U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 September 2007

Case No. 2007-SOX-52

In the Matter of
RICHARD L. AZURE,
Complainant

v.

DOMINICK'S/SAFEWAY,
Respondent

BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION & CANCELLATION OF HEARING

This case arises out of a complaint of discrimination filed by the Complainant, Richard L. Azure, with the Occupational Safety & Health Administration's ("OSHA") North Aurora Area Office dated February 28, 2007, against the Respondent, Dominick's/Safeway ("Dominick's"), pursuant to the employee protection provisions of Public Law 107-204, 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. § 1514A et seq. ("Sarbanes-Oxley Act" or "SOX") enacted on July 30, 2002. The present proceeding was initiated before the Office of Administrative Law Judges ("OALJ") on May 18, 2007, when the Complainant timely filed objections to the Administrator's dismissal of his complaint dated April 20, 2007. Respondent filed a motion on August 6, 2007 asking that this court grant summary decision. Complainant responded, asserting that equitable tolling should be applied due to his "psychological disability" and his attempts to file in the correct forum.

Mr. Azure ("Complainant") requested a hearing based upon the Secretary's findings that he failed to timely file a complaint under the ninety day rule and that equitable tolling should not be applied. Furthermore, Complainant argued that he engaged in protected activity under the act and was terminated for engaging in protected activity.

On August 6, 2007, Respondent filed a Motion to Dismiss the Complaint, averring that there exists no genuine issue of material fact and facts of record warrant entry of judgment for Respondent.[1] Specifically, Respondent argued that Complainant filed his claim outside of the ninety day requirement outlined in 29 CFR § 1980.103(d), and it should therefore be barred. On

[1] I interpret the motion to dismiss as a motion for summary decision under 29 C.F.R. § 18.41.

August 20, 2007, Complainant responded asserting that the doctrine of equitable tolling should apply, and the claim should be allowed to proceed on the merits.[2]

Upon consideration of the matter, I have concluded for the reasons set forth below that there is no genuine issue as to any material fact and that the Respondent is entitled to summary decision.

FACTS

The following are the undisputed facts between the parties. Complainant worked in the meat department at Safeway beginning May 2, 2004 though November 26, 2006. On November 22, 2006, Complainant was notified that he was being transferred to another store.[3] After receiving this notice of transfer, Mr. Azure "finished [his] schedule through Saturday [November 25, 2006] and then applied for disability" on November 27, 2006 – the day he was scheduled to start work at the new store. (Complainant's Aff. dated Jan. 31, 2007). Complainant filed his complaint on February 28, 2007 with OSHA, alleging he was effectively terminated through his transfer notice – and was fired for engaging in two forms of protected activities. The first was an email to corporate office dated November 19, 2006, which asserted:

> discrimination, violations of local and federal codes, battery committed against [him] by the store manager, and [his] intention to file a grievance with [his] union and possible complaints with the Department of Labor and Equal Employment Opportunity Commission.

(Complaint ¶ 3). The second was protected activity, according to Complainant, was emailing "a report of an attempted theft to the company's Ethics Hotline, as required by company policy." *Id.*

Complainant freely admits that his filing of the SOX complaint with OSHA was beyond the 90 day filing deadline. (Complainant's Answer ¶2). However, he asserts two separate facts for why the doctrine of equitable tolling should apply. First, Complainant claims he called OSHA in December of 2006, where an employee misled him into believing OSHA was not the correct government agency with which to file a SOX complaint, but rather the EEOC, the NLRB, or his union would be the correct forum. (*Id.* ¶¶ 3-4). Complainant states he contacted Sherrill Benjamin, Director of North Aurora Area Office of OSHA, who agreed to find out which employee misled him. (Complainant's Answer ¶ 8). Complainant believes said employee would back his assertion that he was mislead. *Id.* At this point, Complainant has yet to hear back from Mr. Benjamin.[4]

At the bottom of Complainant's paycheck, Mr. Azure points to the fact it provides a hotline number where an employee can report "without fear of retaliation incidents of theft,

[2] Complainant also submitted an extension and leave-to-file amendment to answer on August 22, 2007. This request was accompanied with the amended answer. I shall grant Complainant's request and consider the arguments and evidence presented in both briefs.

[3] Complainant asserts this store is 37 miles from his original store.

[4] Complainant also states he requested the residential telephone company call details from last December and January and "is expecting printouts soon."

accounting improprieties, securities fraud, falsification or destruction of records, release of proprietary information and other illegal or unethical behavior … [R]etaliations for calling the Hotline are prohibited by federal law (the Sarbanes-Oxley Act of 2002)." Complainant's Exhibit 5.

The second reason Complainant asserts this court should apply equitable tolling is his psychological disability. Complainant attached Exhibit 12 to his Amended Answer which shows that he received an award from Social Security for disability benefits. He also notes he was first diagnosed with "mental illness" on August 3, 1994. Treatment notes attached to his Amended Answer list diagnoses of major depressive disorder with a superimposed dysthymic disorder and alcohol dependence (in early full remission).

DISCUSSION AND APPLICABLE LAW

Summary judgment (summary decision as applied to administrative law) is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317,322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has produced evidence to show that it is entitled to summary judgment, the party seeking to avoid such judgment must affirmatively demonstrate that a genuine issue of material fact remains for trial. *LINC Fin. Corp. v. Onwuteaka*, 129 F.3d 917, 920 (7th Cir.1997).

In deciding a motion for summary judgment, a court must "review the record in the light most favorable to the nonmoving party and ... draw all reasonable inferences in that party's favor." *Vanasco v. National-Louis Univ.*, 137 F.3d 962, 964 (7th Cir.1998). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Nevertheless, the nonmovant may not rest upon mere allegations, but "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). *See also LINC Fin. Corp*, 129 F.3d at 920. A genuine issue of material fact is not shown by the mere existence of "some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, 106 S.Ct. 2505, 91 L.Ed.2d 202, or by "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson*, 477 U.S. at 252. Therefore, if the court concludes that "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial,'" and summary judgment must be granted. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, (*quoting First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

The standard for granting summary decision in whistleblower cases is analogous to the rules governing summary judgment under the Federal Rules of Civil Procedure. *See Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-52, slip. op. at 1 (ARB Dec. 13, 2002); Fed.R.Civ.P. 56(e). Summary decision is appropriate for either party where the record shows that "there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d); *Celotex Corp.*, 477 U.S. at 322. A material fact is one that might affect the outcome of the suit, and a genuine dispute is one where a reasonable

jury could find for the nonmovant based on the evidence. *Anderson*, 477 U.S. at 247. The opposing party may not rest upon the mere allegations or denials of such pleading but must set forth specific facts showing that there is a genuine issue of fact for the hearing. 29 C.F.R. § 18.40(c). All evidence and factual inferences are viewed in a light most favorable to the nonmovant. *Matsushita Elec*., 475 U.S. at 587; *see also Williams v. Lockheed Martin Corp*., ARB NOS. 99-54 & 99-064, OALJ Nos. 1998-ERA-40, 42 (Sept. 29, 2000).

The Sarbanes-Oxley Act prohibits discriminatory actions by publicly traded companies against an employee who provides, causes to be provided, or otherwise assists in an investigation concerning any conduct which the employee reasonably believes constitutes violations of certain provisions of the Sarbanes-Oxley Act, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1); *Klopfenstein v. PCC Flow Techs. Holdings Inc*., ARB No. 04-149 (May 31, 2006). The Sarbanes-Oxley Act extends such protection to employees of companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 781, or that are required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 780(d). 18 U.S.C. § 1514A(a)).

I. Timeliness

The Sarbanes-Oxley Act requires that a complaint alleging discrimination be filed not later than 90 days after the date on which the alleged violation occurs. 18 U.S.C. § 1514A(b)(2)(D). The applicable regulations at 29 C.F.R. § 1980.103(d) provide:

> Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination. The date of the postmark, facsimile transmittal, or e-mail communications will be considered to be the date of filing.

29 C.F.R. § 1980.103(d). The date an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation. *Kaufman v. United States Envtl. Prot. Agency*, ALJ No. 02-CAA-22 (Sep. 30, 2002) (citing *Whitaker v. CTI-Alaska, Inc*., ARB No. 98-036, ALJ No. 97-CAA-15 (ARB May 28, 1999)). The Administrative Review Board explained that discrete acts of discrimination are easy to identify. Examples are failure to promote, denial of transfer, termination and refusal to hire. *Id.* (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)).

In the case *sub judice*, Complainant does not challenge the fact he filed the complaint with OSHA past the ninety day deadline. He received notice of his transfer on November 22, 2006 and filed his SOX complaint with the North Aurora OSHA Office on February 28, 2007. This equates to approximately ninety-eight days. As the evidence supports Complainant's stipulation, I find that his complaint was not timely filed.

II. Equitable Tolling

The SOX's limitations period is not jurisdictional and therefore is subject to equitable tolling. *Moldauer v. Canadaiga Wine Co.*, ARB No. 04-022, ALJ No. 03-SOX-026, slip op. at 4 (ARB Dec. 30, 2005); *Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-50, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. Tennessee Valley Auth.*, ARB No. 98-11, ALJ No. 98-128, slip op. at 40-43 (ARB Apr. 30, 2001).[5] Equitable tolling applies when a plaintiff, despite using due diligence and through no fault of his own, cannot find or determine information essential to bringing a complaint. *E.g.*, *Chapple v. National Starch & Chemical Co.*, 178 F.3d 501, 506 (7th Cir. 1999); *Taliani v. Chrans*, 189 F.3d 597, 597-598 (7th Cir. 1999); *Soignier v. American Board of Plastic Surgery*, 92 F.3d 547, 552 (7th Cir. 1996); *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 268 (7th Cir. 1995); *Chakonas v. City of Chicago*, 42 F.3d 1132, 1135 (7th Cir. 1994), *Cada v. Baxter Healthcare Corp.*, 920F.2d 446, 451 (7th Cir. 1990).

The primary case detailing equitable tolling under the whistleblower provisions located at 29 C.F.R. § 24 is *School Dist. Of City of Allentown v. Marshall*, 657 F.2d 16 (3rd Cir. 1981). There, the court stated that the restrictions on equitable tolling must be scrupulously observed. *Id*. at 19. When Congress sets a limitations period, even if it is for only a few days, Congress does not leave courts the decision as to which delays might or might not be "slight." *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 at 240 (1976). In adopting the standard set forth by the Second Circuit, the Third Circuit stated equitable tolling may be appropriate only when:

1. the defendant has actively misled the plaintiff respecting the cause of action;
2. the plaintiff has in some extraordinary way been prevented from asserting his rights; or
3. the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Allentown, 657 F.2d. at 19-20.[6] The court noted that these categories were not exclusive, but instructive. Furthermore, the court added from their reading of *Burnett v. New York Central Railroad*, 380 U.S. 424 (1965), that the "filing of a proper claim in the wrong forum must also be timely before it will toll the appropriate limitations period." *Id.* at 20. *See also Burnett v. New York Central Railroad*, 380 U.S. 424, 426-27 (1965)(where the Court stated the filing in the incorrect forum must be timely).

A. Raising of the Precise Statutory Claim in Another Forum

Here, Mr. Azure asserts that equitable tolling should be applied as he filed with the NLRB on January 10, 2007. In this complaint, which is attached to Respondent's Motion as Exhibit C, Complainant states his protected activities includes "filing grievances with the Union

[5] *See also Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451(7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991)(where the court notes neither equitable tolling nor equitable estoppel applies to statutes of limitations that are jurisdictional rather than procedural).

[6] I note the use of the *Allentown* case was adopted by the ARB for SOX purposes in the case of *Harvey v. Home Depot U.S.A. Inc.*, ARB No. 04-114, ALJ No. 04-SOX-20 (ARB June 2, 2006).

and … making a report of possible theft and … Union activities." (Complainant's Answer ¶19; Respondent's Exhibit C). In *Harvey v. Home Depot*, the Board made it clear that Complainants must file the "the precise statutory claim in issue," but merely have done so in the wrong forum. *Harvey*, at 17. Thus, we must look to the elements of a SOX complaint.

i. Elements of SOX

The employee protection provision of the SOX prohibits covered employers from retaliating against employees for providing information or assisting in investigations related to listed categories of fraud or securities violations:

> (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. 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)), 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–
> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a 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, when the information or assistance is provided to or the investigation is conducted by–
>
> (A) a Federal regulatory or law enforcement agency;
> (B) any Member of Congress or any committee of Congress; or
> (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
> (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 an 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.

18 U.S.C.A. § 1514A. Specifically, Section 806 of the SOX protects employees who provide information to a covered employer or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§

1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission (*see, e.g.*, 17 C.F.R. Part 210 (2005), Form and Content of the Requirements for Financial Statements), or any provision of Federal law relating to fraud against shareholders. In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such alleged violation. 68 Fed. Reg. 31864 (May 28, 2003). *See* 18 U.S.C.A. § 1514A(a).

Actions brought pursuant to the SOX are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2005). 18 U.S.C.A. § 1514A(b)(2)(C). Accordingly, to prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the respondent knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Getman v. Southwest Sec., Inc*., ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB July 29, 2005). *Cf.* 29 C.F.R. §§ 1980.104(b), 1980.109(a). *See* AIR 21, § 42121(a)-(b)(2)(B)(iii)-(iv). *See also Peck v. Safe Air Int'l, Inc. d/b/a Island Express*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6-10 (ARB Jan. 30, 2004). The respondent can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Getman*, slip op. at 8. *Cf.* § 1980.104(c). *See* § 42121(a)-(b)(2)(B)(iv). *See also Peck*, slip op. at 10.

Mr. Azure's complaints – which consist of discrimination based on a report of "possible theft," filing grievances with the Union pursuant to contract, discrimination based on sex, and disability – touch on none of the subjects outlined in §§ 1341, 1343, 1344, 1348, or any regulation of the Security and Exchange Commission (mail, wire, radio, TV, bank, or securities fraud). Thus, even though his filing with the NLRB and the EEOC were within the ninety-day limit as outlined in 29 C.F.R. § 1980.103(d), he failed to file a claim which would arise under the SOX whistleblower protection laws. SOX specifically protects whistleblowers who provide information related to fraud or securities violations. Being discriminated against for sex, disability, or for reporting a possible petty theft, do not touch on the area of fraud or securities violation. Thus under this analysis, equitable tolling should not apply.

B. Being Mislead to File in Incorrect Forum

Even if Mr. Azure did not file a precise statutory claim in the wrong forum, he still asserts that he was mislead by an OSHA Employee to file in the wrong forum.[7] Specifically, Complainant states he called the OSHA office in North Aurora, Illinois in December to discuss the correct filing location of a SOX complaint. During that conversation, a representative supposedly told Complainant that he should not file his SOX complaint with OSHA, but rather with the EEOC or the NLRB. (Complainant Answer ¶¶ 3-4).[8] He then claims he spoke with

[7] Complainant also claims he was mislead by the statement on his employee check which stated that calling the hotline to report theft was protected activity was protected under SOX. While this statement by the employer may not be entirely accurate, it has in no way lead Complainant away from the correct filing location.

[8] I note that neither of his filings with the EEOC or the NLRB mention either SOX or activities protected by SOX.

Sherrill Benjamin of the North Aurora OSHA office in February 2006, where Mr. Benjamin agreed to discover the names of the employees that misinformed him of the filing procedures. At the time of his response, Complainant was still awaiting phone records to verify these phone conversations.

Outside of his own affidavit, there is not even a scintilla of evidence in the record to support this assertion. Complainant filed his response to Respondent's motion on August 22, 2007 – over eight months after the OSHA employee supposedly mislead him on the phone. This is more than ample time to obtain phone records to prove he called OSHA in December. Furthermore, Complainant submitted phone bill records from November 14 – December 13 of 2006 to prove he called Dwayne Howard, Dominick's Human Resource Director, on November 19, 2006. The records from the next month would have shown such a call to OSHA actually took place. I also find it unlikely that an OSHA employee would not know the correct location to file a SOX claim – and *even if* an employee did in fact accidentally mislead someone – I find it even more unlikely that Mr. Benjamin would fail to provide evidence or even a letter indicating such an event occurred. Therefore, based upon all these improbabilities, I find that Complainant has not shown he was mislead to file in the incorrect forum, and under this analysis, equitable tolling should not apply.

C. Psychological Disability

Mr. Azure also claims that equitable tolling should apply because his psychological disability prevented him from asserting his rights. Specifically, Mr. Azure states "[T]olling a filing period is a proper and necessary accommodation for a psychiatrically-disabled person where the disability prevents the person from gaining access to the court." While having Complainant's psychological disability would not be easy for anyone, having a major depressive disorder with a superimposed dysthymic disorder and alcohol dependence (in early full remission), does not present an extraordinary block in preserving his rights. There is nothing to suggest that this psychological impairment prevents Mr. Azure from speaking, making phone calls, or writing letters. On the contrary, Mr. Azure, through his Answer and Amended Answer, shows a strong capacity to conduct research and articulate an argument. As such, I find his psychological disability – while it may be real – does not prevent him in an extraordinary way from asserting his rights. More importantly, such an assertion in this case must be supported by a well-reasoned medical opinion that articulates such an impairment would prevent Complainant in an extraordinary way from asserting his rights – which does not exist herein. Therefore, I find by the evidence, equitable tolling should not apply under this prong.

D. Absence of Prejudice to Respondent

Complainant asserts in his Amended Answer that "[I]t is not a significant burden to the Court nor is it a prejudice to the Respondent to grant the Plaintiff the [r]elief of equitable estoppel or tolling and it is in the interest of the greater good." The Supreme Court stated that "[a]lthough absence of prejudice [to the respondent] is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify tolling is identified, it is not an independent basis for invoking the doctrine." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984). As the Supreme Court also said, whatever the

merits of a particular case, "experience teaches us that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826, 100 S.Ct. 2486, 2495, 65 L.Ed.2d 532 (1980); s*ee also Electrical Workers*, 429 U.S. at 240 (where the Supreme Court notes when Congress sets a limitations period, courts are not left with the decision as to which delays might or might not be "slight."). First, I note Complainant established no factor which would justify equitable tolling. Second, an absence of prejudice is not enough reason on its own to justify equitable tolling when Congress has set forth a specific filing deadline. Therefore, I find that the absence of prejudice is not enough to justify equitable tolling.

Conclusion

Here, Complainant admits he filed his whistleblower complaint after the statute of limitations passed. Complainant presented no evidence that would justify the use of the doctrine of equitable tolling. First, Complainant failed to file the precise statutory claim in the wrong forum.[9] This alone is enough to bar the application of equitable tolling. However, Complainant also failed to show that he was mislead to file in the incorrect forum, or that his psychological disability prevented him in an extraordinary way from asserting his rights. Finally, the absence of prejudice alone is not enough to invoke the doctrine of equitable estoppel. As such, even in constructing the facts in a light most favorable to the Complainant, I find there is no genuine issue of material fact, and summary decision is appropriate.

Decision and Order

Therefore, IT IS ORDERED that Respondent's Motion for Summary Decision is GRANTED.

Furthermore, IT IS ALSO ORDERED that the hearing in this matter scheduled for February 5, 2008, is hereby canceled.[10]

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THOMAS F. PHALEN, JR.
Administrative Law Judge

[9] In truth, Complainant failed to articulate any event which would constitute protected activity under SOX.
[10] I note the notice of hearing states the hearing shall take place on February 5, 2007. This is clearly a typo, as my conference call notes indicate the hearing was to take place in 2008 – added to the fact the appeal to this office was not filed until May of 2007, and neither party raised this factually apparent error in their respective filings.

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, Room S-4309, 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).