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Issue Date: 08 April 2008

Case No. 2007-SOX-00079

In the Matter of:

RAJ DARYANANI,

Complainant,

v.

ROYAL & SUN ALLIANCE d/b/a
ARROWPOINT CAPITAL CORP.,

Respondent.

ORDER OF DISMISSAL

This case arises from a complaint filed by Raj Daryanani with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). He alleges that the respondent, Arrowpoint Capital Corp. (Arrowpoint), discriminated against him in violation of the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (SOX or the Act). The Act prohibits discriminatory actions by publicly traded companies against their employees who provided information to their employer, a federal agency, or Congress that the employee reasonably believed constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud), 1342 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (security fraud) or any rule or regulation of the Securities and Exchange Commission (SEC) or any provision of federal law relating to fraud against shareholders.

Procedural History

Mr. Daryanani filed his initial complaint with OSHA on March 29, 2007, alleging that he was terminated on pretextual grounds under the Act. OSHA dismissed the complaint on August 7, 2007, on the grounds that the complaint was untimely filed and respondent was not a publicly-traded company and was not subject to the Act. On August 11, 2007, complainant appealed OSHA's decision.

On October 22, 2007, respondent filed a motion for summary decision seeking dismissal of the complaint, arguing that: (1) Mr. Daryanani's complaint is time barred; (2) respondent is not subject to the provisions of the Act; and, (3) complainant failed to prove a cause of action under the Act.

On December 13, 2007, complainant filed his opposition memorandum in response to respondent's motion for summary judgment. Of note, he alleges that respondent was a subsidiary of a publicly traded company as of the date of his termination and therefore subject to the Act. He also argues that equitable tolling or equitable estoppel should be applied to this complaint because respondent took improper affirmative steps to mislead complainant regarding his potential rights under the Act. Complainant then filed a Rule 56(f) motion for discovery to obtain additional evidence for opposing summary decision.

In an order dated December 19, 2007, I denied complainant's Rule 56(f) motion for discovery on the grounds that it would be premature to pursue such discovery in resolving respondent's motion for summary decision. I ruled that the only issues to be addressed in the summary decision motion are whether the claim was timely filed under the Act and, if so, whether the respondent is subject to the whistleblower provisions of the statute. I allowed each party additional time to submit briefs in support of their respective positions.

On February 12, 2008, complainant filed a brief in support of his response to the motion for summary decision. Respondent filed a brief in support of its motion for summary decision on February 21, 2008, wherein it again moved for summary decision on the grounds that (1) the claim is time-barred, (2) the respondent is not subject to the Act, and (3) the complainant knowingly executed a release and waiver of all claims against respondent.

Background

The following are the pertinent and undisputed facts. Mr. Daryanani was hired on October 11, 2004 by Royal and Sun Alliance of Canada (R&SA Canada), and assigned as a Litigation Manager/Peril Director of the U.S. business operations. During the course of his employment, he performed services for R&SA Canada and R&SA US. Neither of these companies was publicly traded and therefore not subject to SEC filing requirements. However, both R&SA Canada and R&SA US are indirect foreign subsidiaries of Royal & Sun Alliance Group plc (R&SA plc), a company which was publicly traded and subject to SEC filing requirements until October 30, 2006.

According to a summary provided by the respondent in its motion for summary decision, RS&A plc announced in September of 2006 its agreement to sell its U.S. businesses to another company. The sale effectively placed RS&A US in a "run-off capacity, no longer writing or marketing active business in the United States." Arrowpoint Capital Corp. (Arrowpoint) was formed in 2006 and it acquired all of the R&SA US businesses. Arrowpoint's primary business is to continue the current management of R&SA USA in order to meet policyholder obligations. On September 28, 2006, R&SA plc announced that it would delist its registration with the Securities Exchange Commission, effective October 30, 2006.

Complainant was notified of his job elimination on October 17, 2005, and his employment was terminated on December 16, 2005. Concurrent with his termination of employment, Mr. Daryanani was provided 32 weeks of severance in exchange for a full release of any and all claims against respondent. I reiterate that Mr. Daryanani waited until March 29, 2007 to file his complaint with the Occupational Safety and Health Administration.

Discussion and Applicable Law

Respondent is seeking summary decision of this matter based on the grounds that (1) the claim is time-barred, (2) the respondent is not subject to the act, and (3) the complainant knowingly executed a release and waiver of all claims against respondent.

Summary decision may be granted to either party if the pleadings, affidavits, or material obtained through discovery, show that there is no genuine issue of material fact that remains to be resolved. 29 C.F.R. §§ 18.40-41. The moving party bears the initial burden to demonstrate that there is no disputed issue of material fact, which may be demonstrated by "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986); *Hall v. Newport News Shipbuilding and Dry Dock Co.,* 24 BRBS 1, 4 (1990). Upon such a showing, the burden shifts to the non-moving party to establish the existence of a genuine issue of material fact. *Celotex,* 477 U.S. at 322. All evidence must be viewed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242. 261; *Hall,* 24 BRBS at 4. Where a genuine issue of material fact does exist, an evidentiary hearing must be held. 29 C.F.R. § 18.41(b).

The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary decision. *Anderson,* 477 U.S. at 247. It is not enough that the evidence consists of the party's own affidavit, or sworn deposition testimony and a declaration in opposition to the motion for summary decision. The evidence must consist of more than the mere pleadings themselves. *Celotex,* 477 U.S. at 324. A non-moving party who relies on conclusory allegations which are unsupported by factual data or sworn affidavit cannot thereby create an issue of material fact. *See Hansen v. United States,* 7 F.3d 137, 138 (9th Cir. 1993).

Accordingly, in order to withstand respondent's motion, it is not necessary for the complainant to prove his allegations. Rather, he must only allege the material elements of his *prima facie* case. *Bulls v. Chevron/Texaco, Inc., et al,* Case No. 2006-SOX-117 (October 13, 2006). Timely filing or meeting of the equitable consideration requirements to toll the statutory time limits are material elements. *Id.*

Respondent's initial argument that the complainant's claim is time-barred is correct. The Act provides, in pertinent part, that:

> [w]ithin 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has both been made and communicated to the complainant), an employee who believed that he or she has been discriminated

> against in violation of the Act may file … a complainant alleging such discrimination.

29 C.F.R. § 1980.103(d) (2006). Complainant was notified of his anticipated layoff in October of 2005 and his employment was terminated on December 16, 2005. Complainant did not file his initial complaint until March 29, 2007, more than 18 months after he was notified of his layoff and 16 months after he was terminated. This delay renders his complaint untimely. Complainant argues that his claim was timely filed from the date that he became aware of respondent's possible retaliatory motive for his termination. Mr. Daryanani states:

> Complainant filed his claim within 90 days of becoming aware that raising questions about potential ethical and financial impropriety had been the likely cause of his termination, which occurred after Complainant heard that the Royal & Sun Alliance, USA LBO had been announced. Before then, Complainant believed he was terminated because of a falling out with . . . [another employee].

(Complainant's Reply Brief at 2). As a result, complainant requests that his claim be considered as timely filed. He alleges that until that time he thought he was terminated because of a conflict with another employee.

I cannot agree with complainant's argument regarding timeliness. The 90-day filing period begins to run when the employer makes and reasonably communicates the alleged discriminatory adverse employment decision to the complainant. Neither the statute nor its implementing regulations indicate that a complainant must acquire evidence of retaliatory motive before proceeding with a complaint. *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Aug. 31, 2005) (holding that complainant's failure to acquire evidence of XL's motivation for his suspension and firing did not affect his rights or responsibilities for initiating a complaint pursuant to the SOX). *See Wastak v. Lehigh Valley Health Network*, 333 F.3d 120, 126 (3d Cir. 2003), citing *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994) ("a claim accrues in a federal cause of action upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong.").

Mr. Daryanani admits that he was notified of his pending termination in October of 2005, and he was actually terminated in December of 2005. Therefore, the latest date that he could have possibly filed a claim was March of 2006. Mr. Daryanani's claim was filed over a year past the limitations period and is therefore untimely.

Complainant next argues that he was misled by the respondent into signing a general release that prevented him from bringing an earlier claim. Based on these actions, complainant asserts that the doctrines of equitable tolling or equitable estoppel should be applied.

Courts have held that the time limitation provisions under the Act are not jurisdictional, in the sense that a failure to file a complaint within the prescribed period is an absolute bar to administrative action, but rather it is analogous to statutes of limitation and thus may be tolled by equitable consideration. *Donovan v. Hanker, Forman & Harness, Inc.,* 736 F.2d 1421 (10th Cir. 1984); *School District of Allentown v. Marshall,* 657 F.2d 16 (3rd Cir. 1981); *Coke v. General Adjustment Bureau, Inc.,* 654 F.2d 584 (5th Cir. 1891). The *Allentown* court warns, however, that

the restrictions of equitable consideration must be scrupulously observed; the tolling exception is not an open invitation to the court to disregard limitation periods simply because they bar what may otherwise be a meritorious case. *Rose v. Dole,* 945 F.2d 1331, 1336 (6th Cir. 1991). The burden which is on the party seeking the benefit of equitable tolling to establish such tolling is warranted. *Bost v. Federal Express Corp.,* 372 F.3d 1233, 1242 (11th Cir. 2004). Equitable estoppel and equitable tolling are distinct, albeit related, doctrines. *Moldauer v. Canandaigua Wine Co.,* ARB Case No. 04-022, ALJ Case No. 03-SOX-026 (ARB December 30, 2005). Each must be considered separately.

Equitable estoppel focuses on actions taken by a respondent that prevent a complainant from filing a claim. *Santa Maria v. Pacific Bell,* 202 F.3d 1170, 1176 (9th Cir. 2000). Equitable estoppel denotes efforts by the respondent, beyond the wrongdoing upon which the claim is grounded, to prevent the complainant from timely filing a complaint. *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Aug. 31, 2005).

Equitable tolling focuses on the complainant's inability, despite all due diligence, to obtain vital information bearing on the existence of his complaint. *Santa Maria v. Pacific Bell,* 202 F.3d 1170, 1176 (9th Cir. 2000). Generally, there are three situations in which tolling of the statute of limitations is proper: (1) when the respondent has actively misled the complainant respecting the cause of action, (2) the complainant has in some extraordinary way been prevented from asserting his or her rights, or (3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *Allentown,* 657 F.2d at 20. A party seeking to invoke equitable tolling for the filing of a SOX whistleblower complaint based on the professed ignorance of the applicability of the SOX to his or her situation must show that his or her ignorance of the limitations period was caused by circumstances beyond the party's control such as mental incapacity. *See Guy v. SBC Global Services,* 2005-SOX-113 (ALJ Dec. 14, 2005).

In *Moldauer v. Canandaigua Wine Co.,* 2003-SOX-26 (ALJ Nov. 14, 2003), a complainant alleged that he was entitled to equitable estoppel to excuse an untimely filing of a SOX whistleblower complaint based on his signature on a severance agreement in which he agreed to release any discrimination claims he might have under federal and state law against the respondent in exchange for his severance package. The administrative law judge found the issue to be whether the respondent entered the severance agreement in order to prevent complainant from asserting his rights under the Act. The judge found that equitable estoppel did not apply, explaining:

> Most importantly, the doctrine of equitable estoppel requires that the complainant reasonably rely on the respondent's conduct. *Santa Monica,* 202 F.3d at 1177. Despite the severance agreement, Mr. Moldauer filed a complaint with [the California Department of Fair Employment and Housing], met with the FBI to discuss Respondent's alleged accounting improprieties, and complained to the SEC about Respondent's accounting practices within one month of signing the severance agreement. Collectively, these actions indicate that Mr. Moldauer was not lulled into inaction by the severance agreement.

In the present case, complainant agreed to accept severance benefits in exchange for a release and waiver of all claims against respondent. This agreement did not make any specific reference to potential SOX liability. Mr. Daryanani asserts that he was prevented from bringing an earlier claim due to this agreement. Again, I am not persuaded by his argument. Complainant admits that he did not file his claim in a timely manner because he did not become aware of respondent's possible retaliatory motive until January of 2007, when complainant states he first learned of respondent's leveraged buyout. His actions and statements in his briefs do not indicate that he was lulled into inaction by the severance agreement. He failed to file his complaint in a timely manner because, of his own admission, he did not have reason to believe his termination was retaliatory. Complainant has offered no evidence that respondent acted in bad faith or purposely tried to dissuade him from filing a SOX claim.

Mr. Daryanani also notes that respondent made no express reference to potential SOX liability, and therefore the company effectuated a concealment of a potential SOX claim. However, the Administrative Review Board in *Moldauer v. Canandaigua Wine Co.*, 2003-SOX-26 (ALJ Nov. 14, 2003) held that mere silence on the part of the respondent with respect to a SOX claim does not amount to active misrepresentation. Based on the above findings, it is apparent that neither equitable tolling nor equitable estoppel can be applied to Mr. Daryanani's complaint. Accordingly, the respondent's motion for summary decision on the basis that the claim is untimely must be granted.

The remaining issues raised in the motion for summary judgment are rendered moot with my ruling on the timeliness of the complaint. I note, however, that those issues involve questions of material fact which are not resolved by the submitted evidence.[1]

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the complaint filed by Raj Daryanani on March 29, 2007 with the U.S. Department of Labor, Occupational Safety and Health Administration under the Sarbanes-Oxley Act be dismissed because it was untimely filed.

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DONALD W. MOSSER
Administrative Law Judge

[1] It should be noted that complainant mentions several issues regarding his potentially protected activities, severance package, taxes, and other payment issues that also are beyond the limited scope of this opinion.

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, 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(a) and (b).