

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

UPMC and its subsidiaries
UPMC Presbyterian Shadyside and
Magee-Womens Hospital of UPMC,
Single Employer, d/b/a Shadyside Hospital
and/or Presbyterian Hospital and/or
Montefiore Hospital and/or
Magee-Womens Hospital

and

Case 06-CA-081896

SEIU Healthcare Pennsylvania,
CTW, CLC

UPMC and its subsidiary
UPMC Presbyterian Shadyside,
Single Employer, d/b/a Shadyside Hospital
and/or Presbyterian Hospital and/or
Montefiore Hospital

and

Cases 06-CA-086542
06-CA-090063
06-CA-090133 and
06-CA-090144

SEW Healthcare Pennsylvania, CTW, CLC

**CHARGING PARTY SEIU HEALTHCARE PENNSYLVANIA'S OPPOSITION
TO RESPONDENT UPMC'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Section 102.24(b) of the National Labor Relations Board Rules and Regulations and Statements of Procedure, as amended ("Board Rules and Regs."), the Charging Party, SEIU Healthcare Pennsylvania ("Union"), files this Opposition to Respondent UPMC's Motion for Summary Judgment ("Motion").

The Board may deny a motion for summary judgment "where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition

and/or response indicate on their face that a genuine issue may exist.” Board Rules and Regs. § 102.24(b). UPMC not only fails to demonstrate the absence of a genuine issue, but actually *raises* factual issues through the Motion and its Answer. Because these issues can be resolved only by a fact-finder following a trial, summary judgment is inappropriate.

In its Motion, UPMC relies on averments substantiated only by a Declaration from one of its officers, Michele Jegasothy. These assertions merely reiterate the denials in UPMC’s Answer, and in order to rely on them, UPMC must prove them at trial. But even if UPMC did so, these “facts” would not preclude a finding that UPMC and its respondent subsidiaries constitute a single employer.

The Board very recently summarized its test for single-employer status as follows:

Two or more ostensibly separate entities may be found to constitute a single employer where they constitute a single integrated enterprise. In determining whether such a relationship exists, the Board and courts consider four factors: common ownership, common management, interrelated operations, and centralized control of labor relations.

Massey Energy Co., 358 NLRB No. 159, slip op. at 8 (Sept. 28, 2012).

In light of this background, the Union responds to the numbered paragraphs of UPMC’s Motion as follows:

1. The assertion that UPMC is a mere holding company, even if proved at trial, is not dispositive of single-employer status because “[a] holding company and its subsidiary may be found to constitute a single employer if the other attributes of single employer status are present to a sufficient degree.” *See id.*, slip op. at 11.

2. The assertion that UPMC has only directors and officers but not employees, even if proved at trial, is simply another way of stating the obvious: that the individuals whose rights were interfered with are not on UPMC’s payroll. This is usually the case in *any* single-employer

analysis and is not a basis for summary judgment. At any rate, the Acting General Counsel alleges that certain employees of UPMC have been subjected to unfair labor practices. (Consol. Compl. ¶¶ 55-64.) UPMC denies employing those individuals. (Answer ¶¶ 55-64.) UPMC's denial of an employment relationship raises a genuine issue of fact that must be explored at trial.

3. The assertion that UPMC conducts no operations, even if proved at trial, is not dispositive of single-employer status because a holding company and its operating subsidiaries may constitute a single employer. *See Massey Energy Co.*, 358 NLRB No. 159, slip op. at 11. The Board in *Massey* found an alleged lack of operations by a holding company to be insignificant in the single-employer analysis: “[A]lthough Massey and its various operating subsidiaries are separately incorporated, Massey’s operations would not be materially different if it were set up as a single corporation with operating divisions (mining, administrative services, marketing, etc.)” *Id.*

4. The assertion that UPMC engages in no business other than holding ownership interests in other entities, even if proved at trial, is another way of saying that UPMC conducts no operations. *See* ¶ 3, above. But the Acting General Counsel alleges that UPMC *does* do business: it “engages in the governance and supervision” of its subsidiaries; it and its subsidiaries “have provided services for and made sales to each other”; they “have held themselves out to the public as single-integrated business enterprises.” (Consol. Compl. ¶¶ 2(a), 3(a).) UPMC denies these allegations, creating a genuine issue that must be explored at trial. (Answer ¶¶ 2(a), 3(a).)

5. The assertion that UPMC engages in no employee or industrial relations activities essentially reiterates UPMC's denials of certain allegations in the Consolidated Complaint. The Acting General Counsel alleges that UPMC and its subsidiaries “have formulated and

administered a common labor policy” and “have interchanged personnel with each other[.]” (Consol. Compl. ¶ 3(a).) UPMC denies these allegations. (Answer ¶ 3(a).) It is further alleged that UPMC and its subsidiaries jointly maintain various policies pertaining to employees. (Consol. Compl. ¶¶ 46-50.) UPMC denies that it maintains these policies. (Answer ¶¶ 46-50.) UPMC’s denials raise genuine issues that must be explored at trial.

6. The assertion that UPMC does not employ any person mentioned in the Consolidated Complaint, even if proved at trial, is not dispositive of single-employer status for the reasons set forth at ¶ 2, above. The Acting General Counsel alleges that various individuals acted on behalf of UPMC as managers, supervisors or agents. (Consol. Compl. ¶ 8(a)-(b).) UPMC denies such a relationship with those individuals, creating another genuine issue that must be explored at trial. (Answer ¶ 8(a)-(b).)

7. The assertion that UPMC’s Board of Directors “has delegated *practically* all policy-making functions to certain officials of UPMC Presbyterian-Shadyside” (emphasis added) actually tends to support a finding of single-employer status for two reasons: (1) The mere *ability* of UPMC to delegate (and, therefore, reclaim) policy-making functions for UPMC Presbyterian Shadyside is indicative of “the absence of an arm’s-length relationship” between the two entities, which is the hallmark of a single employer. *See Massey Energy Co.*, 358 NLRB No. 159, slip op. at 12; *see also NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1122 (3d Cir. 1982). (2) By stating that its Board of Directors has delegated “practically all” policy-making functions to certain UPMC Presbyterian Shadyside officials, UPMC admits it has retained *some* policy-making functions for UPMC Presbyterian Shadyside,¹ including review and approval of the Code

¹ Also noteworthy is UPMC’s failure to aver that its Board of Directors has delegated *any* policy-making functions to officials of respondent Magee-Womens Hospital of UPMC.

of Conduct governing UPMC Presbyterian Shadyside employees. The nature of UPMC's role with regard to the Code of Conduct and the extent to which UPMC retains other policy-making functions for UPMC Presbyterian Shadyside are genuine issues that must be explored at trial.

8. (a) By stating that it holds a 100 percent ownership interest in UPMC Presbyterian Shadyside, UPMC admits that the two entities share common ownership, which establishes one factor favoring a finding of single-employer status. *See Massey Energy Co.*, 358 NLRB No. 159, slip op. at 11. The assertion that UPMC "does not involve itself in the day-to-day operations, employee and industrial relations, personnel policy promulgation and/or maintenance or employee disciplinary activities of UPMC Presbyterian Shadyside" merely reiterates UPMC's denials of various allegations in the Consolidated Complaint, *see* ¶ 5, above, which raise genuine issues that must be explored at trial.

(b) The assertions that UPMC Presbyterian Shadyside has its own board of directors, officers and human resources department that guide its day-to-day operations without input from UPMC, even if proved at trial, do not preclude a finding of single-employer status because a parent corporation and a subsidiary constitute a single employer even when some day-to-day labor relations decisions are made by the subsidiary, as long as "the larger policy decisions" clearly emanate from the parent. *See Lebanite Corp.*, 346 NLRB 748, 759 (2006). Additionally, these assertions merely reiterate UPMC's denials of various allegations in the Consolidated Complaint, *see* ¶¶ 5 and 8(a), above, which raise genuine issues that must be explored at trial.

(c) By stating that it holds a 100 percent ownership interest in Magee-Womens Hospital of UPMC, UPMC admits that the two entities share common ownership, which

establishes one factor favoring a finding of single-employer status. *See* ¶ 8(a), above. The assertion that UPMC “does not involve itself in the day-to-day operations, employee and industrial relations, personnel policy promulgation and/or maintenance or employee disciplinary activities of UPMC Presbyterian Shadyside” merely reiterates UPMC’s denials of various allegations in the Consolidated Complaint, *see* ¶¶ 5 and 8(a), above, which raise genuine issues that must be explored at trial.

(d) The assertions that Magee-Womens Hospital of UPMC has its own board of directors, officers and human resources department that guide its day-to-day operations without input from UPMC, even if proved at trial, do not preclude a finding of single-employer status for the reasons set forth at ¶ 8(b), above, and merely reiterate UPMC’s denials of various allegations in the Consolidated Complaint, *see* ¶¶ 5 and 8(c), above, which raise genuine issues that must be explored at trial.

9. In making its averments, UPMC relies on a Declaration by its Corporate Secretary, Michele Jegasothy. (Motion at ¶ 9, Ex. A.) UPMC asks the Board to dismiss it as a respondent based on these unproved assertions that have not been subjected to cross-examination and which, in large part, constitute denials of the Acting General Counsel’s allegations, as demonstrated above. UPMC’s argument is circular, assuming the very “facts” that are at issue in these cases: UPMC and its subsidiaries cannot be found to constitute a single employer because UPMC says it and its subsidiaries aren’t a single employer. The only facts established at this point are those alleged in the Acting General Counsel’s Consolidated Complaint that are admitted or not specifically denied by UPMC. *See* Board Rules and Regs. § 102.20. All other facts must be proved at trial, which precludes summary judgment.

Although the Consolidated Complaint, UPMC's Answer and its Motion on their face raise genuine issues that require a trial, the Union avers that a trial would also establish the following facts, *previously asserted by UPMC in publicly disseminated documents*:

(a) UPMC holds certain reserved powers pertaining to the governance of its subsidiaries and has the power to initiate certain actions, and in some cases *any* action, at the subsidiary level.

(b) One-third of the votes of UPMC's Board of Directors are held by individuals appointed by or historically involved in the governance of the subsidiary hospitals. Thus, many of the same individuals oversee the management of and set policy for both UPMC and the subsidiary hospitals.

(c) UPMC provides various integrated services to its subsidiary hospitals, including information services, human resources, regulatory/compliance, finance, treasury, risk management, facilities, quality and government relations.

(d) Because human resources is one of the many integrated functions provided to subsidiaries by the parent corporation, control of labor relations of the subsidiary hospitals is centralized with UPMC.

(e) UPMC promulgates, approves and/or maintains dozens of systemwide policies (available on its intranet site, UPMC Infonet) that govern all major aspects of the subsidiary hospitals' relationship with their employees. These policies encompass, among other areas, compensation; corrective action and discharge; performance management; employment classification; equal employment; leaves of absence; severance upon position elimination; grievance procedures; and benefits such as paid time off, funeral leave and disability income.

(f) Certain of UPMC’s subsidiaries, including UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC, no longer file separate tax returns and instead report their activities to the IRS together with UPMC’s activities, on a “group return”—a Form 990 that reflects the financial and programmatic activities of all of the subordinate organizations on a consolidated basis. Prior to their 2005-06 fiscal year, UPMC and each of its tax-exempt subsidiaries were separately recognized by the IRS as exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code and reported their activities annually to the IRS on separately filed Form 990 information returns. UPMC and its subsidiaries were permitted to file a group return after the IRS reviewed the relationship between UPMC and its subsidiaries and determined that they were entitled to a group exemption. Group exemptions are awarded only where the parent establishes to the satisfaction of the IRS (through the production of information and documentary evidence, signed by an officer of the parent under penalties of perjury) that its subordinate organizations are, in fact, both “affiliated with” and “under the general supervision or control of” the parent.² When the IRS granted UPMC’s request for a group exemption, the agency concluded, based upon evidence provided by UPMC under penalties of perjury, that UPMC exercises “supervision or control” over the subsidiaries covered by the exemption.

(g) In its Form 990, UPMC represents itself and its subsidiaries as “functionally integrated.” UPMC describes itself as “the parent organization of a large integrated healthcare delivery system consisting of controlled subsidiaries,” with its primary mission being “the

² Treas. Reg. § 1.6033-2(d)(1); *see also* Revenue Procedure 80-27, 1980-1 C.B. 677, §§ 1, 4.02(2) (setting forth procedures for requesting a group exemption and emphasizing that all subordinates must be subject to the “general supervision and control” of the parent in order to qualify for a group exemption); *see also* Instructions to Form 990 at 20 (“The central organization (parent organization) named in a group exemption is required to have general supervision or control over its subordinate organizations as a condition of the group exemption).

ongoing support of all subsidiaries in order to assist them in accomplishing their [tax-]exempt educational healthcare, and research missions” through governance oversight and financial oversight.

(h) An external audit of UPMC and its subsidiaries is conducted at a systemwide level only, including all subsidiaries.

(i) UPMC runs systemwide programs that promote technology, quality and patient safety at its subsidiary hospitals.

(j) UPMC provides liability insurance for the subsidiary hospitals through insurance companies of which it is the sole owner.

These facts, if established at trial, would disprove UPMC’s denials and averments and support a finding that it and its subsidiaries are a single employer.

WHEREFORE, the Union respectfully requests that UPMC’s Motion for Summary Judgment be denied in full.

Dated: January 14, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January 2013, I electronically filed the foregoing Opposition to Motion for Summary Judgment and served copies upon the following:

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