In the Matter of:

GEREON MERTEN,	**ARB CASE NO. 09-025**
COMPLAINANT,	**ALJ CASE NO. 2008-SOX-040**
v.	**DATE: June 16, 2011**

BERKSHIRE HATHAWAY, INC.,

and

FLIGHTSAFETY INTERNATIONAL, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Gereon Merten, *pro se*, Congers, New York

For Respondents:
Paul E. Hash, Esq., and Michael J. DePonte, Esq., *Jackson Lewis LLP*, Dallas, Texas

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

Gereon Merten filed a complaint under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX).[1] Merten alleged that Respondent FlightSafety International, Inc. (FSI), a subsidiary of Respondent Berkshire Hathaway, Inc., wrongfully terminated his employment in violation of the SOX's employee protection provisions. The Respondents moved to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure (Fed. R. Civ. P.) 12(b)(1), and for failure to state a claim under Fed. R. Civ. P. 12(b)(6). A Department of Labor (DOL) Administrative Law Judge (ALJ) concluded that Merten did not set forth facts that would establish that the Respondents are employers covered by SOX Section 806 and, therefore, dismissed the complaint. Because the ALJ had subject matter jurisdiction over Merten's SOX complaint and Section 806 covers a subsidiary whose financial information is included in a publicly traded parent company's consolidated financial statements, the ALJ's decision is vacated, and this case is remanded for further proceedings consistent with this Decision and Order of Remand.

BACKGROUND

Respondent FSI is a non-publicly traded subsidiary of Berkshire Hathaway, a publicly traded company subject to the SOX and to Securities and Exchange Commission regulation.[2] Merten was an FSI employee until FSI notified him on October 12, 2007, that his employment would be terminated as of October 31, 2007.[3] In response to his discharge, Merten filed a complaint with OSHA alleging that the Respondents violated SOX Section 806 when it terminated his employment.[4] Finding no reasonable cause to believe that the Respondents violated the Act, OSHA dismissed his complaint. Merten requested a hearing before the Department of Labor's Office of Administrative Law Judges (OALJ).

Prior to a hearing, the Respondents filed a Motion to Dismiss, along with a supporting sworn affidavit, before the ALJ. Specifically, the Respondents argued that Merten was not an employee of a company subject to the SOX. Thus, they contended that the ALJ should dismiss Merten's complaint pursuant to Fed. R. Civ. P. 12(b)(1), as OSHA lacked subject matter jurisdiction over his SOX complaint, and pursuant to Fed. R. Civ. P. 12(b)(6), for failing to state a claim upon which relief can be granted.

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[1] 18 U.S.C.A. § 1514(A) (Thomson/West 2010). The SOX's implementing regulations are found at 29 C.F.R. Part 1980 (2010).

[2] ALJ Order Granting Motion to Dismiss (Order) at 2; Affidavit of Thomas W. Riffe (Affd.) at 2. Section 806, 18 U.S.C.A. § 1514A(a), prohibits a "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d))" from retaliating against an employee who engages in whistleblower protected activity. Such companies are generally referred to as "publicly traded."

[3] Order at 2; Complaint at 1.

[4] Complaint at 1-2.

The ALJ considered the Motion to Dismiss, relying on the Board's holding in *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006) (*Klopfenstein I*), which held that a subsidiary acting as the agent of a publicly traded company with respect to the challenged employment decision can be held liable under Section 806. The ALJ also considered the "integrated enterprise test" for determining whether a parent company is responsible for the activity of its subsidiary as set forth in *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 485 (3d Cir. 2001). The ALJ concluded that Merten did not set forth facts in his complaint that supported a finding that FSI is an agent of Berkshire Hathaway for purposes of employee protection under Section 806 or, therefore, that the Respondents were employers subject to the SOX. Consequently, the ALJ granted the Motion to Dismiss.[5] Merten filed a timely petition for review of the ALJ's decision with the ARB.

JURISDICTION AND STANDARD OF REVIEW

Congress authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the SOX. 18 U.S.C.A. § 1514A(b). The Secretary has delegated that authority to the Administrative Review Board. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). *See* 29 C.F.R. § 1980.110(a). The Board reviews the ALJ's findings of fact under the substantial evidence standard. 29 C.F.R. § 1980.110(b). The Board reviews questions of law de novo. *See Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 4 (ARB Mar. 14, 2008).

DISCUSSION

Initially, the ALJ erred in considering the Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1). The ALJ's subject matter jurisdiction to hear SOX whistleblower complaints exists pursuant to the Secretary of Labor's delegation of her hearing and adjudication authority under 18 U.S.C.A. § 1514A(b) to DOL ALJs.[6] By filing a complaint alleging that the Respondents violated the SOX by terminating his employment, Merten properly invoked the DOL's jurisdiction to adjudicate his complaint. *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039-042, slip op. at 11 (ARB May 25, 2011).

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[5] Order at 5-8. The ALJ also denied Merten's request to amend his complaint by adding two individuals as parties and to supplement his complaint with nine additional alleged adverse personnel actions to which he was subjected. Order at 8.

[6] *See* 18 U.S.C.A. § 1514A(b) (authorizing the Secretary of Labor to hear SOX whistleblower complaints), 29 C.F.R. §§ 1980.106, 1980.107 (delegating the Secretary's hearing and adjudication authority to Department ALJs). *See also*, 69 Fed. Reg. 52104-01 (Aug. 24, 2004) ("Responsibility for receiving and investigating these complaints has been delegated to the Assistant Secretary for OSHA." Secretary's Order 5-2002, 67 Fed. Reg. 65008 (Oct. 22, 2002)).

Moreover, subsequent to the issuance of the ALJ's decision, Congress enacted and the President signed into law on July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act). Section 929A of the Dodd-Frank Act clarifies the SOX whistleblower provision at Section 806 to specifically cover a subsidiary whose financial information is included in the consolidated financial statements of a parent company subject to the registration and reporting requirements of Sections 12 and 15(d), respectively, of the Securities Exchange Act of 1934. Because the Section 929A clarifying amendment does not create retroactive effects, it applies to Merten's case on appeal. *Johnson v. Siemans Bldg. Tech., Inc.*, ARB No. 08-032, ALJ No. 2005-SOX-015, slip op. at 16 (ARB Mar. 31, 2011). The record suggests that FSI is a consolidated entity of Berkshire Hathaway, but we do not find that the record before us conclusively establishes that fact.[7] Consequently, the ALJ's decision is vacated, and this case is remanded for the ALJ to address FSI's status as a consolidated entity[8] of Berkshire Hathaway consistent with the Board's holding in *Johnson* and, if so, to determine the issue of liability under the facts presented at hearing.

Finally, we note that Merten also contended on appeal that the ALJ erred in denying his request to amend his complaint by adding two individuals as parties and to supplement his complaint with nine additional alleged adverse personnel actions to which he was subjected. Because this case must be remanded for reconsideration, the ALJ should also consider all relevant claims of adverse personnel actions which Merten raises when determining the issue of liability. In addition, ALJs should freely grant parties the opportunity to amend their initial filings to provide more information about their complaint prior to consideration of summary dismissal, and dismissals should be a last resort. *See Sylvester*, ARB No. 07-123, slip op. at 13.[9]

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[7] While there is evidence of record suggesting that FSI is a consolidated subsidiary of Berkshire Hathaway within the meaning of Section 806, *see* Merten's Answer in Opposition to Respondents' Motion to Dismiss, Exhibits 21-22, the determination of that question, based upon an appropriate finding of fact(s) subject to such further evidentiary development as may be warranted, is reserved to the ALJ upon remand.

[8] Because a consolidated subsidiary is covered under Dodd-Frank and the record indicates that FSI is a consolidated subsidiary of Berkshire Hathaway, we decline to discuss further subsidiary coverage under agency law. *See Johnson*, ARB No. 08-032, slip op. at 17.

[9] Dismissal is even less appropriate when the parties submit additional documents that justify an amendment or further evidentiary analysis under 29 C.F.R. § 18.40 (ALJ Rule 18.40), the ALJ rule governing motions for summary decision, which is analogous to Fed. R. Civ. P. 56 (summary judgment). In contrast, Rule 12 motions challenging the sufficiency of the pleadings are highly disfavored by the SOX regulations and highly impractical under the OALJ rules. These rules do not contain a rule analogous to Rule 12, but instead allow parties to seek prehearing determinations pursuant to ALJ Rule 18.40. Merten's complaint instead requires further analysis pursuant to ALJ Rule 18.40 or an evidentiary hearing on the merits. *See Sylvester*, ARB No. 07-123, slip op. at 13.

CONCLUSION

An employee of a subsidiary whose financial information is included in a publicly traded parent company's consolidated financial statements is protected against retaliation where the employee engages in whistleblower protected activity under Section 806. Because whether FSI was a consolidated subsidiary of Berkshire Hathaway when FSI terminated Merten's employment is uncertain on the record before us, we leave that finding for consideration on remand. If FSI was a consolidated subsidiary, the ALJ must then determine the issue of liability.

Accordingly, the ALJ's Order Granting Motion to Dismiss is **VACATED** and this case is **REMANDED** for further proceedings consistent with this Decision and Remand Order.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge