UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

STACY M. PLATONE,	:	
	:	
Complainant,	:	
	:	ARB Case No. 04-154
v.	:	
	:	ALJ Case No. 2003-SOX-27
ATLANTIC COAST AIRLINES HOLDINGS, INC.,	:	
	:	
Respondent.	:	

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF RESPONDENT AND IN SUPPORT OF REVERSAL

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September 10, 2004

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The Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully submit this brief *amici curiae* pursuant to the Administrative Review Board ("ARB" or "the Board") order on the granting of the Motion for Leave on August 31, 2004. The brief urges the Board to reverse the recommended decision and order of the Administrative Law Judge and thus supports the position of Respondent, Atlantic Coast Airlines Holdings, Inc.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 330 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's members and many of the Chamber's members are employers subject to the "whistleblower" provisions of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (hereinafter "Sarbanes-Oxley" or "the Act"). Accordingly, the issues presented in this case are

extremely important to the nationwide constituency that EEAC and the Chamber represent. The recommended decision and order of the Administrative Law Judge ("ALJ" or "the Judge") brushes aside the threshold requirement for employer liability under the Act — that the employee engaged in protected activity. More specifically, the Judge did not require Platone to meet her burden of establishing all four elements of a *prima facie* case and, instead, improperly shifted the burden of proof to the Respondent to *disprove* the first element – that Platone reasonably believed Respondent violated the law. This shift flies in the face of long-established Board and federal court precedent, which places the burden of establishing a *prima facie* case squarely on the employee. Moreover, both EEAC and the Chamber are extremely troubled that the Judge in this case adopted an inappropriately broad definition of securities fraud, which in this case transformed what amounts to no more than a garden-variety wage dispute into a "fraud" against shareholders in violation of Sarbanes-Oxley. These conclusions expand the scope of the statute's protection well beyond its limits and, as a result, potentially subjects employers to unwarranted liability for a broad range of lawful activities.

The Administrative Law Judge further compounds the error by disregarding the employer's patently legitimate, nondiscriminatory business reason for discharging the complainant in this case. Instead, the judge applies a distorted rationale that prevents an employer from taking justifiable adverse action against an employee merely because the grounds for discipline were identified by someone that may have had a retaliatory motive.

EEAC and the Chamber seek to assist the Board by highlighting the impact its decision in this case will have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Board relevant matter that has not already been brought to its attention by the parties. Because of their experience, EEAC and the Chamber are well situated to

brief the Board on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Atlantic Coast Airlines ("ACA"), a regional airline carrier, is a wholly owned subsidiary of the respondent, Atlantic Coast Airlines Holdings, Inc. ("Holdings"). *Platone v. Atlantic Coast Airlines*, 2003-SOX-27, at 2 (ALJ Apr. 30, 2004). ACA hired Stacy M. Platone in the summer of 2002 as Manager of Labor Relations and to serve as ACA's "point person" in dealing with its labor unions, including the Airline Pilots Association ("ALPA"). *Id*. at 5. The position was highly sensitive and gave Platone access to delicate financial and other confidential business information. *Id*. For these reasons, the position required a high degree of trust, discretion and confidentiality. *Id*.

ACA terminated Platone's employment in March 2003, after learning of her longstanding romantic relationship with an active and influential ALPA leader. *Id.* at 15. Platone then filed a complaint under the "whistleblower" provisions of the Sarbanes-Oxley Act, contending that she had actually been terminated because she identified a "scheme" in which some ALPA members were receiving payments from the union to which they were not entitled. *Id*. at 21. The Occupational Safety and Health Administration investigated the complaint, concluded that Platone had not engaged in protected activity, and dismissed the case. *Id*. at 1.

Platone objected, and a formal hearing was held before an Administrative Law Judge ("ALJ" or "the Judge"). *Id*. Platone's claim dealt with a practice known as "flight pay loss," the process by which ALPA reimburses ACA for the pay received by pilots who miss scheduled flights because of union business. *Id*. at 6. In late 2002, Platone says that she became concerned that some members of the union were gaming the system by arranging to have a flight assigned

to them when they knew they would have to be out on union business, thus obtaining "flight loss" pay for a day they otherwise would not have been scheduled to work. *Id*.

Platone did not present any evidence that the alleged improprieties were costing the company money, that ACA's financial statements were incorrect, that shareholders were being misled, that the securities laws were being violated or that she thought that they were. Rather, she contended that the errant pilots' activities violated ALPA's constitution and by-laws. She also claimed that her immediate superior, Jeff Rodgers, the Senior Director of Labor Relations, was allowing the pilots to get away with it so that he could curry favor with union officials to gain concessions in upcoming bargaining negotiations.

The Administrative Law Judge ruled in favor of Platone. *Id*. at 28. First, the Judge assumed, without requiring Platone to demonstrate, that the conduct about which Platone was concerned was protected by the Sarbanes-Oxley Act. Second, although the Judge agreed that ACA had a legitimate reason to fire Platone, she ruled that Rodgers' involvement in the decision tainted it, concluding that an employer cannot act on legitimate grounds for termination if the information initially comes from a manager with both legitimate and retaliatory motivations. *Id.* at 27-28.

ACA sought review by the Board.

SUMMARY OF ARGUMENT

The "whistleblower" provisions of Sarbanes-Oxley protect an employee who provides information to her employer that she reasonably believes shows that the employer violated federal laws prohibiting shareholder fraud. 18 U.S.C. § 1514A(a)(1). Under the Act, the complainant must establish a *prima facie* case by showing that: 1) she engaged in a protected activity; 2) her employer was aware of the protected activity; 3) she suffered an adverse

employment action; and 4) the circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the adverse employment action. 29 C.F.R. § 1980.104(b). To establish the first element of the *prima facie* test, the complainant must be able to show that her belief that her employer violated a covered law was *reasonable*.

The decision below improperly shifted the burden of proof to Holdings, however, to *disprove* the first element of Platone's *prima facie* case. Moreover, had the Judge applied the appropriate burden of proof in this case, Platone would not have succeeded in showing that her belief that ACA or Holdings had violated a cover law was reasonable. This improper shift in the burden of proof is contrary to Board precedent under other "whistleblower" laws. The Board should clarify unequivocally that a Sarbanes-Oxley Plaintiff bears the burden of making out a *prima facie* case to avoid improper expansion of the law and the filing of unsubstantiated claims.

The Judge also erred in holding that Holdings or ACA violated the law by terminating complainant's employment because there were legitimate, non-pretextual grounds to discharge complainant and decisionmakers acted on that basis alone. Platone failed to carry her burden of establishing that those legitimate grounds were a pretext for discharging Platone, and for that reason alone judgment should have been entered in favor of Holdings. In addition, judgment for Holdings was warranted because even when a Sarbanes-Oxley complainant does demonstrate that protected activity contributed to an adverse employment decision, the employer will not be held liable if it proves by clear and convincing evidence that it would have taken the same action absent protected activity. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1980.109(a). Accordingly, Holdings still should have prevailed because the company succeeded in showing that it would have discharged Platone anyway because of her failure to disclose a serious conflict of interest.

The Judge had held that, because the person who initially brought Platone's conflict of interest to the attention of the company allegedly harbored a discriminatory animus toward her, Holdings *could not show* that it would have fired Platone for legitimate, non-discriminatory reasons. The Judge's conclusion that it was not possible to separate legitimate from improper motives for Platone's discharge is contradicted by the Judge's own factual findings, however, and important public policy reasons weigh in favor of reversing the Judge on this point. Employers must be able to act on information about performance and conduct-related problems. The Judge's approach in this case would obstruct employer efforts to run their businesses efficiently and effectively, and even subject employers to increased liability, by preventing them from taking legitimate steps to address performance and conduct-related problems just because they learned about the problem from someone who was accused of bias.

The decision below also would subject employers to significantly more Sarbanes-Oxley "whistleblower" complaints, unjustly reward Sarbanes-Oxley complainants with lifelong job security, and seriously undermine an employer's ability to defend itself. Sarbanes-Oxley simply should not be used to second-guess an employer's honest belief that an employee's conflict of interest was a legitimate reason for terminating her.

ARGUMENT

I. THE JUDGE ERRED IN HOLDING THAT THE COMPLAINANT ENGAGED IN A PROTECTED ACTIVITY

A. Sarbanes-Oxley Requires A Complainant To First Establish A *Prima Facie* Case Of Retaliation

The "whistleblower" provisions of Sarbanes-Oxley protect an employee who provides information to her employer that she reasonably believes shows that the employer violated federal laws prohibiting shareholder fraud. 18 U.S.C. § 1514A(a)(1). To establish a *prima facie*

case of retaliation under the Act, the complainant must show that: 1) she engaged in a protected activity; 2) her employer was aware of the protected activity; 3) she suffered an adverse employment action; and 4) the circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the adverse employment action. 29 C.F.R. § 1980.104(b). If the complainant is able to establish a *prima facie* case, the burden shifts to the employer to present evidence that the alleged adverse employment action was motivated by legitimate, non-discriminatory reasons. *Dartey v. Zack Co. of Chicago*, 1982-ERA-2 (Sec'y Apr. 25, 1983). If the employer successfully rebuts the complainant's *prima facie* case, the trier of fact may rule either that the employer was not motivated by the complainant's protected activities or that the employer's proffered reason for the adverse employment action is a pretext for unlawful retaliation. *Id*. at 4. If the trier of fact concludes that the employer was motivated by both prohibited and legitimate reasons, as the Judge concluded here, the employer may still avoid liability by showing that it would have taken the same adverse employment action in the absence of the protected activity. 29 C.F.R. § 1980.104(c). At all times, the "[c]omplainant retains the ultimate burden to prove that the employer discriminated against him for his protected activities." *Halloum v. Intel Corp*., 2003-SOX-7, at 10 (ALJ Mar. 4, 2004) (citation omitted); *Getman v. Southwest Sec., Inc*., 2003-SOX-8, at 10 (ALJ Feb. 2, 2004); *Dartey v. Zack Co. of Chicago*, 1982-ERA-2, at 3-4 (Sec'y Apr. 25, 1983).

B. The Decision Below Improperly Shifted The Burden Of Proof To Holdings To Disprove The First Element Of Platone's *Prima Facie* Case – That Her Belief That Holdings Had Violated The Law Was Reasonable

To establish the first element of the *prima facie* test, the complainant must show that she *reasonably* believed that her employer violated a rule or regulation of the Securities and Exchange Commission or a provision of federal law relating to fraud against shareholders. *Lerbs*

v. Buca Di Beppo, Inc., 2004-SOX-8, at 11 (ALJ June 15, 2004) (citation omitted).[1] The complainant's belief is "'scrutinized under both subjective and objective standards.'" *Id*. (quoting *Melendez v. Exxon Chems. Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000)). In other words, the complainant must have actually believed that the employer was in violation of the Act *and* that belief must be reasonable. *Id*.

Rather than require Platone to satisfy the *first* element of a Sarbanes-Oxley *prima facie* case – that she *reasonably* believed that her employer violated a covered federal law – the Judge improperly shifted the burden of proof to Holdings to prove that Platone's belief was *unreasonable*. In her decision, the Judge casually brushes aside clear evidence that Platone *could not have* reasonably believed the company had suffered *any* financial loss from the union's alleged abuse of flight pay and then proceeds to hold that Holdings *had failed to show* that "the flight pay loss discrepancies were ever resolved" or that ACA had "billed ALPA for the arrearages in flight pay loss." *Platone v. Atlantic Coast Airlines*, 2003-SOX-27, at 24 (ALJ Apr. 30, 2004). In other words, the Judge placed the burden on Holdings to *disprove* the first element of Platone's *prima facie* case by showing that Platone's belief was *unreasonable*.

[1] EEAC and the Chamber do not agree with the holding of the Administrative Law Judge that Platone has shown that she believed Holdings violated any rule or regulation of the Securities and Exchange Commission or a provision of federal law relating to fraud against shareholders, and expect that the flaws in that holding will be fully addressed in Respondent's brief.

Specifically, we find extremely troubling the decision of this Judge to adopt an inappropriately-broad definition of securities fraud that threatens to bring within the scope of Sarbanes-Oxley virtually any dispute involving company funds, including the type of garden-variety wage dispute that arose in this case. If allowed to stand, this holding would grossly expand Sarbanes-Oxley beyond what the law provides and what Congress intended. Moreover, such a holding is simply unworkable for employers who will be forced to expend tremendous time and resources defending simple, every-day business practices. We respectfully urge the Board to clarify the appropriate scope of the Act in this regard.

Yet, this is not the law. A complainant *first* must establish a *prima facie* case of retaliation before the burden of production shifts to the employer. *Dartey v. Zack Co. of Chicago*, 1982-ERA-2, at *4 (Sec'y April 25, 1983). Not until then must the employer produce a legitimate, non-retaliatory reason for the adverse employment action. *Id.* ("If the employee establishes a *prima facie* case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons"). At no time, however, does the employer ever bear the burden of *disproving* any one of the four elements of the complainant's *prima facie* case. *See e.g.*, *Agbe v. Texas Southern Univ.*, ARB No. 98-072, 1997-ERA-13, at 2 (ARB July 27, 1999)("Respondent does not carry the burden of proving a negative proposition, that it was not motivated by Complainant's protected activities when it took the adverse action. Throughout, Complainant has the burden of proving that the employer was motivated, at least in part, by Complainant's protected activities") (citation omitted); *Paynes v. Gulf States Util. Co.*, ARB No. 98-045, 1993-ERA-47, at 4 n.5 (ARB Aug. 31, 1999)(when establishing a *prima facie* case, it is the complainant's burden to show that "protected activity was a contributing factor in the adverse action that was taken" and "not as the ALJ opined . . . , respondent's burden to prove that the complainant was subjected to adverse action for legitimate, non-discriminatory reasons.") (citations omitted). At all times, the responsibility to *affirmatively* prove all four elements of a *prima facie* case rests with the complainant.

If the Judge had applied the appropriate burdens of proof in this case, Platone would not have succeeded in establishing the reasonableness of her alleged belief that Holdings had violated the law. It is undisputed that ACA's collective bargaining agreement with ALPA required ALPA to reimburse ACA for all flight loss pay. It is also undisputed that ACA had

assured Platone that it would *not* make flight loss payments that would go unreimbursed by the union. In fact, the evidence shows that ACA shared Platone's concerns about the flight loss pay issue and supported Platone's efforts to set up a tracking system to determine if the company was losing money. Yet, at no time did Platone present evidence that showed the company was not reimbursed by ALPA. Given these facts, Platone simply could not have reasonably believed that any improper flight swapping by ALPA pilots would have resulted in a financial loss to ACA or Holdings.

C. The Board Should Clarify Unequivocally That A Sarbanes-Oxley Plaintiff Bears The Burden Of Making Out A *Prima Facie* Case To Avoid Improper Expansion Of The Law And The Filing Of Unsubstantiated Claims

Adjudicators have an obligation to dismiss unmeritorious complaints, particularly those in which the complainant is not even able to make out a *prima facie* case. Because the ALJ in this case failed in this obligation, it falls to this Board to step into the breach, not only because of this case, but because of those that will follow. This Board simply cannot permit an Administrative Law Judge to casually convert the complainant's burden of making out a *prima facie* case to a burden on the respondent to disprove a negative. Doing so would, in this and other cases, grossly expand respondents' liability under Sarbanes-Oxley well beyond what the law provides, and turn the law upside-down.

The Judge's approach in this case does not merely permit a single meritless claim to prevail. As Sarbanes-Oxley is a relatively new law, the Judge's decision, if allowed to stand, is likely to be followed in the future by this Judge and others, and lead to the same untenable result in innumerable future cases. In short order, unsubstantiated claims would congest the system, preventing deserving complainants from having *their* day in court and harming those individuals that Sarbanes-Oxley was created to protect. Complainants with legitimate claims will have to

wait in line with the rest. Moreover, the Judge's approach would force innocent employers to expend considerable time and resources to defend themselves against meritless claims, before Administrative Law Judges, this Board, and beyond, unless they want to pay to settle such claims despite their utter lack of merit.

Accordingly, for the sake of the employer in this case and many others to come, this Board should clarify unequivocally that the complainant in a Sarbanes-Oxley case bears the burden of making out a *prima facie* case. In so doing, this Board should reject explicitly the notion that the respondent has any burden whatsoever to disprove the complainant's mere suggestion of a potential *prima facie* case. Indeed, the Board should clarify that the respondent employer has no burden whatsoever unless and until the complainant proves each and every element of the required *prima facie* case.

II. THE JUDGE ERRED IN HOLDING THAT RESPONDENT VIOLATED THE LAW BY TERMINATING COMPLAINANT'S EMPLOYMENT BECAUSE THERE WERE LEGITIMATE, NON-PRETEXTUAL GROUNDS TO DISCHARGE COMPLAINANT AND THE UNDISPUTED EVIDENCE IS THAT THREE SEPARATE DECISIONMAKERS WHO HAD NO KNOWLEDGE OF PURPORTED PROTECTED ACTIVITY RESOLVED TO TERMINATE THE COMPLAINANT ON THOSE LEGITIMATE GROUNDS ALONE

When a Sarbanes-Oxley complainant demonstrates protected activity contributed to an adverse employment decision and that any alternative reasons articulated by the employer for the action were a pretext, the employer still will not be held liable if it proves by clear and convincing evidence that it would have taken the same action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1980.109(a)("Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same

unfavorable personnel action in the absence of any protected behavior").[2] Accordingly, even if Platone could show that she had engaged in a protected activity and that ACA's reasons for discharging her were pretextual, the company still should prevail because the company succeeded in showing that it would have discharged Platone anyway because of her failure to disclose a serious conflict of interest – her romantic relationship with John Swigart, a former leader of the pilots' union who remained influential with the union.

A. Holdings Clearly Demonstrated A Legitimate, Non-Pretextual Reason For Platone's Discharge

In this case, the Judge held that Platone's failure to disclose her relationship with Swigart constituted a legitimate, non-retaliatory ground to discharge Platone. *Platone* at 27. In fact, the Judge acknowledged that Platone's position was a "position of trust" and that the mere "fact that she did not disclose her relationship . . . was a legitimate point of concern for [ACA]." *Id.* Further, the Judge made clear that "[w]hile the Claimant may feel that there was no actual conflict of interest . . . the Respondent perceived a breach of trust in her failure to disclose this relationship, as well as conflict of interest in her continued ability to be loyal to her employer" and that the Judge could not substitute its "business judgment for that of the Employer or second-guess whether that decision was correct." *Id.* at 28.

Perhaps most significantly, though, the Judge further ruled that the other three managers involved in the decision to terminate Platone's employment (each of whom were either peers or out-ranked Mr. Rodgers) either were *not aware* of Platone's alleged protected activity or *did not take those activities into account* when making the decision to discharge her. *Id*. Thus, each of

[2] By proceeding directly to the "clear and convincing evidence" inquiry, the judge therefore omitted a critical step in the McDonnell-Douglas legal analysis applied to whistleblower cases. *See Kahn v. Secretary of Labor*, 64 F.3d 271, 277-79 (7th Cir. 1995)(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

these individuals, the Judge concluded, based their decision to fire Platone *solely* on Platone's failure to disclose a serious conflict of interest and their legitimate concerns about Platone's ability to serve the company loyally.

B. The Judge's Conclusion That It Was Not Possible To Separate Legitimate Motives From Improper Motives For Platone's Discharge Is Contradicted By The Judge's Own Factual Findings

These important findings – that ACA had a legitimate, non-pretextual reason to discharge Platone and that the majority of individuals involved in the decision to terminate Platone had acted on that basis alone – logically should have led the Judge to the inescapable conclusion that ACA would have fired Platone notwithstanding any alleged protected activity.

Yet, she did not. Instead, the Judge proceeded to hold in favor of Platone on the curious theory that Platone's supervisor, whom the Judge concluded harbored a discriminatory animus toward Platone, "got the train rolling" by "initiating the process that resulted in Platone's suspension and termination." *Id.* at 28. In other words, because the person who initially brought Platone's conflict of interest to the attention of the company allegedly harbored a discriminatory animus toward her, the Judge concluded that Holdings *could not show* that ACA would have fired Platone for legitimate, non-discriminatory reasons. Under such circumstances, the Judge reasoned, it was not possible to separate legitimate from improper motives for Platone's discharge.

As an initial matter, this last conclusion is simply not supported by the Judge's own findings, which quite skillfully separates out the legitimate, non-retaliatory motives of the individuals responsible for firing Platone from the alleged improper motives of Platone's supervisor. The Judge concluded, for example, that while Mr. Rodgers may have "planted the seeds for the Complainant's dismissal," he was "careful not to taint any other person among the

group that debated Ms. Platone's fate with any knowledge of her protected activities." *Id.* at 24. In other words, the Judge found that while Platone's alleged protected activities may have been known to Rodgers, no such activities were considered – or even discussed – by the other three decisionmakers when the decision to fire Platone was made.[3]

The Judge's ruling that Holdings could not establish its affirmative defense simply because Rodgers brought to the company's attention a serious conflict of interest conflicts with the settled principle that an employer may terminate an employee for legitimate, non-retaliatory reasons. This is true even when those reasons initially were identified by someone who is motivated by legitimate as well as retaliatory reasons. As the Secretary held in *Ashcraft v. University of Cincinnati*, 1983-ERA-7, at 18 (Sec'y Nov. 1, 1984), "[w]here the employer has a legitimate management reason for taking adverse action against the employee, the employer is not required to hold off such action simply because the employee is engaged in a protected activity." In *Ashcraft*, the Secretary concluded that while the complainant's suspension was in part due to his having engaged in protected activities, the complainant would have been suspended regardless of those activities because of his failure to perform and follow instructions.

[3] Nor did the individuals involved in the decision act as a "rubber-stamp" for Mr. Rodgers. Quite to the contrary, the Judge found that they "debated" the situation, had "clearly [been] concerned about Ms. Platone's ties to the union when she was hired," and were concerned about "the potential for future disclosure of sensitive information to a person with strong past ties to the union." *Platone* at 27-28; *Coggins v. Government of D.C.*, No. 97-2263, 1999 WL 94655, at *4 (4th Cir. Feb. 19, 1999)(employer not liable for race discrimination where final decisionmaker, acting on recommendation to discharge plaintiff for misconduct, "fairly and impartially ascertained" appropriateness of discharge rather than serving as "rubber stamp" for supervisor motivated by racial animus). Further, they were in no way misled by Mr. Rodgers about the factual circumstances underlying the decision; Platone admits that she had a romantic relationship with Swigart and that she failed to disclose this relationship to ACA. All this, taken together with the Judge's conclusion that the company's concerns constituted a legitimate, non-retaliatory reason to fire Platone, shows that the ultimate decision was made by independent, unbiased decisionmakers who relied on a legitimate, non-retaliatory rationale for Platone's discharge.

As was the case here, the adverse employment action was initiated by the complainant's supervisor, whom the complainant alleged harbored a discriminatory animus toward him because he had "blown the whistle." *See also Halloum v. Intel Corp*., 2003-SOX-7, at 13 (ALJ Mar. 4, 2004)(while complainant's report to SEC that supervisor instructed him to engage in unsound accounting practices played some role in the supervisor's decision to strip complainant of supervisory responsibilities, the company had shown by clear and convincing evidence that it would have taken the same steps regardless).

C. Employers Must Be Able To Act On Information About Performance And Conduct-Related Problems To Run Their Businesses Effectively

The Judge's approach in this case would obstruct employer efforts to run their businesses efficiently and effectively, and even subject employers to increased liability, by preventing them from taking legitimate steps to address performance and conduct-related problems just because they learned about the problem from someone who was accused of bias. Under this Judge's holding, for example, if a supervisor who is aware of an employee's protected activity later discovers that the employee is involved in wrongdoing and reports it, his employer may not act on his report simply because it came from someone who was aware of the employee's protected activity and may later be accused of bias. Tying the employer's hands in this manner could potentially subject the employer to increased liability. The employer now knows about misconduct, but cannot stop it, thereby exposing it to potential liability for knowingly allowing the wrongdoing to continue.

Take, for example, a situation where a Sarbanes-Oxley complainant is later found to have sexually harassed a fellow coworker. The complainant's supervisor knows about his Sarbanes-Oxley protected activities, and the complainant has specifically alleged that his supervisor harbors a retaliatory animus toward him because he initiated a complaint. The supervisor, who

has actually witnessed the harassment, nevertheless follows the employer's complaint procedures and immediately reports the harassment to a higher authority. After the complaint is investigated, the company determines that the complainant did sexually harass his coworker. Under this Judge's ruling, however, the company would not be permitted to take action against the complainant because his misconduct originally was brought to their attention by someone allegedly acting with retaliatory motives. Thus, the ruling would require the company to risk running afoul of whole host of local, state and federal laws prohibiting workplace discrimination.

This is an untenable position for employers and one that is simply not warranted by Sarbanes-Oxley. Employers must be able to take appropriate action once they find out about performance or conduct-related problems, including situations like this one where an employee in a highly sensitive position fails to disclose a serious conflict of interest. Common sense suggests that the employer's job is to ascertain the facts for itself, rather than question the motives of the informant. Most importantly, once an employer determines that a worker actually did something wrong, or that a performance problem exists, the employer must be able to take appropriate steps to correct the situation regardless of how or why the employer learned about it. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 296 (4th Cir. 2004) (*en banc*) (noting that contrary rule would mean that "an unbiased employer could never discipline or terminate an employee for an undisputed violation of company rules, including such egregious acts as fighting or stealing . . . so long as the employer could demonstrate that she was 'turned in' by a subordinate employee [of the decisionmaker] 'because of' a discriminatory motivation"), *petition for cert. filed*, 72 U.S.L.W. 3673 (Apr. 5, 2004).

Moreover, most companies necessarily rely on lower-level supervisors who have first-hand knowledge of an individual's work performance and activities to supply relevant

information and even make or recommend employment decisions that affect that person. Mr. Rodgers' position as Senior Director of Labor Relations, for example, involved ensuring that Platone fully and appropriately represented the interests of ACA in negotiations with the company's labor unions. Because Platone's position was, as the Judge concluded, a "position of trust," *Platone* at 27, Mr. Rodgers also had a duty to safeguard delicate financial and other business information. Yet, the decision below essentially bars Mr. Rodgers from discharging his responsibilities simply because he was aware of Platone's alleged protected activities and had been accused of bias. The Judge's ruling in effect requires Rodgers, ACA or both to simply turn a blind eye to the conflict of interest, which threatened to jeopardize the confidentiality of sensitive company information. Again, this position is simply unworkable for employers.

D. The Decision Below Would Subject Employers To Significantly More Sarbanes-Oxley "Whistleblower" Complaints And Unjustly Reward Sarbanes-Oxley Complainants With Lifelong Job Security

Allowing a supervisor's alleged bias to call into question an employer's entire decision-making process is especially problematic because it likely would increase the number of Sarbanes-Oxley claims filed against employers, as well as unjustly reward Sarbanes-Oxley complainants with lifelong job security. The Judge's decision in this case essentially would allow an employee to forestall indefinitely any disciplinary action simply by invoking the Act and accusing his or her supervisor of retaliatory bias, thereby encouraging some employees to make false or unsubstantiated claims just to avoid legitimate performance or conduct-based discipline.

In fact, the decision below likely will have the practical effect of *automatically* insulating from legitimate, non-retaliatory discipline *all* Sarbanes-Oxley complainants – even if no accusation of supervisor bias is made. The reason is that, in most Sarbanes-Oxley cases, a

complainant's supervisor *will at some point* become aware of a subordinate's protected activity, either through the day-to-day monitoring of the complainant's work activities or as a result of a formal investigation of the Sarbanes-Oxley complaint. For example, most employers' internal investigation procedures require that management staff be told about a "whistleblower" complaint on a "need to know" basis; typically, a complainant's immediate supervisor will be among those that "need to know" because his or her assistance often will be needed during the investigation of the complaint. If the decision below is allowed to stand, most employers will be very reluctant to discipline *any* employee engaged in misconduct or simply poor performance, but who also raises issues covered by Sarbanes-Oxley for fear that a later accusation of bias against the supervisor may undermine the company's defense. As a result, employers will be placed in the untenable position of having to reward Sarbanes-Oxley complainants with lifelong job security, and no doubt some employees will be encouraged to lodge Sarbanes-Oxley complaints just to secure this valued benefit.

An employee should not be able to immunize herself from any future disciplinary action simply by alleging bias on the part of a supervisor. Nor should an employee enjoy automatic immunity from legitimate disciplinary action related solely to conduct or performance simply because she has lodged a Sarbanes-Oxley "whistleblower" complaint. Congress never intended that the Act be used to secure for complainants lifetime job security when legitimate, non-retaliatory reasons support the complainant's discipline or discharge. Sarbanes-Oxley should not be used to protect wrongdoers or poor performers in this manner. Moreover, companies like ACA and Holdings must be allowed to protect the interests of shareholders by eliminating serious conflicts of interest that place the security of the company's most sensitive financial and

business information in jeopardy, such as the conflict Platone inappropriately failed to disclose to ACA in this case.

E. The Decision Below Would Seriously Undermine An Employer's Ability To Defend Itself

Where there are legitimate, non-retaliatory reasons to discharge a complainant and the decisionmakers act on those reasons, as the Judge below found in this case, the company *must* prevail. 29 C.F.R. § 1980.109(a)("Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior"). Any other rule would render it virtually impossible for an employer to defend against a Sarbanes-Oxley claim when the complainant's supervisor is aware of protected activity and also has primary responsibility for monitoring and correcting the complainant's future work performance, which is *very often* the case. It will also lead to absurd results – with employers *unable* to address legitimate conduct and performance-related problems and complainants enjoying the unique advantage of being in the position to both manipulate the outcome of the case and to secure life-long job security for themselves.

F. Sarbanes-Oxley Should Not Be Used To Second-Guess An Employer's Honest Belief That An Employee's Conflict Of Interest Was A Legitimate Reason For Terminating Her

Although the "whistleblower" provisions of Sarbanes-Oxley protect an employee who provides information to his or her employer that the employee reasonably believes shows that the employer violated federal laws prohibiting shareholder fraud, the Act does not usurp an employer's ability to make management decisions that are based on legitimate, non-retaliatory reasons. While the Judge acknowledged this well-settled principle in theory, she then proceeded

to ignore it in this case. This important principle often arises in the context of Title VII of the Civil Rights Act, which has direct application here.[4]

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Supreme Court described the limits of Title VII when it cautioned that "[t]he statute was not intended to 'diminish traditional management prerogatives,'" nor does it require "the employer to restructure his employment practices . . . ." *Id*. at 259 (citations omitted).

The Fourth Circuit also has recognized repeatedly that Title VII's sole focus is on whether discrimination played a role in an adverse employment action. In *DeJarnette v. Corning Inc*., 133 F.3d 293 (4th Cir. 1998), for example, the Fourth Circuit acknowledged that Title VII does not allow it to criticize an employer's reason for taking an employment action as unwise, or even unfair, if there is no evidence of discrimination. Under Title VII, the court's task simply is to determine whether discrimination played a role in the discharge. As the court explained in *DeJarnette*,

> Title VII is not a vehicle for substituting the judgment of a court for that of the employer. Particularly, this Court does not sit as a kind of superpersonnel department weighing the prudence of employment decisions made by firms charged with employment discrimination. Our sole concern is whether the reason for which the defendant discharged the plaintiff was discriminatory. Thus, when an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination.

Id. at 298-99 (internal quotations and citations omitted); *see also Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 377 (4th Cir. 1995)("Title VII is not a vehicle for substituting the judgment of a court for that of the employer"); *EEOC v. Clay Printing Co.*, 955 F.2d 936, 946 (4th Cir.

[4] *Kester v. Carolina Power and Light Co*., ARB No. 02-007, 2000-ERA-31 (ARB Sept. 30, 2003)(applying Title VII framework in context of federal "whistleblower" cases).

1992)("It is not . . . the function of this court to second-guess the wisdom of business decisions").

The principle that restricts courts from evaluating the wisdom or fairness of an employer's business reason for making an employment decision in a Title VII case absent evidence of discrimination applies equally in the context of a Sarbanes-Oxley "whistleblower" case where the complainant has engaged in misconduct. Whether the employer learns of the misconduct on its own or through the employee's supervisor, the focus of the inquiry is limited to whether the employer truly believed that the employee engaged in the misconduct. If so, the employer's honest belief constitutes a legitimate, non-retaliatory reason for the termination that is not a pretext for unlawful retaliation, even if the court or another decisionmaker would have responded differently.

Even if an employer allegedly had reason to suspect that a supervisor reported the misconduct because of a retaliatory motive, an employer that nevertheless concluded on its own that the employee committed the misconduct should not be liable under Sarbanes-Oxley. Consistent with the focus of this law on whether the employer engaged in unlawful retaliation, the Board's concern should be whether the employer truly believed that the employee engaged in the alleged misconduct, not how or why the employer first learned of the alleged wrongdoing or even whether its conclusion ultimately was correct.

In this case, Platone concedes that she had an on-going romantic relationship with an active and influential union leader. Platone also concedes that she failed to disclose this relationship to ACA, notwithstanding the fact that she held a very sensitive position that required a high degree of trust, discretion and confidentiality. Further, the Judge below concluded that ACA's reasons for firing Platone were legitimate and non-pretextual and that the three other

managers involved in the decision to terminate Platone (each of whom either out-ranked or was a peer in the management structure to Platone's supervisor) either were not aware of any protected activities or did not take such activities into account when making the decision to discharge her. Thus, the evidence shows that ACA's decision to fire Platone was based on legitimate, non-retaliatory reasons. Such reasons should not now be second-guessed simply because these sound reasons for discharge were brought to the attention of the company by someone who is alleged to have unlawful motives.

CONCLUSION

For all of the above reasons, the Board should reverse the findings of the Administrative Law Judge and hold in favor of Holdings.

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