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Office of Administrative Law Judges
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Issue Date: 16 February 2010

CASE NO: 2009-SOX-00040

In the Matter of:

LISA C. CHARLES,
Complainant,

v.

PROFIT INVESTMENT MANAGEMENT,
PROFIT FUNDS INVESTMENT TRUST,
THE PROFIT FUND, EUGENE A. PROFIT,
AND MICHELLE Q. PROFIT
Respondents.

DECISION AND ORDER GRANTING SUMMARY DECISION AND DISMISSING COMPLAINT

This matter arises out of a complaint filed by Lisa C. Charles ("Complainant") against Profit Investment Management, Profit Funds Investment Trust, The Profit Fund, Eugene A. Profit, and Michelle Q. Profit (collectively "Respondents") under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A ("SOX" or the "Act"). The Regional Administrator of the Occupational Safety and Health Administration dismissed the complaint because the preponderance of the evidence indicated that Complainant's alleged protected activity was not a contributing factor in the adverse action taken against her. Complainant then requested a formal hearing. Respondents have filed a motion to dismiss on several grounds. Respondents allege that Complaint's claim is not cognizable under the Act because Complainant's actual employer was Profit Investment Management, which is a privately held company. Second, Respondents allege that even if Complainant was a covered employee under the Act, she cannot establish that she engaged in any protected activity. Third, Respondents allege that Complainant's termination was not in retaliation for any protected activity, and was instead a result of her failure to appear for work for over a month.

In deciding this matter, I have fully read and considered Respondents' motion, Respondents' memorandum in support of the motion for summary judgment and the attached exhibits, as well as the affidavits of Eugene Profit, John Splain, and Carmen Colt. Complainant did not submit a response to Respondents' motion.

For the reasons set forth below, I conclude that this claim must fail because Complainant is not a covered employee under the Act, as her employer is a privately held company. As I will grant the motion to dismiss because Complainant is not a covered employee under the Act, I will not address Employer's alternative grounds for dismissal.

Material Undisputed Facts

1. Respondent Profit Investment Management ("PIM")[1] is a registered investment adviser, operating as a Delaware limited liability company. [Declaration of Eugene Profit, ¶ 1.] PIM has no securities registered under Section 12 of the Securities Exchange Act of 1934 ("'34 Act") and is not required to file reports under Section 15(d) of the '34 Act. [*Ibid.*]
2. Respondent Profit Funds Investment Trust ("PFIT") is an open-end diversified management investment company organized as a Massachusetts business trust. [Profit decl., ¶ 5.] PFIT is required to file reports under Section 15(d) of the '34 Act. [*Ibid.*] PFIT has no employees. [*Id.*, ¶ 9.]
3. PIM entered into a management agreement with PFIT on November 30, 1998. [Profit decl., ¶ 13, Exhibit A.] The agreement, which remains in effect, requires PIM to provide investment advice, portfolio management, and other services to PFIT. [*Ibid.*]
4. Respondent The Profit Fund ("Fund") is a diversified series of shares offered by PFIT. [Profit decl., ¶ 11.] The Fund has no employees. [*Ibid.*]
5. Respondent Eugene Profit is President and Chief Executive Officer of PIM. [Profit decl., ¶ 1, 51.] He is also president and a member of the Board of Trustees of PFIT. [*Id.*, ¶¶ 5-6.] Mr. Profit is considered an "interested" trustee of PFIT because of his affiliation with PIM. [*Ibid.*]
6. Respondent Michelle Q. Profit is the wife of Eugene Profit, and is Chief Compliance Officer of PFIT and of PIM. [Profit decl., Exhibits C, D, E, F.] She also serves as senior vice president and general counsel of PIM. [*Id.*, Exhibit R.]
7. Complainant was an employee of PIM; she was hired by Mr. Profit as his assistant in May of 2004. [Profit decl., ¶ 18.] Complainant additionally served as PIM's office manager and, although lacking experience in the financial industry, accompanied Mr. Profit to client meetings in order to help her gain experience with a view to her assuming a marketing role for PIM. [*Id.*, ¶¶ 18-19.] Complainant was promoted to Director of Client Relations in 2005, and to Vice President one year later. [*Id.*, ¶ 20.] She was given additional responsibilities of marketing PIM to institutional investors in October of 2007 and was given a 30% salary increase at that time. [*Ibid.*]
8. Complainant was continually employed by PIM from June of 2004 through May of 2008. [Profit decl., ¶ 53, Exhibits U, V.] Her employment with PIM ended on May 7, 2008. [*Id.*, ¶ 50.]
9. The decision to terminate Complainant's employment with PIM was made solely by Mr. Profit in his capacity as president and Chief Executive Officer of PIM. [*Id.*, ¶ 51.] Mr. Profit did not consult with PFIT's Board of Trustees before

[1] PIM was formed under the name "Investor Resources Group, LLC" and changed its name to PIM in March of 2008. [Declaration of Eugene Profit, ¶ 53 and Exhibit T.]

terminating Complainant's employment, and PFIT's Board of Trustees played no part in her termination. [*Id.*, ¶ 52; Declaration of John F. Splain, ¶ 15.]

Applicable Law

1. *Standard of Review- Summary Decision*

Summary decision may be entered pursuant to 29 C.F.R. § 18.40(d) under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See Gillilan v. Tennessee Valley Authority*, 91-ERA-31 at 3 (Sec'y, Aug. 28, 1995); *Flor v. United States Dept. of Energy*, 93-TSC-1 at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. *Anderson*, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, summary decision should be entered only when no genuine issue of material fact exists that must be litigated. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). When a respondent moves for summary decision on the grounds that the complainant lacks evidence of an essential element of his claim, the complainant is then required under Fed. R. Civ. P. 56 and 29 C.F.R. Part 18 to present evidence demonstrating the existence of a genuine issue of material fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Celotex Corp. v. Catrett, supra.*

2. *Coverage under Section 806 of Sarbanes Oxley*

Section 806 of the Act provides that no publicly traded company, or any "officer, employee, contractor, subcontractor or agent of such company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate" against a covered employee. A covered employee under the Act is one who provides information or participates in an investigation relating to violations of certain criminal statutes relating to fraud, rules or regulations of the Securities and Exchange Commission, or any provisions of Federal law relating to fraud against shareholders. To be protected, the information must have been provided to the employee's superior or to another employee with the authority to investigate, discover, or terminate the misconduct, to federal law enforcement or regulatory personnel, or to members of Congress; or the employee must have participated in proceedings relating to the violation. Actions brought under the Sarbanes-Oxley Act are governed by the burdens of proof set forth under 49 U.S.C. §42121(b), the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21."). 15 U.S.C. §1514A(b)(2)(C); *Halloum v. Intel Corporation*, ARB No. 04-068, ALJ No. 2003-SOX-7 (ARB Jan. 31, 2006); see also 29 C.F.R. §1980.104 (discussing general burdens of proof for SOX claim). According to the regulations, an employee is defined as "an individual presently or formerly working for a company or company representative…or an individual whose employment could be affected by a company or company representative." 29 C.F.R. §1980.101. A "company representative" is defined as "any

officer, employee, contractor, subcontractor, or agent of a company." *Id.* At issue in this claim is whether Respondent is a covered employer under Section 806 of the Act.

Conclusions of Law

Although all parties acknowledge that Complainant's former employer, PIM, is a privately held company, Complainant alleges that PIM and the rest of the named Respondents are covered employers as either contractors or agents of "publicly traded companies or others who are required to file reports under the Securities Exchange Act." [Complaint, ¶ 4.] Complainant argues that PIM, PFIT, and the Fund are subject to the Act as they are regularly required to file reports with the SEC pursuant to the Act. Respondents allege that while PFIT is required to file reports under Section 15(d) of the Act, and is thus a covered employer, PIM is a privately held entity, and is not covered under SOX as a contractor or an agent of PFIT or any other publicly traded company.

I find that of the Respondents named in this matter, only PFIT is a covered employer, as it is the only entity required to file reports under the '34 Act. PIM and the Fund, as privately-held companies is not a covered employer; nor is either of the named individuals.

Complainant was employed by PIM at the time of her alleged protected activity, and her employment was terminated by Respondent Eugene Profit. As PIM is a privately held entity, the issue for determination is whether PIM or Mr. Profit is considered either contractors or agents of PFIT, a company within the meaning of the Act.

1. *Respondents PIM and Eugene Profit Were Not Agents of PFIT*

In *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, the Administrative Review Board held that a privately held subsidiary of a publicly held company may be a covered employer under the Act if the subsidiary is an agent of the public company with regards to employment matters. *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB 07-021, 07-022 (August 31, 2009). To aid in making that determination, an administrative law judge applies the common law of agency to the facts in each claim. *Id*. In *Zang v. Fidelity Management & Research Co.*, the ALJ applied the *Klopfenstein* rationale to situations involving a privately-held entity acting as an agent of a publicly-traded entity. *Zang*, 2007-SOX-00027 (March 27, 2008). I agree with the ALJ in *Zang* that the rationale from *Klopfenstein* is applicable under the circumstances present in both *Zang* and the present case: a privately-held entity acting as an agent for a publicly-traded entity is not materially different than a privately-held subsidiary acting as an agent for a publicly-traded parent company. Whether PIM and Mr. Profit are considered covered employers under the Act depends on whether they are agents of PFIT, and were acting on behalf of PFIT when terminating Complainant's employment.

In order to determine whether PIM or Mr. Profit were acting as agents of PFIT, the following elements of agency must be evaluated: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control. *Zang*, 2007 SOX 00027 at 12, citing *Klopfenstein*.

A. *PIM*

After consideration of the submitted evidence, I find that PIM was not acting as an agent of PFIT with regards to Complainant's termination. According to the management contract between PIM and PFIT, PIM is an independent contractor of PFIT and is not authorized to act as an agent of PFIT. [Management Agreement, Exhibit A to Profit declaration.] PFIT's Board of Trustees has no involvement with any employment or staffing decisions nor does it have any control over the day-to-day activities of PIM. The evidence establishes that the Board at no time authorized PIM to make any employment decisions on PFIT's behalf, and specifically, that the Board had no involvement with the decision to terminate Complainant's employment. It appears that there is no genuine issue of material fact as to whether the Board was involved in any employment decisions with regards to Complainant; thus, I find that PIM was not acting as an agent of PFIT when Complainant was terminated.

B. *Mr. Profit*

The decision to terminate Complainant's employment was made solely by Mr. Profit. If that action can be attributed to PFIT's Board, it is possible that Mr. Profit, in his role as an interested trustee, was acting on behalf of PFIT in this situation. I find that he was not. While Mr. Profit is the president of PIM and has control of PIM's employment matters, his role as an interested trustee of PFIT and his role as president of PIM are different in both their scope and responsibilities. PIM provides investment advisory services to several other clients besides PFIT, and Mr. Profit, in his role as president of PIM, regularly makes decisions with regards to those clients. Thus, it would be incorrect to attribute to PFIT any of Mr. Profit's actions with regards to PIM. There is no evidence that Mr. Profit is authorized to make any decisions on behalf of the Board or without their consent, nor is there any evidence that the Board had any input on any of Mr. Profit's employment decisions. There is no evidence contradicting Respondents' claim that the decision to terminate Complainant was made solely by Mr. Profit in his role as president of PIM.

After consideration of the above, I find that there is no genuine issue of material fact with regards to whether both Mr. Profit and PIM are agents of PFIT, or any other covered employer. They did not act as agents of PFIT and did not make any employment decisions on behalf of PFIT or any other covered employer.

2. *PIM's Status as a Contractor of PFIT*

Respondent PIM acts as an investment advisor for Respondent PFIT pursuant to a management contract, under which PIM provides portfolio management and other services to PFIT. PIM is, therefore, a contractor of PFIT. The literal language of the Act would suggest that, because PIM is a contractor of PFIT, its discharge of Complainant, if in response to her having engaged in protected activity, would violate the Act. The Act, however, requires more. In *Zang*, the ALJ determined that the mere existence of a contract between a publicly-traded company and a privately-held company does not create a relationship such that the privately held company is covered under the Act. Instead, the ALJ applied the reasoning in *Klopfenstein* and concluded that a contractor of a publicly traded company can be covered under Section 806 if it

was acting on behalf of the publicly traded company when it terminated or retaliated against the employee. *Zang*, 2007 SOX 00027. This approach has been adopted by several administrative law judges. *See Flesar v. Am. Medical Ass'n*, 2007 SOX 00030 (June 13, 2007); *see also Reno v. Westfield Corporation, Inc.*, 2006 SOX 00030 (Feb. 23, 2006). To state that any privately held company under contract with a publicly traded company is a covered employer creates an exceptionally broad interpretation that is outside the scope of the Act. I agree with the reasoning in *Zang*, and hold that PIM could be covered under Section 806 if it acted on behalf of PFIT when it terminated Complainant's employment. I find, however, that PIM did not act on behalf of PFIT.

Although the management contract between PIM and PFIT states that PIM acts as an independent contractor for PFIT, it is clear from the above analysis and the evidence provided that PIM does not act on behalf of PFIT when it comes to employment matters and did not do so when terminating Complainant's employment. After considering all of the submitted evidence, I find that Complainant has failed to show that either Respondent PIM or Mr. Profit acted as contractors or agents of Respondent PFIT when her employment was terminated, and has not demonstrated that there are material facts in dispute on this issue. As Respondent PIM is not a covered employer, and neither PIM nor Mr. Profit are agents or contractors of a covered employer with regards to employment matters, the Complainant is unable to establish that she is a covered employee under Section 806 of the Act. I conclude that there is no genuine issue of material fact in dispute and Complainant's complaint must be dismissed.

3. *Michelle Q. Profit*

Although Respondents did not make any argument with respect to Mrs. Profit's liability, it is clear, and I have found, that the decision to terminate Complainant's employment was solely that of Mr. Profit acting as president of PIM. Thus, both because Mrs. Profit is not a covered employment and because she played no role in Complainant's termination, she is entitled to summary decision in her favor.

Conclusion

Complainant was not employed by a covered employer. The evidence establishes that her termination was not requested, required, or influenced by PFIT, the only covered employer named in this matter. Consequently, Complainant is not a covered employee, and her claim is not subject to the Act and must therefore be dismissed.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. Respondents' motion for summary decision is GRANTED;
2. Complainant's complaint is DISMISSED WITH PREJUDICE.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).