NO. 09-2423

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JANICE M. FLESZAR,
Petitioner,

-vs-

UNITED STATES DEPARTMENT OF LABOR,
Respondent

Petition for Review of Decision by
United States Department of Labor Administrative Review Board,
ARB Case Nos. 07-091 & 08-061

BRIEF AND REQUIRED SHORT APPENDIX FOR PETITIONER, JANICE M. FLESZAR

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DISCLOSURE STATEMENT

In accordance with F.R.A.P. 26.1 and Circuit Rule 26.1, Janice M. Fleszar certifies that she is an individual party. As a result, she has no parent corporations and there are no publicly held companies that own 10% or more of the party's stock. The Law Office of Joseph M. West, P.C. is the only law firm whose partners or associates have appeared on her behalf in the case.

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JURISDICTIONAL STATEMENT

This is an administrative appeal from a decision of the United States Department of Labor Administrative Review Board. Janice M. Fleszar initiated these proceedings below by filing two complaints under the whistleblower provisions of Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, as implemented by 29 C.F.R. Part 1980, with the Regional Administrator of the Occupational Safety and Health Administration. 29 C.F.R. § 1980.103(c). After the Regional Administrator issued findings, the United States Department of Labor Office of Administrative Law Judges had jurisdiction to conduct a hearing in accordance with 29 C.F.R. § 1980.106-.107. After the Administrative Law Judges issued their decisions, Ms. Fleszar petitioned for review before the Administrative Review Board, which had jurisdiction to issue a final decision under 29 C.F.R. Part 1980. 29 C.F.R. § 1980.110(a). The Administrative Review Board issued its final decision on March 31, 2009.

On June 1, 2009, Ms. Fleszar filed a petition for review in this Honorable Court, vesting this Court with jurisdiction to hear the appeal. *See* 18 U.S.C. § 1514A (providing that Sarbanes-Oxley whistleblower claims are governed by the rules and procedures set forth in 49 U.S.C. § 42121(b)); 49 U.S.C. § 42121(b)(4)(A) (providing for review in the United States Court of Appeals); 29 C.F.R. § 1980.112(a) (same).

STATEMENT OF ISSUES

In this Sarbanes-Oxley whistleblower action, Petitioner Janice M. Fleszar made repeated requests for an investigation into the question of whether her employer the American Medical Association was a covered entity. She also requested that documents be subpoenaed. Despite these requests, neither OSHA, the Administrative Law Judge, nor the Administrative Review Board conducted any investigation into the question. Did the Administrative Review Board commit reversible error by dismissing Ms. Fleszar's claims without first heeding her requests for an investigation?

STATEMENT OF THE CASE

Petitioner Janice M. Fleszar appeals the dismissal of two complaints against the American Medical Association ("AMA") under the whistleblower provisions of Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, as implemented by 29 C.F.R. Part 1980 ("Sarbanes-Oxley," the "Act," or "SOX"). Ms. Fleszar filed her first complaint on or about September 29, 2006, in the form of a letter to the AMA Retirement and Savings Plan, which was copied to Shirley Liu, Benefits Advisor, United States Department of Labor. (App'x 17-21). This letter was construed as a complaint under Sarbanes-Oxley's whistleblower provisions. In response, the United States Department of Labor, Occupational Safety and Health Administration Regional Administrator issued a final determination letter indicating that the AMA "is not a company within the meaning of SOX," and dismissed the complaint. (App'x 15). Ms. Fleszar objected to the dismissal, and the case was assigned ALJ Case No. 2007-SOX-00030.

Later, after Ms. Fleszar was terminated from her employment with the AMA, she filed a second Sarbanes-Oxley whistleblower complaint on or about October 22, 2007. (App'x 60-78). Again, the Regional Administrator issued a final determination letter indicating that the AMA "is not a company within the meaning of" Sarbanes-Oxley, and dismissed the complaint. (App'x 58). Ms. Fleszar objected to the dismissal, and the case was assigned ALJ Case No. 2008-SOX-00016.

Ms. Fleszar took up each case before an Administrative Law Judge, and submitted factual support and legal argument to undercut the findings of the Regional Administrator. In each case, the Administrative Law Judge ruled that Ms. Fleszar's complaint should be dismissed because the AMA was not a company that was subject to the whistleblower provisions of Sarbanes-

Oxley. (App'x 1-4; App'x 5-9). Ms. Fleszar appealed those decisions to the United States Department of Labor Administrative Review Board. (*See* App'x 46-48; App'x 333-35).

On March 31, 2009, the Administrative Review Board issued its Order of Consolidation and Final Decision and Order. (App'x 10-14). This Order consolidated the two cases and affirmed the decisions of the Administrative Law Judges that held that the AMA was not subject to the whistleblower provisions of Sarbanes-Oxley. Ms. Fleszar initiated this appeal by filing a petition for review on June 1, 2009.

STATEMENT OF FACTS

A. Introduction

After serving the American Medical Association ("AMA") for 25 years and amassing a record of well-documented and quality performance, Petitioner Janice M. Fleszar was subjected to a host of adverse employment actions and ultimately terminated on August 22, 2007. (*See* App'x 17, 60). Ms. Fleszar attempted to seek redress for the AMA's actions by filing two complaints under the whistleblower provisions of Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, as implemented by 29 C.F.R. Part 1980.

Ms. Fleszar was unsuccessful in the administrative proceedings below. Administrative Law Judges dismissed Ms. Fleszar's two Sarbanes-Oxley whistleblower complaints upon a finding that the AMA was not a "company" within the meaning of the Act. (App'x 1-4; App'x 5-9). Generally speaking, Sarbanes-Oxley "provides for employee protection from discrimination by companies and representatives of companies because the employee has engaged in protected activity pertaining to a violation or alleged violation of 18 U.S.C. 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 29 C.F.R. § 1980.100. Sarbanes-Oxley defines a "company" as "any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) and any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))." 29 C.F.R. § 1980.101. After the Administrative Review Board consolidated the two proceedings and affirmed the dismissal of Ms. Fleszar's complaints (App'x 10-14), she initiated this appeal.

The background that follows discusses Ms. Fleszar's employment with the AMA and the procedural history of the two whistleblower complaints at issue. After that, the background sets forth the facts Ms. Fleszar presented during the administrative proceedings that go to whether the

AMA is, or should be, subject to Sarbanes-Oxley whistleblower provisions, as well as Ms. Fleszar's pleas for an investigation.

B. First Sarbanes-Oxley whistleblower complaint

These proceedings began when Ms. Fleszar filed her first complaint on or about September 29, 2006, in the form of a letter to the AMA Retirement and Savings Plan, which was copied (cc'd) to Shirley Liu, Benefits Advisor of the United States Department of Labor, Benefits and Security Administration. (App'x 17-21). In the letter, Ms. Fleszar demanded documentation concerning her employment and entitlement to pension benefits, and alleged "adverse employment actions [she had] suffered as a result of reporting possible illegal practices and exercising [her] rights under the law as they relate to the Employee Retirement Income Security Act (ERISA) and the Family Medical Leave Act (FMLA)." (*Id*.) These adverse actions included "retaliation, fraud, discrimination, and harassment." (*Id*.). Although the letter did not expressly invoke the whistleblower provisions of Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, the Department of Labor construed the letter as a complaint under those provisions.

In response to Ms. Fleszar's complaint, the United States Department of Labor, Occupational Safety and Health Administration Regional Administrator issued a final determination letter. The letter concluded, without stating the evidentiary basis for its conclusion, that the AMA "is not a company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781) and is not required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)." (App'x 15-16). Thus, the Regional Administrator concluded, the AMA "is not a company within the meaning of SOX." (*Id*.) Because the AMA was not considered a company within the meaning of Sarbanes-

Oxley, the Regional Administrator reasoned, the whistleblower provisions did not apply to the AMA. (*Id*.) The Regional Administrator thus dismissed Ms. Fleszar's complaint (*Id*.).

Ms. Fleszar objected to the Regional Administrator's dismissal, and the case was assigned ALJ Case No. 2007-SOX-00030. Shortly thereafter, Administrative Law Judge Richard T. Stansell-Gamm issued a Show Cause Order, *sua sponte*, ordering the parties to show cause why "Ms. Fleszar's September 29, 2006 SOX whistleblower complaint against the Respondent should be dismissed because the AMA is not a respondent subject to the employee protection provisions of SOX." (App'x 25). In response, Ms. Fleszar submitted a letter attaching exhibits and setting forth her legal argument (App'x 28-29), and the AMA submitted a Response and Declaration of Michael Katsuyama, Division Counsel for the AMA. (App'x 30-38). The AMA also filed a reply to Ms. Fleszar's letter. (App'x 39-40).

On June 13, 2007, Administrative Law Judge Stansell-Gamm issued an Initial Decision and Order, concluding that Ms. Fleszar's complaint should be dismissed because the AMA was not a company that was subject to the whistleblower provisions of Sarbanes-Oxley. (App'x 1).

Ms. Fleszar appealed this decision to the Administrative Review Board. (App'x 41-45). Despite some initial delays in filing her brief with the Administrative Review Board, the Board ultimately accepted Ms. Fleszar's brief on appeal. (App'x 54-56; App'x 79-95). Although the AMA did not file a brief (*see* App'x 53), the Administrative Review Board ultimately ruled against Ms. Fleszar in a consolidated order, discussed in more detail below.

C. Second Sarbanes-Oxley whistleblower complaint

On August 22, 2007—after Ms. Fleszar appealed the Administrative Law Judge's decision in the first Sarbanes-Oxley whistleblower complaint, but before the Administrative Review Board had issued a decision—the AMA terminated Ms. Fleszar's employment. (App'x 60). Upon her termination, the AMA sent Ms. Fleszar a draft Separation Agreement and Waiver

and Release of Claims and Rights. (App'x 70-75). This document acknowledged her pending Sarbanes-Oxley whistleblower claim and would have had Ms. Fleszar waive and release the claim. (App'x 72). The agreement also would have prevented her from "participat[ing] in any manner in any other person's legal proceedings against AMA, except as required by law." (App'x 73). Ms. Fleszar did not sign the document.

Rather, she filed a second whistleblower complaint, on or about October 22, 2007. (App'x 60-78). In that complaint, Ms. Fleszar invoked the whistleblower provisions of Sarbanes-Oxley because the AMA terminated her after she exercised her right to protection under the law by filing the first complaint. (App'x 60).

As with the first whistleblower complaint, the United States Department of Labor, Occupational Safety and Health Administration Regional Administrator issued a final determination. (App'x 58-59). The Regional Administrator concluded that the AMA "is not a company within the meaning of 18 USC § 1514A in that it neither has a class of securities registered under section 12 of the Securities Exchange Act . . . nor is required to file reports under section 15(d) of the Securities Exchange Act . . . ." (App'x 58) The Regional Administrator apparently came to this conclusion without conducting any investigation, and went so far as stating that "OSHA lacks jurisdiction to conduct an investigation." (*See id.*)

Ms. Fleszar objected to the dismissal, and the case was assigned ALJ Case No. 2008-SOX-00016. Shortly thereafter, Chief Administrative Law Judge John M. Vittone issued an Order to Show Cause, *sua sponte*, ordering the parties to show cause whether the second whistleblower complaint "should be dismissed because the Respondent is not a company subject to the applicable SOX provisions." (App'x 96-98).

In response, Ms. Fleszar submitted a 20-page brief and approximately 130 pages of exhibits in an attempt to show that the AMA is, or should be, a covered entity under the Act. (App'x 99-118).

The AMA submitted a reply that relied upon Administrative Law Judge Stansell-Gamm's June 13, 2007 decision and a second Declaration of Michael Katsuyama. (App'x 119-36). The second Katsuyama declaration is the same as the first, with the exception of the addition of three paragraphs. (*See* App'x 37-38 & App'x 135-36).

On March 4, 2008, Administrative Law Judge Vittone issued a Decision and Order Dismissing the Complaint. (App'x 5). This decision echoed that of Administrative Law Judge Stansell-Gamm, and concluded that the AMA was not a company that was subject to the whistleblower provisions of Sarbanes-Oxley. (App'x 5).

Ms. Fleszar appealed this decision to the Administrative Review Board. (App'x 137-332; App'x 333-35). In support of her appeal, Ms. Fleszar filed a 26-page brief and a host of documents that were presented to the Administrative Law Judge for consideration. (App'x 336-86). The AMA submitted a response in support of the decision of the Administrative Law Judge. (App'x 387-403). Although Ms. Fleszar responded with further briefing and evidence in support of her appeal (App'x 404-20), the Administrative Review Board ultimately ruled against Ms. Fleszar in a consolidated order, discussed below.

D. Decision of the Administrative Review Board

On March 31, 2009, the Administrative Review Board issued its Order of Consolidation and Final Decision and Order. (App'x 10-14). This Order consolidated the two cases discussed above—ALJ Case No. 2007-SOX-00030 and ALJ Case No. 2008-SOX-00016—because of the "substantial identity of the legal issues and the commonality of much of the evidence, and in the interest of judicial and administrative economy." (App'x 12).

In addressing the question of whether the AMA was a covered entity, the Administrative Review Board highlighted the two Katsuyama declarations submitted by the AMA. (App'x 14). In contrast to the weight given to these declarations, the Administrative Review Board characterized the evidence and argument submitted by Ms. Fleszar as: "a murky pond of material, much related to the putative merits of her claim, [which] asks the ALJs and now asks us to fish for her legal theory on SOX coverage." (*Id*.) The Administrative Review Board then parsed out some arguments made by Ms. Fleszar, ruled against them, and ultimately affirmed the decisions of the Administrative Law Judges that held that the AMA was not subject to the whistleblower provisions of Sarbanes-Oxley. (App'x 13-14). Ms. Fleszar then initiated this appeal by filing her Petition for Review.

E. Facts going to coverage under the whistleblower provisions of Sarbanes-Oxley

The central issue during the administrative proceedings was whether the AMA is, or should be, subject to the whistleblower provisions of Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A. In the proceedings below, Ms. Fleszar and the AMA each presented evidence on the subject.

1. Fleszar's proofs and repeated pleas for an investigation

Ms. Fleszar presented a host of information on the AMA's historical transactions with and business dealings that called into question whether the AMA was or should be a covered entity, and pleaded that the government investigate the question. Following is the evidence that Ms. Fleszar—a *pro se* party at the time—was able to assemble.

AMA's relationship with Oppenheimer Capital. In the administrative proceedings below, Ms. Fleszar presented evidence that in 1994, the AMA partnered with Oppenheimer Capital, L.P.—a registered investment adviser with the SEC under the Investment Advisers Act

of 1940—to form AMA Investment Advisers. (App'x 42-44; App'x 221-28; App'x 305; App'x 350-51). AMA Investment Advisers filed reports with the SEC, including 10-Ks. (App'x 316-23; App'x 367-68).

AMA's partnership with Allscripts. Ms. Fleszar presented evidence that the AMA, along with other medical societies, founded and governed Medem, Inc., which is a physician-patient communications network. (App'x 351-52). Medem, Inc. engaged in a strategic partnership with Allscripts Healthcare Solutions, which is a publicly traded company. (*Id.*).

AMA's endorsement of Sunbeam products. Ms. Fleszar presented evidence that the AMA entered into an endorsement deal with Sunbeam Corp., whereby the AMA would receive royalties in exchange for the use of its seal on Sunbeam's home health-care products. (App'x 292-93; App'x 352-53; App'x 373-86).

AMA's SEC filings. Ms. Fleszar presented evidence that the AMA filed certain reports with the SEC as recently as 2002 (App'x 306-12), and that other AMA-related entities filed reports with the SEC as well. These entities included the AMA Family of Funds, Inc., AMA Growth Fund, Inc., AMA Money Fund, Inc., and Medical Technology Fund, Inc. (App'x 213-20; App'x 363-66).

Given the foregoing evidence, and the complexity of the business dealings that it suggests, Ms. Fleszar:

- repeatedly requested that an investigation be conducted on her behalf (*see, e.g.*, App'x 50-52; App'x 100; App'x 139; App'x 404-05);
- requested that certain documents be subpoenaed for review (*see* App'x 145); and
- requested the appointment of an attorney to represent her. (App'x 407).

Ms. Fleszar even went so far as writing to the General Counsel of the Administrative Review Board complaining of the lack of an investigation and requesting assistance (App'x 50-52), and when that did not work, she express mailed a copy of her Petition for Review (complaining, in part, of a lack of investigation) directly to Elaine L. Chao, the Secretary of Labor herself. (App'x 149). Despite these several requests, Ms. Fleszar is unaware of any investigation being conducted at any level of the administrative proceedings below.

2. AMA's proofs

The AMA submitted the Declaration of Michael Katsuyama, who is Division Counsel for the American Medical Association. (App'x 37-38). In it, Katsuyama stated that the AMA is a not-for-profit corporation organized under the laws of Illinois (*Id*. at ¶ 2), and as such, that it is exempt from federal income taxes under 26 U.S.C. § 501(c)(6). (*Id*. at ¶ 3). Katsuyama stated that the "AMA has not issued any securities registered under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. 78l ('SEA')," and that the "AMA is not required to file any reports under Section 15(d) of the SEA, 15 U.S.C. 78o(d)." (*Id*. at ¶¶ 4 & 5).

To explain the existence of documents the AMA has filed with the SEC, Katsuyama stated "[t]o the extent that the AMA has filed any documents or reports with the SEC, no such filing was ever made pursuant to Section 15(d) of the SEA. The last occasion on which the AMA filed any documents with the SEC was in 2002, and such documents were not filed pursuant to Section 15(d) of the SEA." (*Id*. at ¶ 5).

SUMMARY OF ARGUMENT

Petitioner Janice M. Fleszar had a 25-year career with the American Medical Association—a career that came to a screeching halt when she exercised her right to protection under the whistleblower protection provisions of the Sarbanes-Oxley Act. In her first complaint under those provisions, she challenged various decisions that her employer had made and brought to light the adverse employment actions she had suffered as a result. She was fired from her job after raising these issues, so she filed a second whistleblower complaint seeking redress for her employer's apparent retribution for bringing the first. Ultimately, both complaints were dismissed by the United States Department of Labor Administrative Review Board upon a finding that the AMA was not covered under the Sarbanes-Oxley whistleblower provisions.

During the administrative proceedings, Ms. Fleszar—a *pro se* party at the time—amassed a significant record of evidence in an attempt to show that the AMA was or should be covered. She also made numerous pleas for an investigation into the question of coverage, going so far as contacting the General Counsel of the Administrative Review Board. These calls for action fell on deaf ears, and to her knowledge, no investigation was even conducted. From beginning to end, the entire administrative system essentially took the AMA at its word that it was not a covered entity, and did not heed Ms. Fleszar's pleas to look closer at the facts.

The Administrative Review Board committed reversible error by dismissing Ms. Fleszar's whistleblower claims without first heeding her requests for an investigation. In several other Sarbanes-Oxley whistleblower cases, Administrative Law Judges and the Administrative Review Board have allowed discovery into the question of whether the respondent was a covered entity. Not here. This Honorable Court should remand the case so that Ms. Fleszar has the opportunity to conduct discovery on the question of whether the AMA is or should be covered.

ARGUMENT

I. STANDARD OF REVIEW

The Administrative Procedure Act governs Ms. Fleszar's appeal to this Court. *See* 18 U.S.C.A. § 1514A(b)(2) (stating that a Sarbanes-Oxley whistleblower action shall be governed by rules and procedures set forth in 49 U.S.C.A. § 42121(b), the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century); 49 U.S.C.A. § 42121(b)(4)(A) (providing that an appeal to the court of appeals shall conform to the Administrative Procedure Act—chapter 7 of title 5, United States Code).

Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (D), this Court may "hold unlawful and set aside agency action, findings, and conclusions" that are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." This Court reviews *de novo* questions of law regarding Sarbanes-Oxley whistleblower actions, giving deference to the Administrative Review Board's interpretation of § 1514A. *Welch v. Chao*, 536 F.3d 269, 276 & n.2 (4th Cir. 2008) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)). Findings of fact by the Administrative Review Board will be upheld if they are supported by substantial evidence. *Id.*

II. THE ADMINISTRATIVE REVIEW BOARD COMMITTED REVERSIBLE ERROR BY NOT HEEDING FLESZAR'S REPEATED CALLS FOR AN INVESTIGATION INTO THE AMA'S COVERED STATUS PRIOR TO DISMISSING HER CASE

A. Sabanes-Oxley whistleblower actions, generally

The Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, was enacted into law on July 30, 2002, as a Congressional response to the Enron scandal. *See* S. Rep. No. 107-146, at 2-8 (2002). Section 806 of the Act, codified

at 18 U.S.C. § 1514A, sets forth protection for whistleblowers that report conduct reasonably believed to be a violation of certain federal laws. The Act provides:

> No 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, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--
>
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
>
> (A) a Federal regulatory or law enforcement agency;
>
> (B) any Member of Congress or any committee of Congress; or
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. § 1514A.

Employees believing they have been discriminated against in violation of the Act may file a complaint with the Area Director of the Occupational Safety and Health Administration. 18 U.S.C. § 1514A(b)(1)(A) (stating that complaints may be filed with the Secretary of Labor);

67 Fed. Reg. 65,008 (Oct. 22, 2002) (Secretary of Labor's Order 5-2002, delegating and assigning responsibility to enforce the Act to the Assistant Secretary for Occupational Safety and Health); 29 C.F.R. § 1980.103(c) (stating that the complaint should be filed with the "OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed").

In filing such a complaint, the employee has the burden to make out a prima facie case of a violation of this Act by showing:

> (1) The employee engaged in a protected activity or conduct;
>
> (2) The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity;
>
> (3) The employee suffered an unfavorable personnel action; and
>
> (4) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.

29 C.F.R. § 1980.104(b)(1). Once such a complaint is filed, OSHA has the authority to conduct an investigation in accordance with 29 C.F.R. § 1980.104. *See also* OSHA WHISTLEBLOWER INVESTIGATIONS MANUAL, OSHA Directive DIS 0-0.9 (Aug. 22, 2003), at pp. 14-1 – 14-11.[1]

OSHA will then issue "written findings as to whether or not there is reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act." 29 C.F.R. § 1980.105(a). If the employee prevails, he is entitled to "all relief necessary to make the employee whole," 18 U.S.C. § 1514A(c)(1), which includes reinstatement, back pay with interest, and compensation for special damages. 18 U.S.C. § 1514A(c)(2)(A)-(C).

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[1] OSHA makes this manual available online. The direct link to the manual is http://www.osha.gov/OshDoc/Directive_pdf/DIS_0-0_9.pdf. It is also available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3016

If any party disagrees with OSHA's written findings, there are two stages of administrative appeal, followed by the potential for a federal appeal. The party can file objections with the Chief Administrative Law Judge for the United States Department of Labor. 29 C.F.R. § 1980.106(a). The Administrative Law Judge then conducts a *de novo* hearing. 29 C.F.R. § 1980.107(a) & (b). After the Administrative Law Judge issues a decision with the appropriate findings and conclusions, 29 C.F.R. § 1980.109(a), a party is entitled to seek review before the Administrative Review Board, which has been delegated authority by the Secretary of Labor to issue final decisions under 29 C.F.R. Part 1980. 29 C.F.R. § 1980.110(a). After the Administrative Review Board issues its decision, any party may appeal to the United States Court of Appeals. 29 C.F.R. § 1980.112(a).[2]

B. The Sarbanes-Oxley whistleblower provisions can apply to more than just publicly traded companies

Contrary to the AMA's assertions below and contrary to the conclusions of OSHA, the Administrative Law Judges, and the Administrative Review Board, the scope of coverage of the Sarbanes-Oxley whistleblower provisions is not a black-and-white issue. Section 806, on its face, applies to companies "with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l)" and companies that are "required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))." 18 U.S.C. § 1514A(a). Although this statutory language would seem to present a bright-line test for

[2] Although most complaints under the Sarbanes-Oxley whistleblower provisions follow this procedural path, there is potential to side-step a final decision of the Administrative Review Board and file an action in federal district court if the Board has not issued a decision within 180 days of the complaint being filed. 29 C.F.R. § 1980.114(a). This is not what happened in Ms. Fleszar's case, and is mentioned simply to explain why there are citations to district court decisions later in this brief.

whether a particular entity is covered, case law interpreting the Act demonstrates that it has a broader reach, and that the coverage determination is fact intensive.

Non-public subsidiaries, generally – *Morefield v. Exelon Services, Inc.*

In an early case interpreting the reach of the Act, the Administrative Law Judge in *Morefield v. Exelon Services, Inc.*, 2004-SOX-00002 (ALJ Jan. 28, 2004)[3], was asked to decide whether an employee of a non-public subsidiary of a subsidiary of a publicly traded company was protected under the whistleblower provisions. According to the Administrative Law Judge, "[t]he publicly traded entity is not a free-floating apex" when its "value and performance is based, in part, on the value and performance of component entities within its organization." *Id*. at 3. Thus, the Administrative Law Judge ruled, "[a] publicly traded corporation is, for Sarbanes-Oxley purposes, the sum of its constituent units . . . In this context, the law recognizes as an obstacle no internal corporate barriers to the remedies Congress deemed necessary. It imposed reforms upon the publicly traded company, and through it, to its entire corporate organization." *Id*. (emphasis added).

Although some later decisions disagreed with *Morefield*, at least one federal appellate court cited *Morefield* with apparent approval. *Compare Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 6 (1st Cir. 2006) (citing *Morefield* and commenting that "the statute can be read to embrace an agent-subsidiary's retaliation against a protected employee"), with *Rao v. Daimler Chrysler Corp*., No. 06-13723, 2007 WL 1424220, at *3-5 (E.D. Mich. May 14, 2007) (analyzing *Morefield*, collecting cases on the subject of subsidiary coverage under Sarbanes-

[3] Decisions of Administrative Law Judges are available at www.oalj.dol.gov. Federal courts have recognized that these decisions are persuasive authority. *See, e.g., Malin v. Siemens Medical Solutions Health Services*, 638 F.Supp.2d 492, 498 n.5 (D. Md. 2008).

Oxley, and ultimately dismissing plaintiff's complaint because defendant was not a publicly traded company and defendant's publicly traded parent was not a named defendant).

Non-public companies serving as agents of publicly traded companies

Under the explicit language of Section 806, the Act's whistleblower provisions also apply to agents of companies with registered securities or that are required to file Securities Exchange Act reports. 18 U.S.C. § 1514A(a); *see also* 29 C.F.R. § 1980.101 (defining "Company representative" to include "any officer, employee, contractor, subcontractor, or agent of a company"). The Act does not define "agent" or indicate that an "agent" must be a public company to be covered.

Thus, the Administrative Review Board has indicated that a non-public company can be covered under Section 806 by virtue of its agency relationship with a public parent, and that the existence of such a relationship "should be determined according to principles of the general common law of agency." *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB Case No. 04-149, at 14 (ARB May 31, 2006).[4] *See also Brady v. Calyon Securities (USA)*, 406 F. Supp. 2d 307, 318 (S.D.N.Y. 2005) (collecting cases on the "proper application of the 'agency' provision to companies that have acted as agents of publicly traded companies with respect to their employment relationships").

Alter ego / corporate veil piercing

Employees of private subsidiaries can be protected by Sarbanes-Oxley if subsidiary was an alter-ego of the public parent. For example, in *Platone v. Atlantic Coast Airlines Holdings, Inc.*, 2003-SOX-00027 (ALJ Apr. 30, 2004), the complainant was employed by a private subsidiary of a public company. She brought a whistleblower complaint against the public

[4] Administrative Review Board decisions are available at http://www.dol.gov/arb/.

parent, and the Administrative Law Judge concluded "that the existence of separate corporate identities does not insulate the Respondent from liability." *Id.* at 20. The private subsidiary and public parent had a "great degree of commonality" of senior management, used their logos and names interchangeably, and common benefits plan. *Id.* Under these circumstances, the Administrative Law Judge concluded, the public parent was the "alter ego" of the private subsidiary that employed the complainant. *Id.* at 21.

Other cases have referred to this type of theory as "piercing the corporate veil" between private employer and public parent company. *See, e.g., Dawkins v. Shell Chemical, L.P.*, 2005-SOX-41, at 4 (ALJ May 16, 2005) (recognizing viability of veil piercing theory in the Sarbanes-Oxley context and stating that complainant must "allege facts to show sufficient commonality of management and purpose between the subsidiary/employer and its parent to justify piercing the corporate veil and holding the parent company liable for its subsidiary's actions").

As the foregoing discussion demonstrates, it is an oversimplification—if not entirely incorrect—to say that *only* publicly traded companies are covered by Sarbanes-Oxley whistleblower provisions. Rather, whistleblower coverage turns on the unique facts of each case—facts that need to be discovered before a decision can correctly be made.

C. Fleszar repeatedly requested an investigation into the AMA's covered status

Throughout the administrative proceedings below, Ms. Fleszar pled for an investigation into AMA's covered status—after all, the purpose of whistleblowing is to alert the authorities of potential wrongdoing so an investigation can be launched. These requests for an investigation went to the Administrative Law Judge, the Administrative Review Board, and even directly to the General Counsel for the Administrative Review Board:

- In her response to Judge Vittone's Order to Show Cause, Ms. Fleszar wrote that her "complaint was not thoroughly investigated . . . nor did it address an

investigation of AMA's status as a covered company based on information Ms. Fleszar provided . . . ." (App'x 100).

- In her petition for review of Judge Vittone's dismissal order, Ms. Fleszar argued to the Administrative Review Board that Judge Vittone did not "[i]ndicate any effort to research issues raised or request relevant documentation from AMA, government agencies, or other sources despite Ms. Fleszar's plea to conduct an investigation." (App'x 139).
- In her rebuttal to the AMA's brief to the Administrative Review Board, Ms. Fleszar contended that none of the issues she raised "were discussed or appear to have been researched/investigated (as requested) with the care, vigor, and authority afforded ALJs." (App'x 404-05).
- In a Letter to Administrative Review Board General Counsel, Ms. Fleszar wrote "I am deeply upset/concerned that the Chicago area OSHA office/s are not properly investigating the issues put forth in the complaints . . . ." (App'x 50).

When she got no response from these various requests, she went further up the chain of command by express mailing directly to Elaine L. Chao, the Secretary of Labor, a copy of her Petition for Review that, among other things, complained about the lack of investigation. (App'x 149).

In addition to her pleas for an investigation, Ms. Fleszar specifically requested that certain documents be subpoenaed for review. (App'x 145 – "Given the extreme importance of this information relative to Ms. Fleszar's complaint, she suggests that these and possibly other relevant documents be subpoenaed for review.") (emphasis removed). She also asked for the appointment of counsel to assist her in litigating the complaints. (App'x 407). Despite these

numerous requests, Ms. Fleszar is aware of no investigation being conducted during the administrative proceedings.

D. Fleszar presented sufficient evidence to warrant an investigation into the AMA's covered status

Ms. Fleszar was a *pro se* party throughout the administrative proceedings below, and despite lacking any legal or investigatory training, she amassed hundreds of pages of documents showing the AMA's business dealings and other activities that could show that it was or should be a covered entity. She showed that the AMA partnered with covered entities in business ventures, resulting in the formation of business entities that filed reports with the SEC. (App'x 42-44; App'x 221-28; App'x 305; App'x 316-23; App'x 350-51; App'x 367-68). She showed that the AMA assisted in founding an entity that partnered with a publicly traded company. (App'x 351-52). She showed that the AMA entered into an endorsement deal for the use of its seal. (App'x 292-93; App'x 352-53; App'x 373-86). And she showed that the AMA had filed *some* reports with the SEC (App'x 306-12), and that various AMA-related entities filed a host of SEC reports as well. (App'x 213-20; App'x 363-66).[5]

Although these pieces of evidence may not alone show that the AMA is a covered entity, they certainly cause one to question whether the AMA may be a covered entity. Ms. Fleszar did not have a fair chance to turn that "may be" into an "is" because her persistent requests for an investigation fell on deaf ears.

[5] These facts developed by Ms. Fleszar distinguish this case from *Paz v. Mary's Center for Maternal & Child Care*, ARB Case No. 06-031 (ARB Nov. 30, 2007). In *Paz*, the Administrative Review Board concluded that Sarbanes-Oxley did not cover the respondent—a "non-profit health organization" that was not publicly traded. *Id*. at 1-2. But there, unlike in this case, the petitioner did not "challenge the ALJ's decision that since Mary's is not a publicly traded company, Sarbanes-Oxley does not cover Mary's." Here, in contrast, Ms. Fleszar asserted that the AMA was covered, gathered evidence in support of that claim, and presented legal argument to that effect.

For example, an investigation may have shown that the AMA's relationships with public companies put it in the role of "agent" to those companies, which could have triggered coverage under 18 U.S.C. § 1514A(a) and 29 C.F.R. § 1980.101. But this determination of the existence of an agency relationship, made "according to principles of the general common law agency," *Klopfenstein,* ARB Case No. 04-149, at 14, is notoriously fact sensitive. Without access to discovery, Ms. Fleszar had no chance to establish coverage on that theory.

Ms. Fleszar may also have been able to establish coverage under the alter ego / veil piercing theory recognized in cases like *Platone* and *Dawkins,* if she had been given an opportunity to conduct discovery on the AMA's relationships with funds that appear to be closely linked with the AMA—the AMA Family of Funds, Inc., AMA Growth Fund, Inc., AMA Money Fund, Inc., and Medical Technology Fund, Inc. (App'x 213-20; App'x 363-66). But her calls for action went unanswered, hamstringing her ability to show coverage on that theory.

And finally, it is possible that an investigation would reveal that the AMA's quasi-parent and quasi-subsidiary relationships with covered entities could trigger application of the *Morefield* principle. *Morefield,* on its face, deals with the situation where an employee of a private subsidiary of a covered entity seeks redress under the Sarbanes-Oxley whistleblower provisions. If Ms. Fleszar was permitted to develop more detailed facts as to the AMA's relationships with public companies, she could have argued for an extension of the *Morefield* principle to cover that situation. But without the facts to support her argument, Ms. Fleszar had no fair opportunity to argue for coverage under an extension of *Morefield.*

E. The Administrative Review Board committed reversible error by not allowing an investigation into the AMA's covered status

In the administrative proceedings below, there was virtually no investigation by OSHA, the Administrative Law Judges, or the Administrative Review Board. Instead of answering Ms.

Fleszar's requests for an investigation and to subpoena documents, the administrative system—from beginning to end—mechanically concluded that the AMA was not a covered entity because the AMA was not a company within the meaning of 18 U.S.C. § 1514A. At one point, it was even suggested that OSHA lacked jurisdiction to conduct an investigation in the first place. (*See* App'x 58).

In truth, OSHA did have jurisdiction to conduct an investigation, and the Administrative Law Judges and Administrative Review Board had the discretion to allow discovery into the AMA's covered status. This discretion is illustrated by decisions in other Sarbanes-Oxley whistleblower cases. For example, in *Andrews v. ING North America Insurance Corp.*, ARB Case No. 06-071 (ARB Aug. 29, 2008), the complainants filed a Sarbanes-Oxley complaint alleging that they were terminated in violation of the Act's whistleblower provisions. OSHA concluded that the respondent corporation was not covered by Sarbanes-Oxley because it did not have a class of securities registered under section 12 and was not required to file reports under section 15(d) of the Securities Exchange Act of 1934. *Id*. at 1. Furthermore, OSHA refused to investigate whether the respondent might be covered because of its subsidiary status. *Id*. (noting that respondent was "a subsidiary of a subsidiary of a subsidiary of a subsidiary" of a Dutch corporation that was listed on the New York Stock Exchange.). The Administrative Law Judge ultimately agreed with OSHA and dismissed the complaint because the respondent was not a covered employer. *Id*. at *2.

On review, the Administrative Review Board disagreed with the Administrative Law Judge's decision. *Id*. Although the respondent corporation may not have been directly covered by virtue of the issuance of securities or filing of reports, it may have been covered under another theory. *Id*. Specifically, the Administrative Review Board noted that the complainants were

attempting to establish coverage on an agency theory, and held that the complainants must be given an opportunity to prove that the respondent corporation acted as an agent for the covered parent company. *Id*. at 2-3. The Administrative Review Board thus denied the respondent corporation's motion to dismiss and remanded the case for discovery into the respondent's covered status. *Id*. at 3.

Other Sarbanes-Oxley whistleblower cases also support a complainant's right to discovery on the covered status of the respondent. *See, e.g.*, *Malin v. Siemens Medical Solutions Health Services*, 638 F. Supp. 2d 492, 495 (D. Md. 2008) (commenting that prior to the case coming to the district court, the Administrative Law Judge permitted the parties to take "jurisdictional discovery" as to whether the respondents' corporate relationships might subject them to liability under the Sarbanes-Oxley whistleblower provisions); *Cantwell v. Northrop Grumman Corp.*, 2004-SOX-00075, at 1 (ALJ Feb. 9, 2005) (discussing scheduling order that provided for bifurcated discovery, where Phase I was "limited to the preliminary issue of whether there is jurisdiction under the employee protection (whistleblower) provisions of the Sarbanes Oxley Act of 2002, 18 U.S.C. § 1514A"); *Gale v. World Financial Group*, 2006-SOX-43, at 2, 7, 9-10 (ALJ June 9, 2006) (concluding—after allowing discovery on the relationship and control of the non-public respondent that was "eight subsidiary-layers and one continent removed from a publicly-traded Dutch company"—that there was a genuine issue of material fact on the respondent's covered status).

Andrews, *Malin*, *Cantwell*, and *Gale* demonstrate that in Ms. Fleszar's case, OSHA, the Administrative Law Judges, and the Administrative Review Board could have allowed discovery into the question of whether the AMA was covered. But they didn't. Ms. Fleszar repeatedly asked for such an investigation, to no avail. The only reasonable conclusions are either (1) that

OSHA, the Administrative Law Judges, and the Administrative Review Board incorrectly concluded they could not investigate (*cf.* App'x 58 – "OSHA lacks jurisdiction to conduct an investigation"), or (2) that they simply refused to do so.

In either case, the Administrative Review Board committed reversible error by not remanding to the Administrative Law Judges for discovery. If the first is true—that administrative bodies believed they could not investigate the AMA's covered status—that would constitute an error of law, as *Andrews*, *Malin*, *Cantwell*, and *Gale* all demonstrate that such discovery is, in fact, permitted. This Court reviews questions of law *de novo*, *Welch*, 536 F.3d at 276 & n.2, and thus should reverse and remand for discovery into the AMA's covered status.

If the second is true—that the administrative bodies simply refused to investigate the AMA's covered status—those refusals would constitute an abuse of discretion. Neither OSHA, the Administrative Law Judges, nor the Administrative Review Board offered any reasons to justify their refusal of Ms. Fleszar's requests for an investigation. As set forth above, Ms. Fleszar presented evidence sufficient to at least warrant an investigation. This Court should conclude that the refusal to investigate constituted an abuse of discretion, and reverse and remand for discovery into the AMA's covered status. *See* 5 U.S.C. § 706(2)(a) (allowing this Court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

CONCLUSION AND REQUEST FOR RELIEF

Ms. Fleszar is not asking for the world in this appeal. In the proceedings below, over and over she requested an investigation into the AMA's covered status. She backed these requests with what information she was able to assemble without the assistance of counsel or the government. The administrative bodies to which the requests were made had the authority and the responsibility to investigate, yet they did not. All Ms. Fleszar asks of this Honorable Court is the same opportunity the complainants had in cases like *Andrews*, *Malin*, *Cantwell*, *Gale*—formal discovery and investigation into whether there is coverage of her employer under Sarbanes-Oxley. Specifically, to inquire as to whether the AMA's business dealings and relationships with covered entities render the AMA a covered entity.

Ms. Fleszar therefore respectfully requests that this Honorable Court reverse the decision of the Administrative Review Board and remand this case to allow discovery on the question of whether AMA is a covered entity. Furthermore, given that over two years has already passed since her termination, and it took well over the allotted 180-day time period for a final decision the first time through the administrative system (*see* App'x 421-22), Ms. Fleszar requests that the remand order provide for an investigation to be concluded within 90 days.

Respectfully submitted,

Dated: November 9, 2009

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CIRCUIT RULE 31(e)(1) CERTIFICATION

In accordance with Circuit Rule 31(e)(1), a digital version of the foregoing brief and attached short appendix (Cir. R. 30(a)) is being furnished to the court and to opposing counsel at the time the paper is filed. The undersigned counsel certifies that materials included in the separate appendix (Cir. R. 30(b)) are not available electronically, and are being provided in hard copy, rather than digital form.

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PROOF OF SERVICE

The undersigned, counsel for Petitioner Janice M. Fleszar, hereby certifies that on November 9, 2009, (1) two copies of the foregoing brief and required short appendix of Petitioner, (2) one copy of the separate appendix of petitioner, and (3) a digital version of the brief and required short appendix were delivered to the following:

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), the undersigned counsel certifies that all material required by Circuit Rule 30(a) is included in the attached appendix, and all material required by Circuit Rule 30(b) is included in the separate appendix.

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ATTACHED REQUIRED SHORT APPENDIX