In the Matter of:

LISA C. CHARLES, **ARB CASE NO. 10-071**

COMPLAINANT, **ALJ CASE NO. 2009-SOX-040**

v. **DATE: December 16, 2011**

**PROFIT INVESTMENT MANAGEMENT,
PROFIT FUNDS INVESTMENT TRUST,
THE PROFIT FUND, EUGENE A. PROFIT,
and MICHELLE Q. PROFIT,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Lisa Charles Lewis[1]**, *pro se*, Washington, District of Columbia**

For the Respondent:
Wilfred J. Benoit, Jr., Esq.; Michael J. Wylie, Esq.; *Goodwin Procter LLP*, Boston, Massachusetts

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge;* and Luis A. Corchado, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of 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 (Thomson/West Supp. 2011) (the "Act" or "SOX"), and its implementing regulations found at 29 C.F.R. Part 1980 (2011). Lisa Charles filed a complaint on August 1, 2008, alleging that Profit Investment Management

[1] The Complainant married and changed her name during the pendency of this case.

(PIM), Profit Funds Investment Trust (PFIT), The Profit Fund (the Fund), Eugene A. Profit, and Michelle Profit (collectively, the Respondents) discharged her in violation of the SOX.

On February 16, 2010, a Department of Labor Administrative Law Judge (ALJ) dismissed Charles' complaint pursuant to Respondents' Motion for Summary Decision (Motion). For the following reasons we reverse the ALJ's ruling and remand the case.

BACKGROUND

Charles filed her SOX complaint with the Occupational Safety and Health Administration (OSHA) on August 1, 2008. She was represented by counsel. According to her complaint, PIM employed Charles from May 2004 until May 2008. She states that her duties included serving as the office administrator for PIM, PFIT, and the Fund. She alleges that, during her employment, she reported SEC rule violations to Eugene Profit and Michelle Profit. Her complaint also contends that Eugene Profit discharged her on May 7, 2008.[2]

OSHA denied her complaint, and Charles requested a hearing before an ALJ. On April 20, 2009, the ALJ issued a Notice of Hearing and Pre-Hearing Order, scheduling a hearing for August 12, 2009. Prior to that date, on June 17, 2009, Charles' counsel withdrew, and she proceeded pro se.

The parties participated in at least two telephonic status conferences with the ALJ. On October 30, 2009, the ALJ issued an Order Setting Briefing Schedule (Order), which indicated that "a telephonic status conference was held in the above-captioned matter on October 30, 2009. Matters discussed included scheduling a hearing, discovery issues, and a schedule for briefing a motion for summary decision." This Order indicated that any opposition to a motion for summary decision should have been filed no later than January 8, 2010, but did not mention the consequences of failing to respond. Charles submitted a letter to the ALJ on November 25, 2009, stating "I have requested additional supplements from Profit Investment Management (PIM) that I feel will further support my complaint but have been withheld from my request to produce and labeled 'irrelevant' by opposing counsel."

The Respondents filed their Motion on December 10, 2009. Charles did not submit a response to the Motion until February 8 or 16, 2009.[3] According to Charles, she did not file a timely response because she misunderstood the Order, and because the Respondents thwarted her attempts to complete discovery.[4] On February 16, 2010, the

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[2] Complaint at 2-4.

[3] The ALJ's docket list provides two dates memorializing receipt of Charles' response.

[4] Complainant's Response to Respondents' Memorandum in Reply to Complainant's Appeal at 2-3.

ALJ issued a Decision and Order Granting Summary Decision and Dismissing Complaint (D. & O.). The ALJ concluded that Charles had not been employed by a SOX-covered employer. Charles appealed the ALJ's ruling to the Administrative Review Board (Board).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX.[5] The Board reviews an ALJ's grant of summary decision de novo.[6] Under 29 C.F.R. § 18.40(d)(2011), the ALJ may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." "The burden is on the moving party 'to demonstrate the absence of any material factual issue genuinely in dispute.'"[7]

DISCUSSION

We have reviewed the record in this case, and we conclude that we must reverse the ALJ's decision granting the Respondents' Motion. The record insufficiently explains whether there was a pending discovery dispute that materially affected Charles' ability to respond to the Motion by the date the ALJ established. In addition, there is a genuine issue of fact regarding whether each of the Respondents is a covered employer under the SOX.

A. Procedural Error

The reason for remanding this case is the unresolved discovery issue Charles raised before the ALJ. Charles alleges that the Respondents thwarted her efforts to respond to the Motion. Under the regulations governing SOX cases, an ALJ may deny a motion for summary decision if "the moving party denies access to information by means of discovery to a party opposing the motion."[8]

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[5] 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).

[6] *Reamer v. Ford Motor Co.*, ARB No. 09-053, ALJ No. 2009-SOX-003, slip op. at 3 (ARB July 21, 2011).

[7] *See, e.g., American Intern. Grp., Inc. v. London American Intern. Corp. Ltd.*, 664 F.2d 348, 351 (2d Cir. 1981) (quoting *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975)).

[8] 29 C.F.R. § 18.40(d).

The record indicates that on either February 8 or 16, 2009, Charles submitted a letter to the ALJ opposing the Motion. In her brief before the Board, Charles states that her "Response to Respondents' [Motion] was hindered due to Respondents' refusal to comply with Judge Johnson's Order Re Discovery unless I agreed to enter into a confidentiality agreement with respect to certain information I requested pursuant to Judge Johnson's Order Re Discovery."[9] It is not clear from the record whether there was a pending discovery dispute and whether such discovery dispute impeded Charles from responding to the motion for summary decision. Consequently, we remand for the ALJ to consider whether the discovery dispute pertained to the issues in the motion for summary decision. After considering the discovery issue, the ALJ has discretion to decide how to address the Motion.

In addition to the potential discovery dispute, Charles may not have been aware of the consequences for failing to reply to the Motion by the date the ALJ specified. In *Hooker v. Washington Savannah River Co.*,[10] the ARB applied federal precedent requiring a judge to give a pro se complainant notice of the requirements for opposing a motion for summary judgment and the right to file pleadings, affidavits, or other evidence in response to the motion. We held that the ALJ in that case erred in granting summary judgment on Hooker's constructive discharge and blacklisting claims because he failed to inform Hooker of "his right to file affidavits or 'other responsive materials' and did not warn him that failing to respond could mean that his case would be over."[11] We also noted that, when being notified of the requirements for responding to a motion for summary decision, a pro se litigant is entitled to "a form of notice sufficiently understandable to one in appellant's circumstances fairly to apprise him of what is required."[12]

In this case, the record indicates that the ALJ conducted telephonic conferences with the parties prior to granting the Motion. It is possible that, during these conferences, the ALJ informed Charles of the consequences for failing to respond to the Motion. However, the record does not indicate that he did so.

In sum, we cannot affirm the ALJ's ruling on the Motion based on the record before us. Accordingly, we remand the case and direct the ALJ to provide Charles with a notice containing: (1) the text of the rule governing summary decisions before ALJs (i.e., 29 C.F.R. § 18.40), and (2) a short and plain statement that factual assertions in the

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[9] Complainant's Response to Respondents' Memorandum in Reply to Complainant's Appeal at 3.

[10] ARB No. 03-036, ALJ No. 2001-ERA-016 (ARB Aug. 26, 2004).

[11] *Id.*, slip op. at 9.

[12] *Hooker*, ARB No. 03-036, slip op. at 8, citing *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975) (citing *Hudson v. Hardy*, 412 F.2d 1091, 1094 (1968)).

evidence submitted by the Respondents will be taken as true unless she contradicts them with counter-affidavits or other documentary evidence.[13]

B. There Is a Genuine Issue of Material Fact in Dispute

Congress enacted the SOX on July 30, 2002, as part of a comprehensive effort to address corporate fraud. SOX Title VIII is designated the Corporate and Criminal Fraud Accountability Act of 2002 (the Accountability Act). Section 806, the SOX's employee-protection provision, prohibits covered employers and individuals from retaliating against employees for providing information or assisting in investigations related to certain fraudulent acts. The provision, as amended, reads, in relevant part:

> (a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)), including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such 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 an employee in the terms and conditions of employment because of any lawful act done by the employee --
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> (1) to provide information, cause information to be provided, or otherwise assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire, radio, TV fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –
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> (A) a Federal regulatory or law enforcement agency; . . . or

[13] *See, e.g.*, *Timms v. Frank*, 953 F.2d 281, 285 (7th Cir 1992)("a short and plain statement in ordinary English" is appropriate because "the need to answer a summary judgment motion with counter-affidavits is contrary to lay intuition.").

> (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
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> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission , or any provision of Federal law relating to fraud against shareholders.[14]

In their Memorandum in Support of their Motion, the Respondents assert that Section 806 covers only employees of publicly traded companies.[15] The ALJ reviewed the Motion and concluded that "[Charles'] claim must fail because [she] is not a covered employee under the Act, as her employer is a privately held company."[16] This conclusion is incorrect.

The plain language of Section 806(a) identifies several categories of potentially covered entities beyond the registration and reporting requirements of SOX (i.e., "any officer, employee, contractor, subcontractor, or agent of such company"). The Second and Sixth Circuits have concluded that the use of the term "any" preceding the listing of the several entities identified in Section 806(a) is an indication that Congress intended the clause "officer, employee, contractor, subcontractor, or agent" to be interpreted in an all-encompassing manner.[17] Without further explanation from the ALJ, we therefore cannot agree with his conclusion that "only PFIT is a covered entity, as it is the only entity required to file reports under the '34 Act."[18] The ALJ also concluded that, "[t]o 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

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[14] 18 U.S.C.A. § 1514A. On July 21, 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. 111-203, 124 Stat 1376 (2010), which amended the SOX whistleblower law in a manner which does not impact the outcome of this case.

[15] Memorandum in Support of Respondent's Motion at 15.

[16] D. & O. at 2.

[17] *Johnson v. Siemens Bldg Techs., Inc*., ARB No. 08-032, ALJ No. 2005-SOX-015, slip op. at 22 (ARB Mar. 31, 2011), citing *United States v. Thompson*, 685 F.2d 993, 996 (6th Cir. 1982); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976).

[18] D. & O. at 4.

Act."[19] This statement may or may not prove true in some cases, but it is incorrect to conclude that "no contractor" is ever covered. The record in this case is sufficiently disputed with respect to the nature of the contractual relationship between PFIT and PIM. In addition, resolution of the pending discovery dispute may raise additional material facts. Consequently, summary judgment is improper.

As we explained in *Johnson*, the legislative history of the SOX "demonstrates that Congress intended to enact robust whistleblower protections for more than employees of publicly traded companies."[20] The legislative history discusses not only Congress's objective of protecting whistleblowing by employees of a publicly traded company, but protecting as well employees of private firms that work with, or contract with, publicly traded companies.[21]

Accordingly, we also disagree with the ALJ's conclusion 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."[22] In reaching this conclusion the ALJ cited cases holding that a company subsidiary can be an agent under a common law agency theory.[23] But by focusing on those cases, the ALJ failed to consider alternative bases and factors upon which common law agency might be established.[24] Furthermore, evidence in the record suggests that PIM contracted with PFIT and that Mr. Profit served as an officer of PFIT, as such they may be covered employers under the plain language of Sec. 806.

The Respondents also assert that Charles is not covered by the SOX because she was employed by PIM, "a private company that had sole control over the terms and conditions of her employment."[25] The regulations governing the SOX indicate that 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."[26] A "company representative" is defined as "any

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19 *Id*. at 6.

20 *Johnson,* ARB No. 08-032, slip op at 16.

21 *Id.*, slip op. at 23, citing S. Rep. 107-146 (May 6, 2002) at 4-5.

22 D. & O. at 5.

23 *Id*. at 4-5, citing *Klopfenstein v. PCC Flow Tech. Holdings, Inc*., ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006), and *Zang v. Fidelity Mgmt. & Research Co*., ALJ No. 2007-SOX-027 (Mar. 27, 2008).

24 *See Johnson*, ARB No. 08-032, slip op. at 17, 19.

25 Memorandum in Support of Respondent's Motion at 18.

26 29 C.F.R. § 1980.101.

officer, employee, contractor, subcontractor, or agent of a company."[27] Charles alleged in her complaint that "[i]n her role as Vice President, [she] was the office administrator for PIM, PFIT, PVALX and Profit's other funds."[28] The employment and agency relationships are disputed in the record. If Charles had an employment relationship with PFIT, de facto or otherwise, she may be a covered employee. Even accepting the Respondents' argument that Charles was employed by PIM, a factual issue remains about the contractual and agency relationships and, therefore, whether Charles is an employee of a covered contractor. Further, it is possible that one or more of the Respondents may have acted as a representative of PFIT. If Charles' employment "could be affected by" any such company representative, she may be considered a covered employee under Section 806. As the ALJ noted, "[t]he 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."[29]

We conclude that a genuine issue of fact exists as to whether the Respondents could, as a matter of law, be held in violation of Section 806. We do not rule on the merits of Charles' claim.

CONCLUSION

The ALJ's Decision and Order is **REVERSED** and **VACATED**. This matter is **REMANDED** for further proceedings consistent with this Decision and Order of Remand.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

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[27] *Id*.

[28] Complaint at 2.

[29] D. & O. at 5.