include subsidiaries of publicly traded companies within its coverage. See 18 U.S.C. 1514A(a). The ALJs have provided differing views as to the coverage of subsidiaries under SOX. Compare, e.g., Morefield v. Exelon Servs., Inc., 2004-SOX-2 (Jan. 28, 2004) (subsidiaries covered based on coverage of publicly traded parent); with Bothwell v. American Life Income, 2005-SOX-57 (Sept. 19, 2005) (subsidiaries of publicly traded companies covered only if the "corporate veil" is pierced); with Klopfenstein v. PCC Flow Technologies Holdings, Inc., ARB No. 04-149 (May 31, 2006) (subsidiary acting as parent's agent is covered under SOX's whistleblower protection provision). In Morefield, the ALJ concluded that subsidiaries of publicly traded companies are covered based on the covered status of their parent companies. The ALJ reasoned that "[a] publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units; and Congress insisted upon accuracy and integrity in financial reporting at all levels of the corporate structure, including the non-publicly traded subsidiaries." 2004-SOX-2 at 6. See Ciavarra v. BMC Software, Inc., 2008 WL 352273, *3 (S.D. Tex. Feb. 7, 2008) (citing Carnero v. Boston Scientific Corp., 433 F.3d 1, 6 (1st Cir. 2006)) ("an employee of a subsidiary is a covered employee for § 1514A purposes where the officers of the publicly-traded parent company have the authority to affect the employment of the subsidiaries' personnel"). By contrast, the ALJ in Bothwell held that subsidiaries only can be covered by virtue of their parent companies when the "corporate veil" is pierced. See Platone v. FLYi, Inc. (formerly Atlantic Coast Airlines Holdings, Inc.), 2003-SOX-27 (ALJ Apr. 30, 2004) (relying on veil piercing factors to find coverage), *reversed on other grounds*, ARB No. 04-154 (ARB Sept. 29, 2006). In other cases, such as this one and Klopfenstein, ALJ have deemed employees of non-publicly traded subsidiaries covered by SOX's whistleblower protection provision if the subsidiary was acting as the parent's agent when it dismissed the complainant.

Neither the automatic coverage theory found in Morefield, nor the corporate veil piercing test in Bothwell, is a proper means of determining subsidiary coverage.[2] While the agency test

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[2] The ALJ in this case did not address the merits of either of these methods of determining subsidiary coverage under SOX. Therefore, the Assistant Secretary will not address them extensively in this brief. As to automatic coverage of subsidiaries, a basic tenet of corporate law is that a parent corporation is not liable for the acts of its subsidiary merely because it owns the subsidiary's stock. See United States v. Bestfoods, 524 U.S. 51, 61, 63 (1998) (holding that the normal attributes of a parent-subsidiary relationship will not render the subsidiary and parent one legal entity). Further, well-established principles of statutory construction support the conclusion that subsidiaries are not automatically covered under section 806. SOX's whistleblower protection provision omits any reference to subsidiaries, even though other sections of the Act expressly include subsidiaries within the class of regulated entities. See, e.g., section 302(a)(4)(B) (15 U.S.C.

used by the ALJ in this case is one valid means of determining coverage for employees of subsidiaries, see Klopfenstein, the integrated employer test outlined below also is applicable.

A. The Integrated Employer Test is Commonly Applied under Other Employment Statutes

The integrated employer test is routinely used by federal courts in cases under labor and employment statutes in determining whether a parent corporation and its subsidiary are both liable for statutory violations. The test, which was first developed by the National Labor Relations Board and endorsed by the Supreme Court in Radio and Television Broad. Techs. Local Union 1264 v. Broadcast Serv. of Mobile, Inc., 380 U.S. 255 (1965), to determine whether two firms were sufficiently related

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7241(a)(4)(B)); section 402 (15 U.S.C. 78m(k)(1)). It is well settled that "where Congress includes particular language in one section of the statute but omits it in another section of the same Act, . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983) (citation omitted); see also Banjo Buddies, Inc. v. Renosky, 399 F.3d 168, 174 (3d Cir. 2005). As to a corporate veil piercing test, its use generally arises outside of labor and employment law. Veil piercing has been criticized "for employing the same formulations of the test across the different contexts in which plaintiffs seek to impose liability." Pearson v. Component Tech. Corp., 247 F.3d 471, 485 (3d Cir. 2001) (citations omitted). The specific factors used to determine whether to pierce the corporate veil vary from jurisdiction to jurisdiction. See Brotherhood of Locomotive Eng'rs v. Springfield Terminal Ry. Co., 210 F.3d 18, 26 (1st Cir. 2000) (federal standard for piercing corporate veil is notably imprecise and fact intensive; no litmus test in federal courts governing when to disregard corporate form). Moreover, a party seeking to pierce the corporate veil bears a heavy burden, with the inquiry generally involving whether the corporate form to be disregarded is merely a legal fiction. See Pearson, 247 F.3d at 485 (citation omitted).

to meet the jurisdictional minimum amount of business volume, focuses on labor relations and economic realities rather than on corporate formalities. See Pearson v. Component Tech. Corp., 247 F.3d 471, 486 (3d Cir. 2001); Murray v. Miner, 74 F.3d 402, 405 (2d Cir. 1996).

Under the integrated employer test, two or more companies may be considered so interrelated that they constitute a single employer subject to liability or coverage under the particular statute. In determining whether to treat entities as a single employer, courts examine the following four factors: (1) the interrelation of operations; (2) centralized control of labor or employment decisions; (3) common management; and (4) common ownership or financial control. See Pearson, 247 F.3d at 486; Hukill v. Auto Care, Inc., 192 F.3d 437, 442 (4th Cir. 1999); see also, e.g., Sandoval v. The City of Boulder, Colorado, 388 F.3d 1312, 1322 (10th Cir. 2004); Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 993-94 (6th Cir. 1997). None of these factors is conclusive, and all four need not be met in every case. See Armbruster v. Quinn, 711 F.2d 1332, 1337-38 (6th Cir. 1983), overruled on other grounds by Arbaugh v. Y & H Corp., 546 U.S. 500 (2006). Instead, a single employer determination "ultimately depends on all the circumstances of the case." Pearson, 247 F.3d at 486. Nevertheless, the centralized control of labor operations is the most important of the four factors. See Bristol v. Bd. of Cy. Comm'rs of Cy of

Clear Creek, 312 F.3d 1213, 1220 (10th Cir. 2002); Romano v. U-Haul Int'l, 233 F.3d 655, 666 (1st Cir. 2000).

Use of the integrated employer test, also known as the "single employer" test, generally arises in two circumstances. First, the test is used to impose liability on a parent corporation when its subsidiary corporation is insolvent. See Pearson, 247 F.3d at 483. Second, the integrated employer test is used in employment cases to determine when affiliated corporations of a covered employer should be viewed as one enterprise for statutory coverage purposes. Id. It is this latter use of the integrated employer test that is applicable here.

Courts began applying the integrated employer test in employment discrimination cases in the 1970s. See Baker v. Stuart Broad. Co., 560 F.2d 389 (8th Cir. 1977) (applying test to Title VII, which covers employers with 15 or more employees, 42 U.S.C. 2000e(b)). Its application to determine when the employees of two or more corporations should be aggregated to meet the coverage threshold under numerous employment laws has found wide acceptance in the federal courts. See, e.g., Morrison v. Magic Carpet Aviation, 383 F.3d 1253, 1257 (11th Cir. 2004) (applying test under Family and Medical Leave Act ("FMLA"), which covers employers that have at least 50 employees within a 75 mile radius of the worksite, 29 U.S.C. 2611(2)(B)(ii)); Childress v. Darby Lumber, Inc., 357 F.3d 1000, 1005-06 (9th Cir. 2004) (applying test under Worker Adjustment and Retraining Notification Act ("WARN Act"), which defines an employer as "any business enterprise" that employs 100 or more employees, 29 U. S.C. 2101(a)); Haulbrook v. Michelin North America, Inc., 252 F.3d 696, 703 n.1 (D.C. Cir. 2001) (Americans with Disabilities Act ("ADA"), which, like Title VII, limits coverage to employers that have 15 or more employees, 42 U.S.C. 12111(5)(A)); Pearson, 247 F.3d at 494-95 (WARN Act); U-Haul Int'l, 233 F.3d at 665 (Title VII); Hollowell v. Orleans Regional Hosp. LLC 217 F.3d 379, 388-89 (5th Cir. 2000) (WARN Act); Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1184 (10th Cir. 1999) (Title VII); Hukill, 192 F.3d at 442 (FMLA); Swallows, 128 F.3d at 993-94 (ADA; Age Discrimination in Employment Act ("ADEA"), which covers employers employing 20 or more employees, 29 U.S.C. 630(b)); and Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240-41 (2d Cir. 1995) (Title VII).[3] But see Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 86-87 (3d Cir. 2003) ("substantive consolidation" test found under

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[3] The Second Circuit stated:

> There is well-established authority under this theory that, in appropriate circumstances, an employee, who is technically employed on the books of one entity, which is deemed to be part of a larger "single-employer" entity, may impose liability for certain violations of employment law not only on the nominal employer but also on another entity comprising part of the single integrated employer.

Arculeo v. On-Site Sales & Mktg., LLC, 425 F.3d 193, 198 (2d Cir. 2005) (citing Arrowsmith Shelbourne).

bankruptcy law is appropriate test under Title VII to determine whether entities may be considered consolidated); Papa v. Katy Indus., Inc., 166 F.3d 937, 940-44 (7th Cir.), cert. denied, 528 U.S. 1019 (1999) (applying integrated employer test to Title VII, ADA, and ADEA conflicts with Congress' specific intent to shield small companies from liability under those statutes).

The integrated employer test also has been applied in cases that do not involve statutory small employer exemptions. See, e.g., Beverly Enters. v. Herman, 130 F. Supp. 2d 1, 22 (D.D.C. 2000) (arising under the non-discrimination and affirmative action provisions applicable to government contractors under Executive Order 11,246 (30 Fed. Reg. 12319 (1965)), section 503 of the Rehabilitation Act of 1973 (29 U.S.C. 793), and section 402 of the Vietnam Era Veterans' Readjustment Assistance Act (38 U.S.C. 4212), enforced by the Office of Federal Contract Compliance Programs ("OFCCP")). In Beverly, the court used the OFCCP's guidelines for determining whether a parent and a subsidiary are to be treated as a single "contractor" for the purpose of imposing sanctions for violations. The OFCCP's guidelines require the agency to consider whether: (1) the parent and subsidiaries have common ownership; (2) the parent and subsidiaries have the same directors and/or officers; (3) the parent has de facto control of the subsidiary; (4) the personnel policies of the parent and the subsidiaries emanate from a common source; and, (5) the operations of the parent and the subsidiaries are dependent on each other. See 1972 WL 8708, 52 Comp. Gen. 145, 146 (1972) (Opinion letter of Comptroller General reciting the guidelines taken from a letter dated Feb. 26, 1971 of the Solicitor of Labor). As the court acknowledged, these guidelines are analogous to the integrated employer test. 130 F. Supp. 2d at 22.

B. The Board Should Adopt the Integrated Employer Test for Determining Subsidiary Coverage under Section 806 of SOX

The Assistant Secretary urges the Board to adopt the integrated employer test for determining subsidiary coverage under section 806. Application of the integrated employer test to subsidiary coverage under section 806 would serve several significant purposes.

First, as discussed above, the integrated employer test is routinely used in employment discrimination cases to determine when affiliated corporations should be considered one entity for liability and coverage purposes.[4] Its use is appropriate here because whistleblower protection provisions like the one in SOX are traditionally regarded as employment related. See English v. General Elec. Co., 496 U.S. 72, 83 and n.6 (1990). In English, the Supreme Court noted that enforcement of the Energy Reorganization Act's ("ERA") whistleblower protection provision

[4] Use of the integrated employer test in SOX whistleblower cases thus will promote the congressional goal of consistency. See 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Senator Leahy) (section 806 "sets a national floor for employee protections in the context of publicly traded companies").

was entrusted by Congress to the Department of Labor and not to the Nuclear Regulatory Commission. Id. Similarly, here, enforcement of Sarbanes-Oxley's whistleblower protection provision was entrusted to the Department and not to the Securities and Exchange Commission, the primary agency responsible for administering other provisions of Sarbanes-Oxley.[5]

Indeed, the language of section 806, limiting coverage to companies with a class of securities registered under section 12 or that are required to file reports under section 15(d) of the Securities Exchange Act of 1934, is analogous to that of other limited-coverage employment statutes in which the integrated employer test is used. For instance, the WARN Act defines an employer as "any business enterprise" that "employs 100 or more employees, excluding part-time employees" or "100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)." 29 U.S.C. 2101(a)(1). Similarly, Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees

[5] On appeal, Johnson claims that the "control person" liability test, commonly used in securities law, should be used to determine subsidiary coverage under SOX's whistleblower protection provision. Based on that theory, Johnson claims that SBT is a covered entity under section 806. This argument lacks merit because, as discussed above, SOX's whistleblower protection provision is an employment-based provision, administered by OSHA within the Department of Labor, not by the Securities and Exchange Commission. Johnson cites no case law applying a control person liability theory outside the securities law context.

for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. 2000e(b). In all these situations, courts have used the integrated employer test to determine whether two or more entities (typically, parent and subsidiary corporations) have integrated functions to such an extent that they are acting as a "single employer" and thus satisfy the statutory limits on coverage. Congress presumably was aware of how courts have interpreted these coverage provisions when it enacted section 806. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 379-80 (1982); see also Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."). Accordingly, nothing in section 806 justifies the use of a different approach to determine when two or more corporations will be considered a single enterprise than is used under these other enactments.[6]

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[6] Despite the widespread acceptance of the integrated employer test in a variety of employment-related contexts, the Seventh Circuit rejected the test in Papa, 166 F.3d at 940-44. The court determined that applying the integrated employer test conflicted with Congress' specific intent to shield small companies from liability under those statutes. Further, the court viewed the test as too vague to be applied consistently in the context of anti-discrimination laws. Id. at 940-42. Instead, the court identified three possible situations in which a parent could be liable for the acts of its subsidiaries: 1) where the circumstances warrant piercing the corporate veil; 2) where the corporation was divided into subsidiaries in an effort to avoid liability under the anti-discrimination laws; or 3) where the parent directed the discriminatory act or policy at

A second reason for the Board to adopt the integrated employer test is that it would further the purposes of the statute. Although it is clear from the language of section 806 that Congress did not intend automatically to cover subsidiaries, adoption of the integrated employer test recognizes that where two companies are "integrated," employees of both companies should be protected if they engage in whistleblower activity. The test properly focuses on "labor relations . . . and it emphasis on economic realities as opposed to corporate formalities." Pearson, 247 F.3d at 486. In so doing, it reflects the "fairness of imposing liability for labor infractions where two nominally independent entities do not act under an arm's length relationship." Id. (internal quotation omitted). As noted above, SOX was designed to ensure the accuracy and integrity of financial reporting at all levels of the corporate structure. See Sections 302(a)(4)(B) and 402 (15 U.S.C. 78j-1(m)(3)(B)(ii); 15 U.S.C. 7241(a)(4)(B); and 15 U.S.C. 78m(k)(1), respectively).

Finally, not only would adopting the integrated employer test create consistency in cases brought under SOX's whistleblower program, it also would promote uniformity among

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issue. Id. at 940-41. No other circuit has adopted the Papa test for determining whether two corporate entities should be consolidated. Moreover, the court's concern in Papa does not apply to SOX whistleblower cases because, unlike Title VII, ADA, and ADEA, section 806 does not contain a small employer exemption.

other programs administered by the Department of Labor. Such uniformity enhances compliance by employers regulated by the Department. Regulations implementing several of the Department's enforcement statutes adopt a form of the "integrated employer" test. See, e.g., the FMLA regulations at 29 C.F.R. 825.104(c)(2); the WARN Act regulations at 20 C.F.R. 639.3(a)(2); see also the OFCCP Guidelines, supra.

C. The Integrated Employer Test is Similar to but Different From the Agency Test Exclusively Used by the ALJ in this Case

As outlined above, the integrated employer test examines four factors: 1) interrelations of operations; 2) centralized control of employment decisions; 3) common management; and 4) common ownership. In analyzing whether there is centralized control of employment decisions, which is the most important factor, the court looks to whether the parent controls employment decisions generally or determines general employment policies. It does not look exclusively to whether the parent participated in the decision to fire or otherwise take adverse action against the individual complainant employee. Thus, the inquiry is not specific to the parent's role with regard to the complainant employee. By contrast, the agency analysis in SOX whistleblower cases has focused on whether the parent corporation had knowledge of or participated in the decision to fire the complainant employee. See Klopfenstein, ARB No. 04-149 at 15-16. This distinction is important because, even if not acting as an agent with regard to the particular complainant's employment, a subsidiary may be covered if it is sufficiently integrated with its parent corporation.

While the agency test is one valid means of determining subsidiary coverage under SOX, it should not be viewed as the sole means. In Klopfenstein, the Board specifically noted that its holding does not address whether a subsidiary could be covered under SOX. Id. at *13. Rather, Klopfenstein addresses how to determine whether a subsidiary has acted as an agent of its parent corporation when it dismissed the complainant employee. The ALJ in this case interpreted Klopfenstein as holding that the only way SBT could be covered under SOX as a subsidiary is if it acted as Siemens AG's agent when it fired Johnson. To the extent that the ALJ's analysis implies that this is the sole means by which a subsidiary would be covered under SOX, such a conclusion is unwarranted.

Regardless of the ALJ's interpretation of Klopfenstein, the ALJ's agency analysis was, in fact, not substantially different than it would have been had the ALJ used an integrated employer test. The ALJ focused primarily on whether Siemens AG had knowledge of or participated in SBT's decision to dismiss Johnson. 2005-SOX-00015 at 6, 8. However, the ALJ took note of the absence of any evidence that Siemens AG had any role in SBT's employment decisions generally or in setting SBT's employment policies. Id. at 8. This bolstered the ALJ's finding that SBT was not acting as Siemens AG's agent when it discharged Johnson. The ALJ also noted that there was no evidence that the two companies share common directors or management. Id. In effect, the ALJ's analysis in this case was not significantly different than it would have been had it used an integrated employer test.

D. Based on the Record Evidence, SBT and Siemens AG are not Integrated Employers under the Four-Factor Test

Despite having exclusively used an agency analysis to determine subsidiary coverage rather than an integrated employer analysis, the ALJ's conclusion should be upheld because, based on the evidence submitted by Johnson, SBT and Siemens AG are not integrated employers.[7]

1. Interrelation of operations. The focus of the interrelation element is whether the parent corporation "excessively influenced or interfered with the business operations of its subsidiary . . . beyond that found in the typical parent-subsidiary relationship." Lusk v. Foxmeyer Health Corp., 129 F.3d 773, 778 (5th Cir. 1997). Evidence of interrelation of operations includes a parent maintaining a subsidiary's books or records, or sharing office space or bank accounts. See Engelhardt v. S.P. Richards Co., Inc., 472 F.3d 1, 6-7 (1st Cir. 2006) (no interrelation of operations where

[7] It is the employee's burden to prove that the subsidiary and the parent are integrated companies and that she is covered under the statute. See, e.g., Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1069-70 (10th Cir. 1998).

subsidiary had separate headquarters, human resource department, records and record keeping, and separate worksites which fulfilled wholly distinct functions from parent and where the nature of their businesses was also distinct); Hukill, 192 F.3d at 443 (no interrelation of operations where companies operate at separate locations, file separate tax returns, hold separate shareholder and Board of Directors' meetings, conduct separate banking operations, and purchase goods separately); Swallows, 128 F.3d at 994 (no interrelation of operations where companies kept own records and maintained separate offices and bank accounts). Based on the facts of record, there is no evidence that Siemens AG and SBT are interrelated in any of these ways.

On appeal, Johnson points to various documents that she claims show that Siemens AG controlled SBT.[8] She claims that SAG controlled SBT's operations in the following ways: 1) by directing that all accounting related complaints by employees be made to Siemens AG as part of its SOX compliance; 2) by stating in its annual report that, as part of its system of internal certification, subsidiaries should certify the accuracy of financial reports; and 3) by including financial figures for SBT in Siemens AG's consolidated financial statements. These facts alone are not sufficient to show an interrelatedness of

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8 Johnson's arguments here form part of her contention that the ALJ's application of the agency test is erroneous. While she has not addressed an integrated employer test specifically, her arguments regarding control are equally applicable to an integrated employer analysis.

operations. There is no evidence, for instance, that Siemens AG handled SBT's accounting or other financial operations. See, e.g., Kang v. U. Lim America, Inc., 296 F.3d 810, 815 (9th Cir. 2002) (companies interrelated where parent kept subsidiary's accounts, issued its checks, and paid its bills). Taking steps to ensure that subsidiaries provide accurate financial reports and that the company complies with SOX does not rise to the necessary level of interrelatedness. See, e.g., Pearson, 247 F.3d at 501 ("the mere fact that the subsidiary's chain-of-command ultimately results in the top officers of the subsidiary reporting to the parent corporation does not establish the kind of day-to-day control necessary to establish an interrelation of operations").

2. Centralized control of employment decisions. The circuit courts applying the integrated employer test are nearly unanimous in their view that control over employment decisions is the most important of the four factors in evaluating employer status. See, e.g., Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1244-45 (11th Cir. 1998) (control of employment decisions is crucial under the integrated-enterprise test). Nevertheless, courts differ as to the amount of control needed to satisfy this element. See, e.g., Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1071 (10th Cir. 1998) (parent's broad policy statements regarding employment matters not sufficient to establish centralized control over labor relations; rather,

parent must control day-to-day employment decisions of subsidiary); Swallows, 128 F.3d at 995 (control is authority to hire and fire, or make final decisions with regard to employment); Lusk, 129 F.3d at 777 (control depends on whether parent was the final decision-maker in connection with the employment matters underlying litigation); Hukill, 192 F.3d at 444 (control involves power to hire, fire, and supervise, as well as to control work schedules); U-Haul Int'l, 233 F.3d at 666 (control focuses on extent to which parent "exerts an amount of participation [that] is sufficient and necessary to the total employment process, even absent total control or ultimate authority over hiring decisions").[9]

Regardless of the amount of control necessary, the facts in the record demonstrate that Siemens AG exercised insufficient control over employment decisions at SBT. SBT makes its own management and personnel decisions. Hislip Aff., ¶ 7. Siemens AG is not involved in such decisions. Id. SBT's employment policies are labeled as being from SBT and therefore appear to be separate from Siemens AG. See CX 320 (respectful workplace and harassment policy); RX 11 (performance improvement plan

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[9] Pearson suggests that the differences in how courts view the "control of labor" prong may result from a sliding scale, such that "if the parent has sufficiently overwhelmed its subsidiary in taking the challenged action, such a showing is sufficient to create liability; if the parent was involved to a lesser degree, there must be some demonstration of the presence of the other aspects of the integrated employer test." 247 F.3d at 487.

policy); RX 225 (retaliation policy). Siemens AG is not mentioned anywhere in these policies. SBT appears to use its own employment forms as well. See RX 88 & 168 (personnel action forms); RX 1 & 2 (performance review and planning forms); RX 26 (counseling report forms); RX 8 (termination checklist form). The managers and supervisors at the Roseville Branch appear to have been employed solely by SBT. See Tr. 1279, 1748, 2035. Finally, as the ALJ found, Siemens AG did not approve, recommend, or suggest to SBT that Johnson be discharged. SBT and its employees were solely responsible for all of the employment decisions relating to Johnson. See RX 81 (offer letter to Johnson); RX 2 (performance review for Johnson); RX 3, 27 (performance improvement plan for Johnson); RX 100 (recommendation for discharge signed by Roseville branch operations manager); Tr. 1817, 1930, 2050-51, 2174.

Contrary to Johnson's argument on appeal, there is no basis to impute to Siemens AG constructive knowledge of, let alone participation in, Johnson's dismissal.[10] Based on the evidence introduced by Johnson below, there is no basis upon which to conclude that Siemens AG exercised the type of control over SBT's employment decisions required to establish that the two

[10] The ALJ case Johnson cites, Deremer v. Gulfmark Offshore, Inc., 2006-SOX-00002 (June 29, 2007), does not address whether knowledge of or participation in a termination decision may be imputed to a parent corporation. Rather, it addresses whether an employer is deemed to have knowledge of a complainant's protected activity.

companies were a single employer. Compare, e.g., Armbruster, 711 F.2d at 1338-39 (parent controlled labor relations of subsidiary where parent hired subsidiary president and plant manager, approved plaintiff's hiring and was involved in her termination); Arrowsmith Shelburne, 69 F.3d at 1241 (parent approved subsidiary's personnel status reports and all its major employment decisions, and employee of parent hired and fired plaintiff, an employee of subsidiary).

Johnson's reliance on two memoranda from Siemens AG regarding how to handle employee accounting related complaints does not warrant a different conclusion. These memoranda state that employees may report violations of accounting and auditing regulations to Siemens AG's Office for Compliance or affiliated officers. RX 259, CX 289.[11] Johnson argues that these show that Siemens AG had the ability to influence the investigation of the accounting practices that she alleges she complained about, and thereby had the ability to affect the terms of her employment. That argument falls short. These memoranda reflect measures necessitated by SOX's statutory requirements, see, e.g., 15 U.S.C. 78j-1(m)(4)(A) and (B); 7201(3)(A); 7241(a)(4)(B), and, thus, are the type of control typically exerted over a subsidiary by a publicly traded parent. Cf. Migrant and Seasonal Agricultural Worker Protection Act, 62 Fed. Reg. 11734,

[11] One of the memoranda post-dates Johnson's employment with SBT and is therefore not relevant. CX 289. It is dated May 14, 2004, over two months after Johnson was dismissed.

11745 (Mar. 12, 1997) (Preamble to Final Rule) ("[W]here agricultural employers/associations undertake responsibilities solely as a result of a legal obligation unrelated to an employment relationship, those undertakings will not be considered in the joint employment analysis."). They do not suffice to show control over employment decisions to satisfy this critical factor of the integrated employer test.

c. Common management. As the ALJ noted, there is no evidence that Siemens AG and SBT share common officers, directors, or managers. See Armbruster, 711 F.2d at 1339 (finding common management where president of one company was also director and officer of the other); McKenzie, 834 F.2d at 934 (companies shared common president).

d. Common ownership or financial control. There can be no dispute that the "common ownership" factor is met in this case; SBT is a wholly-owned subsidiary of Siemens Corporation, which is a wholly-owned subsidiary of Siemens AG. Although common ownership can be evidence of an integrated employer relationship, it is "the least important factor" to consider, see, e.g., Int'l Bhd. of Teamsters v. American Delivery Serv., 50 F.3d 770, 775 (9th Cir. 1995), because common ownership is an ordinary aspect of a parent-subsidiary relationship. There is no legal authority for the "imposition of liability merely as a result of the control ordinarily exercised by a parent corporation over a subsidiary by virtue of its ownership." Pearson, 247 F.3d at 490.

In sum, examining the four factors together, SBT and Siemens AG cannot be considered a single employer under the integrated employer test based on the evidence submitted by Johnson below. Common ownership/financial control appears to be the only prong of the integrated employer test that is met here. Johnson has not shown that the operations of SBT and Siemens AG are significantly interrelated or that Siemens AG controls employment policies or decisions at SBT. Nor has Johnson shown that there is common management between the two companies. Accordingly, the Board should affirm the ALJ's decision dismissing Johnson's complaint for lack of coverage under section 806.

CONCLUSION

For the reasons set forth above, the Assistant Secretary respectfully requests that this Board apply the integrated employer analysis -- the proper standard for determining subsidiary liability -- to the facts of this case, and affirm the ALJ's coverage determination.[12]

Respectfully submitted,

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[12] Alternatively, because neither the parties nor the ALJ considered the applicability of the integrated employer test, the Board may wish to consider remanding the case to the ALJ for an examination of the record in light of the four factors of the integrated employer test. See Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714-15 (1986) (when appellate court determines that lower court misinterpreted law, and additional factual findings are essential to the resolution of the legal question, the appellate court should remand the matter so that the trial court can make those factual findings).

CERTIFICATE OF SERVICE

I certify that copies of the Assistant Secretary for the Occupational Safety and Health Administration's Brief of the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae were served on the following individuals on this 14th day of March, 2008:

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