UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD



In the Matter of:

CARRI S. JOHNSON,
Complainant,

v.

ARB CASE NO. 08-032
ALJ CASE NO. 2005-SOX-015

SIEMENS BUILDING
TECHNOLOGIES, INC. and
SIEMENS AG,
Respondents.

# BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF THE COMPLAINANT

This case presents the question of whether a public corporation and its nonpublic consolidated subsidiary may both be held liable under § 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, for the subsidiary's discharge of one of its employees in retaliation for reporting suspected fraudulent financial reporting. The clear meaning of § 806, read in the context of the Sarbanes-Oxley Act considered as a whole, is that both the public parent and the nonpublic consolidated subsidiary are liable for the consolidated subsidiary's retaliatory action.[1]

Section 806 of the Sarbanes-Oxley Act protects employees who report corporate financial malfeasance from retaliation by a "company with a class of

[1] This case does not present the occasion to address whether a public parent corporation or a nonpublic subsidiary may be held liable under § 806 where the subsidiary is an unconsolidated subsidiary.

securities registered under section 12 of the Securities Exchange Act of 1934 or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934," i.e., by a public company, or by "any officer, employee, contractor, subcontractor, or agent of such company." 18 U.S.C. § 1514A(a)(1). Placed in their statutory context, the whistleblower protections of § 806 clearly extend to "all employees of every constituent part of the publicly traded company, including, but not limited to, subsidiaries and subsidiaries of subsidiaries which are subject to its internal controls, the oversight of its audit committee, or contribute information, directly or indirectly, to its financial reports." *Morefield v. Exelon Servs., Inc.*, ALJ No. 2004-SOX-002, slip op. at 8 (ALJ Jan. 28, 2004). Employees of consolidated subsidiaries of public corporations are protected, because such subsidiaries "are subject to [the public parent corporation's] internal controls, the oversight of its audit committee, or contribute information, directly or indirectly, to its financial reports," *ibid.*, and are thus "agent[s] of [the public] company," 18 U.S.C. § 1514A(a), with regard to the accounting requirements of the Sarbanes-Oxley Act.

The purpose of the Sarbanes-Oxley Act is "[t]o protect investors by improving the accuracy and reliability of corporate [financial] disclosures." Pub.L. 107-204, 116 Stat. 745. Among the corporate financial disclosures covered by the Act are the financial statements of public companies and their consolidated subsidiaries.

As a general matter, a parent corporation is required to issue a consolidated financial statement disclosing the financial condition and operations of both the parent corporation and any subsidiary corporations in which the parent has a

controlling financial interest. *See* Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 94 (1987).[2] "The purpose of consolidated statements is to present, primarily for the benefit of the shareholders and creditors of the parent company, the results of operations and the financial position of a parent company and its subsidiaries essentially as if the group were a single company with one or more branches or divisions." *Id.* ¶ 1. "Consolidated financial statements . . . recognize[] that boundaries between separate corporate entities must be ignored to report the business carried on by a group of affiliated corporations as the economic and financial whole that it actually is." *Id.* ¶ 30.

Reflecting the fact that the parent corporation and its consolidated subsidiaries are an "economic and financial whole" for financial reporting purposes, the Sarbanes-Oxley Act imposes on public corporations various responsibilities with respect to financial reporting on their consolidated subsidiaries. Since most public corporations are holding companies that conduct virtually all of their operations through consolidated subsidiaries, the Act would fail of its purpose if it did not reflect this basic public accounting fact.

The Act requires the principal executive and financial officers of the reporting public corporation to certify that, "based on the officer's knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances

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[2] Consolidated statements are generally required with respect to subsidiaries in which the parent corporation has "a controlling financial interest" in the form of "ownership of a majority voting interest," i.e., "over fifty percent of the outstanding voting shares of [the other] company." *Id.* ¶ 2.

under such statements were made, not misleading." 15 U.S.C. 7241(a)(2). The Act further provides that "the signing officers . . . are responsible for establishing and maintaining internal controls" that are sufficient "to ensure that material information relating to the [parent public corporation] *and its consolidated subsidiaries* is made known to [the] officers by others *within those entities*." 15 U.S.C. § 7241(a)(4)(A) & (B) (emphasis added). "[T]he signing officers" must "disclose[] to the [parent public corporation's] auditors and the audit committee of the board of directors "all significant deficiencies in the design or operation of internal controls" and "any fraud, whether or not material, that involves management or other employees who have a significant role in the . . . internal controls." 15 U.S.C. § 7241(a)(5).

These provisions of the Act impose on the principal executive and financial officers of a public parent corporation an interlocking set of financial reporting obligations that run down to the subsidiary corporations controlled by the parent. The parent's officers are responsible not only for certifying that the consolidated reports are not materially misleading but also for establishing sufficient internal accounting controls to ensure that reliable financial information is reported by both the officers and employees of the parent public corporation itself and the officers and employees of the parent's consolidated subsidiaries. If the parent's officers learn of any deficiencies in these internal controls or of any fraud involving management or employees who have a significant role in the controls, including management or employees of a consolidated subsidiary, the parent's officers must

report that to parent's auditors and to the parent's audit committee.

The Act also requires that there be an "audit committee" made up of directors of the public corporation that will have responsibility for "overseeing the accounting and financial reporting process of the [public corporation] and audits of the financial statements of the [public corporation]." 15 U.S.C. § 7201 (a)(3)(A). The audit committee is required to "establish procedures for . . . the confidential, anonymous submission by employees of the [public corporation] of concerns regarding questionable accounting or auditing matters." 15 U.S.C. § 78j-1(m)(4)(B). Such procedures must cover not only those directly employed by the public parent corporation but also employees of the consolidated subsidiaries, which participate in "the accounting and financial processes of the [public corporation]" by providing information that is included in "the financial statements of the [public corporation]." 15 U.S.C. § 7201 (a)(3)(A).[3]

In sum, for purposes of financial reporting and internal accounting controls, the Act treats "a group of affiliated corporations as the economic and financial whole that it actually is," SFAS No. 94 ¶ 30, and regulates the "operations and the financial position of a parent company and its subsidiaries essentially as if the[y] were a single company," *id.* ¶ 1. In particular, the chief officers of a public parent corporation are responsible for "ensur[ing] that material information relating to the

[3] The Act also imposes on attorneys an obligation to "report evidence of a . . . breach of fiduciary duty or similar violation by [a public] company or any agent thereof, to the chief legal counsel or the chief executive officer of the company" and, if they "do[] not appropriately respond to the evidence," the attorney is required "to report the evidence to the audit committee of the board of directors of the [public company]." 15 U.S.C. § 7245. Attorneys representing a consolidated subsidiary must report breaches by the subsidiary's employees to the officers or board of the parent public corporation. 17 C.F.R. § 205.2(h).

[parent's] consolidated subsidiaries is made known to such officers by others within those entities" and for disclosing "any fraud, whether or not material, that involves management or other employees who have a significant role" in making that information known. 15 U.S.C. § 7241(a)(4)(B) & (5)(B). And, the audit committee of the public parent corporation has a parallel obligation to establish procedures for receiving confidential submissions from employees "regarding questionable accounting or auditing matters." 15 U.S.C. § 78j-1(m)(4)(B). With regard to accounting practices, then, the Sarbanes-Oxley Act treats a consolidated subsidiary as the agent of the public parent corporation by requiring that the consolidated subsidiary "act on the principal's behalf and subject to the principal's control." *Restatement (Third) of Agency* § 1.01 (2006).

If follows from the fact that a consolidated subsidiary is the agent of a public company with respect to financial reporting and internal accounting controls that the consolidated subsidiary is also the parent's agent with respect to § 806 retaliation. For instance, there is no question that if a consolidated subsidiary engaged in fraudulent accounting practices, the parent would be responsible for that conduct. This is so, because "the parent corporation is itself responsible for the wrongs committed by its agents in the course of its business." *United States v. Bestfoods*, 524 U.S. 51, 65 (1998) (quotation marks, brackets and citation omitted). Likewise, if a consolidated subsidiary retaliated against an employee for reporting such fraudulent accounting practices, there is no question that the parent would be responsible for that conduct by the parent's agent. Just as the parent is responsible

for the consolidated subsidiary's fraudulent accounting, it is also responsible for the consolidated subsidiary's retaliation against an employee for reporting the fraud.

This is not to say that the parent public corporation and the consolidated subsidiary should be treated as a single legal entity for § 806 purposes. That provision distinguishes between the public corporation itself and the agents of the public corporation and prohibits retaliation against whistleblowers by both. 18 U.S.C. § 1514A(a). The public corporation itself is liable as the principal for unlawful retaliation carried out by its agent in the course of its agency. *See Restatement (Third) of Agency* § 7.04. And, of course, the consolidated subsidiary is also liable for its own direct retaliatory acts. *See id.* § 7.01. In other words, the employees of the consolidated subsidiary may file charges under § 806 against either the public corporation, as the principal, or the consolidated subsidiary, as the "agent of [the public] company," or, as occurred here, against both the public corporation and the consolidated subsidiary.

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2010, copies of the Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* in Support of Petitioner were served via first class U.S mail on the following persons:

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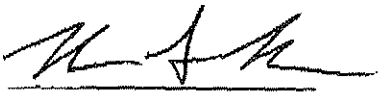

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