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**Issue Date: 01 October 2007**

Case No.: 2007-SOX-49

In the Matter of:

Susan M. Hinds,
Complainant

v.

Hillenbrand Industries, Inc.,
Batesville Services, Inc., and
MainSource Financial Group, Inc.,
Respondents

## RECOMMENDED ORDER OF DISMISSAL

This proceeding arises under the employee protection provisions of the Sarbanes-Oxley Act of 2002 and the procedural regulations found at 29 C.F.R. Part 18. The U.S. Department of Labor issued the Secretary's Findings on a complaint filed by Susan M. Hinds. A hearing has been requested by the Complainant on the determination made by the Department of Labor.

On July 10, 2007, I issued an Order advising the parties that I would consider the timeliness of the Complainant's complaint as a preliminary matter, before addressing the merits of the Complainant's Complaint. On August 3, 2007, counsel for Respondent Batesville Services, Inc. (Batesville), and Hillenbrand Industries, Inc. (Hillenbrand), filed a Brief in Support of Motion to Dismiss Complainant's Appeal, a Statement of Undisputed Material Facts, and a Certification of Sharon P. Margello.

On August 3, 2007, counsel for Respondent MainSource Financial Group, Inc. (MainSource) filed its Answer to the Complainant's Complaint, a Motion for Summary Decision and To Affirm April 19, 2007 Secretary's Findings, and a Brief in Support of its Motion for Summary Decision and to Affirm April 19, 2007 Secretary's Findings.

On August 30, 2007, the Complainant filed her Motion in Response to MainSource's Motion for Summary Decision and to Deny the April 19, 2007 Secretary's Findings, and her Brief in Support of her Motion in Response to MainSource's Motion for Summary Decision and to Deny the April 19, 2007 Secretary's Findings. On August 30, 2007, the Complainant also filed a Brief in Support of Hinds Motion in Response to Hillenbrand's Motion to Dismiss, a Statement of Undisputed Material Facts, and a Certification of Susan M. Hinds.

On September 14, 2007, counsel for Batesville/Hillenbrand and MainSource filed their Replies to the Complainant's submissions. On September 20, 2007, the Complainant filed her Reply to the Respondents' Replies.

## *Background*

This is the second complaint that the Complainant has filed under the Sarbanes Oxley Act against Respondents Batesville and Hillenbrand. Her first claim, which charges that the Complainant was dismissed in retaliation for engaging in protected activity under the Sarbanes Oxley Act, was filed complaint on November 3, 2005; it was dismissed by OSHA as untimely. The Complainant appealed, and the matter is currently pending before me as 2007 SOX 72.

The Complainant was employed as Director of Financial Planning and Analysis for approximately six months in 2005 by Batesville Services, Inc., which is owned by Hillenbrand Industries, Inc. In that position, she reported to Mr. Douglas I. Kunkel, the Vice President and CFO at Batesville.[1]

On October 24, 2005, the Complainant sent an e-mail to Ms. Jennifer Bullard, the Personnel Manager for Respondent MainSource, responding to an advertisement in "The Cincinnati Enquirer" for a Chief Financial Officer position with MainSource. The Complainant also submitted a resume. According to her sworn affidavit, Ms. Bullard interviewed the Complainant by telephone on November 16, 2005. Ms. Bullard determined by the end of her telephone interview that the Complainant did not have the depth of experience necessary to be further considered for the position. Because she did not consider the Complainant to be a viable candidate, she did not forward an application to her. (Batesville/Hillenbrand EX K).

The Complainant submitted handwritten notes that appear to reflect a telephone discussion with Ms. Bullard (Complainant's Exhibit S).[2] In her Response, the Complainant alleged that on or about November 28, 2005, she received a voice mail message from Ms. Bullard, who stated that she was returning the Complainant's call, and that she was not able to work out the schedule with the CEO for a phone or in person interview. According to the Complainant, Ms. Bullard stated that she would get back with her, that they were excited about her candidacy, and would like to keep moving forward in the right direction. Although the Complainant indicated that she had a recording of this message, she did not submit it with her Response. Nor do her exhibits include any handwritten notes from this conversation. Ms. Bullard did not address this telephone call one way or the other in her affidavit. The

[1] In their pleadings, the parties have included many factual allegations that have no relevance to the issue of the timeliness of the Complainant's complaint, or indeed to her claim under the Sarbanes Oxley Act. It is abundantly clear that the parties dispute many of these facts, including the circumstances surrounding the termination of the Complainant's employment with Respondent Batesville. However, for purposes of ruling on the motions for summary judgment, I have considered only those factual allegations that bear on that determination, and either are not in dispute, or do not change the outcome, even assuming them to be true.

[2] In her responsive pleading, the Complainant stated that the telephone conversation with Ms. Bullard took place on November 18, 2005; in her reply pleading, she stated that this conversation took place "around" November 16, 2005. The handwritten pages reflect that the Complainant called three times and left a message with Ms. Bullard; the latest call was on November 18, 2005. The handwritten that follow these three notations appear to reflect a conversation with Ms. Bullard.

Complainant stated that she followed up with several calls to Ms. Bullard, but she never heard from her, nor did she receive an employment application.

On January 4, 2006, MainSource issued a press release announcing that it had appointed Mr. James M. Anderson, as an internal candidate with five years of experience, as CFO; Mr. Anderson immediately assumed the responsibilities of the CFO position. MainSource filed a Form 8-K with the U.S. Securities and Exchange Commission confirming Mr. Anderson's appointment on January 4, 2006. (MainSource EX K).

The Complainant stated that on May 15, 2006, during the process of discovery in connection with her claim in 2006 SOX 72, she learned that Mr. Kunkel was a member of the Board of Directors at MainSource, and that the position she had inquired about had been filled by a former Hillenbrand employee. The Complainant filed the instant complaint with OSHA on August 4, 2006, alleging that Respondents Batesville and Hillenbrand retaliated against her by blacklisting her from "certain employment opportunities."[3] The Complainant did not name MainSource as a party, although in her allegations of blacklisting, she claimed that she was "abruptly dropped from the candidacy list" by a company where she had applied for a Chief Financial Office position, and that was "excited about" her candidacy. As pointed out by Respondent MainSource in its reply brief, it was not until September 22, 2006 that the Complainant also named MainSource as a Respondent.

The Complainant alleges that she was denied the Chief Financial Officer position with MainSource because her former supervisor at Batesville, Mr. Doug Kunkel, is on the Board of Directors of MainSource, and that he interfered with her application for the position in retaliation for her filing of the November 3, 2005 SOX complaint against Batesville and Hillenbrand (2007 SOX 72).[4]

## DISCUSSION

The purpose of summary judgment is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Green v. Ingalls Shipbuilding, Inc*., 29 BRBS 81 (1995); *Harris v. Todd Shipyards Corp*., 28 BRBS 254 (1994). An administrative law judge may grant a summary decision for either party if the pleadings, affidavits, materials 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 judgment as a matter of law. 29 C.F.R. § 18.40(d). "When a motion for summary decision is made and supported as provided in this section [by affidavit], a party opposing the motion may not rest upon mere allegations or denials of such pleadings. Such response must set forth specific facts showing that there is a genuine issue of material fact for

[3] The Complainant also alleged as retaliation statements by Respondents Batesville/Hillenbrand in their June 23, 2006 position statement submitted in connection with 2007 SOX 72, and by their conduct towards her during her deposition on July 26, 2006, also in connection with 2007 SOX 72; and her claim that Batesville did not provide "reasonable accommodations" to the Complainant in December 2005, in connection with release of her personal items.

[4] Although I am dismissing the Complainant's complaint for other reasons, I note that the Complainant has not alleged any facts, other than Mr. Kunkel's status as a Board member of MainSource, to support her speculation that Mr. Kunkel (presumably acting on behalf of MainSource) interfered with her application for the CFO position at MainSource.

hearing." 29 C.F.R. § 18.40(c). The evidence and inferences are viewed in the light most favorable to the non-moving party. *Dunn v. Lockheed Martin Corp*., 33 BRBS 204, 207 (1999).

At issue is whether the Complainant timely filed the instant complaint with OSHA. Under the Sarbanes Oxley Act, an employee alleging discharge or other discrimination must file a complaint with the Secretary of Labor within 90 days of the violation. 18 U.S.C. § 1514(A)(b)(2)(D). The regulations at 29 C.F.R. § 1980.103 provide that a complaint for discrimination must be filed within 90 days of "when the discriminatory decision has been both made and communicated to the Complainant." *See, Marc Halpern v. XL Capital, Ltd*, ARB Case No. 04-120 (Aug. 31, 2005). It is the date that the employer communicates to the employee its intent to implement an adverse employment decision that marks the occurrence of a violation, rather than the date the employee experiences the consequences. *Id* at 3.

Central to the issue of whether the Complainant's filing was timely is the question of when the alleged violations of the Act occurred. With respect to her allegations of blacklisting and retaliation in connection with her application for the CFO position at MainSource, there is no dispute that, as stated in Ms. Bullard's sworn affidavit, MainSource publicly announced on January 4, 2006, that Mr. Anderson had been appointed to the position. Nor is there any disagreement among the parties that by January 4, 2006, at the latest, the decision had been made to fill the CFO position at MainSource with someone other than the Complainant. The resolution of this issue turns on when this decision was "communicated" to the Complainant. Under the Complainant's theory, MainSource had a "legal duty" to inform her of their decision, which was actually "communicated" to her only when she learned of it during the course of discovery in another proceeding. MainSource argues that its press release, and its public filing with the Securities and Exchange Commission served to constructively notify the Complainant that she was not selected for the position.

As noted by both the Complainant and Respondents, in connection with fraud claims under Rule 10b-5, the Courts have determined that the statute of limitations begins to run, not when the fraud occurs, or when it is discovered, "but when (often between the date of occurrence and the date of the discovery of the fraud) the plaintiff learns, or should have learned through the exercise of ordinary diligence in the protection of one's legal rights, enough facts to enable him by such further investigation as the facts would induce in a reasonable person to sue" within the applicable time period. *Fujisawa Pharmaceutical Company, Ltd. v. Kapoor*, 115 F.3d 1332, 1334 (7th Cir. 1997), *citing Law v. Medco Research, Inc.*, 113 F.3d 781, 785 (7th Cir. 1997). The Courts have referred to this doctrine as "inquiry notice." An important factor in determining the date on which a statute of limitations begins to run is the ease of access to the information needed to timely file a suit.

In her pleadings, the Complainant alleges that she made several telephone calls to Ms. Bullard to inquire about the position after the alleged November 28, 2005 voice mail message from Ms. Bullard. She does not indicate when she made these calls, or precisely how many she made. She concedes that she never received an application form from Ms. Bullard, nor did she hear from her after the alleged November 28, 2005 voice mail message.

Although she stated that a press release was issued on January 4, 2006, Ms. Bullard did not indicate the publications, if any, in which the press release appeared, or whether MainSource maintains a website on which the announcement was made. But it is clear that this information was filed with the Securities and Exchange Commission, and it was publicly available. It would have been a simple matter for the Complainant, who is a well-educated individual with a business background, to determine, through MainSource's filings with the Securities and Exchange Commission, if nothing else, that this position had been filled.

I find that the statute of limitations in connection with the Complainant's blacklisting claim began to run on January 4, 2006, when MainSource publicly announced that Mr. Anderson had been chosen for the position for which the Complainant had applied, and filed notice of this decision with the Securities and Exchange Commission. As of this date, the Complainant, through the exercise of ordinary diligence, could have easily learned that she would not be hired for the CFO position. Nor, for that matter, was it a secret that Mr. Kunkel was a member of the Board of Directors of MainSource; MainSource is a publicly traded company, and this information is publicly available. Thus, as of January 4, 2006, the Complainant had access to the facts that underlie her claim of blacklisting.[5]

The Complainant argues that she should be allowed to proceed in this matter under the doctrine of equitable tolling. This doctrine does not depend on any wrongdoing by the respondent, but instead focuses on the complainant's inability, despite all due diligence, to obtain vital information bearing on the existence of her complaint. *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000). This doctrine extends the statute of limitations until the complainant can gather information needed to articulate a claim.

Generally, tolling the statute of limitations is proper under any of the following circumstances: (1) when the defendant has actively misled the plaintiff respecting the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from asserting her rights; or (3) where the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *School District of the City of Allentown*, 657 F.2d 16, 20 (3rd Cir. 1981), *citing Smith v. American President Lines, Ltd*., 571 F.2d 102, 109 (2nd Cir. 1978); *Halpern, supra*, at 4. Courts have held that the restrictions on equitable tolling must be scrupulously observed, and it is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious claim. *Doyle v. Alabama Power Co*., 1987 ERA 53 (Sec'y, Sept. 29, 1989).

The Complainant argues that she is entitled to equitable tolling of the limitations period because MainSource actively misled her as to her "cause of action" by hiding the facts of its employment decision. Other than her conclusory statements, however, the Complainant has not pointed to any actions on MainSource's part that would support the conclusion that they "hid" their decision to hire someone else for the position. Indeed,

[5] In her reply brief, the Complainant argues that the alleged blacklisting is an act of "continuing discrimination," and thus the timeliness of her claim is not at issue. The Complainant has alleged a discrete act of blacklisting, involving the decision by Main Source not to hire her for the CFO position. While the effects of this decision may linger for the Complainant, her characterization of it as "continuing discrimination" does not relieve her of the obligation to timely file her complaint.

MainSource issued a press release regarding their decision, and publicly filed notice of the decision with the Securities and Exchange Commission.

The Complainant argues that MainSource knowingly and willfully concealed their "discriminatory action" by refusing to communicate with her about the status of the CFO position, and that they "refused" to communicate in a fair and equal manner. She pointed to MainSource's "failure to communicate" in response to her repeated inquiries. But MainSource had no duty to communicate directly with the Complainant, nor has the Complainant cited to any legal authority establishing such a duty. MainSource was certainly free to ignore the Complainant's calls; as discussed above, they publicly announced in January 2006 that they had hired someone else for this position.

It appears that the Complainant is also arguing that MainSource misled her by indicating to her in the alleged November 28 voice mail message from Ms. Bullard that they were excited about her candidacy, and wished to keep the process moving forward. The Complainant argues that she exercised diligence in communicating with Ms. Bullard, but was denied access to the employment decision. According to the Complainant, the discriminatory decision was made and communicated to her only when she learned, in the process of discovery in 2006 SOX 72, that the position had been filled. However, even if I were to assume that Ms. Bullard left such a voice mail message for the Complainant, and that the voice mail would tend to lead a reasonable person to believe that she was still being considered for the position, it would not change the timeliness analysis. As the Complainant acknowledged, she did not receive an employment application, and her calls to Ms. Bullard were not returned. By its public announcement on January 4, 2007, MainSource unequivocally announced to the world that Mr. Anderson had been appointed to the position.

The Complainant also argues that she has experienced "extraordinary circumstances" because her counsel has withdrawn in 2006 SOX 72, and she is unrepresented in this particular matter. She argues that this has "impacted Hinds's ability to fully understand all her legal rights and act[ing] upon them in a timely fashion." In fact, the Complainant is represented by counsel in her claim that is the subject of 2006 SOX 72, which was filed with the U.S. Department of Labor on November 3, 2005. In other words, she was represented by counsel during the 90 day filing period in this particular claim. Thus, the Complaint had "gained the 'means of knowledge' of her rights and can be charged with constructive knowledge of the law's requirements." *Stallcop v. Kaiser Found. Hosps*., 820 F.2d 1044, 1050 (9th Cir.), *cert. denied*, 484 U.S. 986 (1987).

But even if she were not represented by counsel, the Complainant's claim that she was not able to fully understand her legal rights and timely file her claim does not square with the facts. The Complainant, who has received a masters degree in business administration and is a certified public accountant, worked for Respondent Batesville as the Director of Financial Planning. The Complainant is also familiar with the legal process, having brought several charges against Respondents Batesville and Hillenbrand for alleged violations of Title VII of the Civil Rights Act, and the Equal Pay Act; she also filed charges against Batesville and Hillenbrand in connection with 2006 SOX 72. She is currently enrolled in law school. Clearly, the Complainant has the ability to understand and act upon her legal rights. Nor is she unaware

of the filing requirements for Sarbanes Oxley whistleblower claims: her claim in 2006 SOX 72 was dismissed by the Secretary as untimely, and it is currently on appeal before this court.

But even if the Complainant were ignorant of the applicability of the Sarbanes Oxley Act to her situation, or the filing requirements thereunder, this is simply not an "extraordinary circumstance" that might justify applying the doctrine of equitable estoppel. A party invoking that doctrine must show that her ignorance was caused by circumstances beyond her control. *See, e.g., Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999)(plaintiff's mental incapacity warranted equitable tolling); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998)( pro se inmate's lack of knowledge "until it was too late" of one-year limitation period for filing habeas corpus petition insufficient to warrant equitable tolling); *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999), *cert. denied*, 531 U.S. 1164 (2001)("ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing.").

In her pleadings, the Complainant has not argued that she suffered from a disability that prevented her from understanding and acting upon her legal rights during the filing period for this claim.[6] However, she has submitted various medical records as attachments to her pleadings. (Complainant's EX M). These consist of a letter from Dr. Myles L. Pensak dated October 19, 2005, discussing her ENT examination on that date. This letter reflects that the Complainant had a multi-year history of aural symptoms; Dr. Pensak diagnosed her with endolymphatic hydrops.[7] Dr. Arthur L. Hughes, a neurologist, also wrote a letter dated August 12, 2005, indicating that the Complainant had a history of Meniere's syndrome.[8] His impression was that she had a normal brain MRI scan; episodic paresthesias of the left arm of doubtful pathological significance, and Meniere's syndrome by history; he recommended "reassurance." The Complainant also attached a paragraph, source unknown, stating that

> Meniere's Disease is one of the most unbearable medical conditions around. It is characterized by a number of symptoms, including vertigo, inner ear pressure, tinnitus, and hearing loss. People who suffer from Meniere's Disease are very often unable to work in any capacity.

However, these letters do not tend to establish that the Complainant suffered from any disability that prevented her from understanding and acting upon her rights during the 90 day limitations period in this particular claim, if ever. Indeed, such a conclusion is flatly contradicted by her activity in connection with her EEOC complaints, which included preparing and filing her complaints, and providing documentation and information to the EEOC investigators. During the filing period, the Complainant was also actively involved in the prosecution of her earlier claim in 2006 SOX 72. While the Complainant may suffer from Meniere's syndrome, there is no

[6] The Complainant stated that between July 22, 2005 and November 1, 2005, she was on "medical leave," and under a "medical condition;" she stated that she was not incapacitated, but rather "limited in capacity" during this time period. (Complainant's Response at p. 10). However, she has made no allegations regarding her physical or mental capacity during the 90 day filing period for this particular claim.

[7] The American Medical Association Encyclopedia of Medicine describes Hydrops as an abnormal accumulation of fluid in the body tissues or in a sac.

[8] The American Medical Association Encyclopedia of Medicine describes Meniere's disease as a disorder of the inner ear, characterized by recurrent vertigo, deafness, and tinnitus.

evidence to suggest that this condition is so disabling that it prevented her from understanding and acting upon her rights at any time during the 90 day filing period. The Complainant has offered no documentation, or even explanation, as to how this physical condition, which apparently has not presented an obstacle to engaging in other activities, prevented her from filing her complaint during the 90 day limitations period.

Finally, it appears that the Complainant is arguing that statements made by Respondents Batesville and Hillenbrand in pleadings submitted in 2006 SOX 72, as well as their conduct during her deposition in connection with that claim, and their alleged failure to accommodate her in arranging for the release of personal items after she left their employ, were in retaliation for her protected activities, and thus adverse action under the Sarbanes Oxley Act. However, for purposes of the Sarbanes Oxley Act, these actions, even accepting the truth of the Complainant's allegations, are not legally "adverse." Under Section 806 of the Act, a covered employer may not "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." 18 U.S.C. § 1541A(a). With the exception of blacklisting and interfering with a complainant's subsequent employment, the Act merely protects an employee from retaliation for her protected activities while the complainant is an employee of the respondent. *See, Harvey v. Home Depot U.S.A., Inc.*, No. 04-114 (ARB June 2, 2006). The Complainant has not alleged that these actions by the Respondents adversely affected the terms or conditions of any subsequent employment. Thus, with respect to these claims, Complainant has failed to state a cause of action under the Sarbanes Oxley Act.

## CONCLUSION

I find that the adverse action that is the subject of the Complainant's claim in this matter, that is, her alleged "blacklisting" in connection with the CFO position about which she inquired in November 2005, occurred on January 4, 2006, when Respondent MainSource publicly announced that a person other than the Complainant had been given the position. The Complainant had 90 days from that date to file her complaint under the Sarbanes Oxley Act. Her complaint, which was filed against Respondents Batesville/Hillenbrand on August 4, 2006, and against Respondent MainSource on September 22, 2006, was untimely.[9] I also find that the Complainant has not established that she is entitled to tolling of the statute of limitations on the grounds of equitable estoppel or equitable tolling. As the Complainant's claim of blacklisting is untimely, it must be dismissed.

Additionally, I find that the Complainant's allegations that the Respondents Batesville and Hillenbrand made false statements in pleadings, and harassed her during her deposition in connection with 2006 SOX 72, and her claims regarding the release of her personal items by Respondent Batesville, do not state a cause of action under the Sarbanes Oxley Act.

[9] The Complainant vehemently argues that her claim against MainSource was filed on August 4, 2006. With her reply brief, the Complainant submitted a second set of exhibits, including a copy of her statement to OSHA, dated September 22, 2006 (CX G), and the OSHA Case Activity Worksheet, indicating that the blacklisting complaint against MainSource was filed on September 22, 2006 (CX H). As noted above, the original claim of blacklisting against Batesville/Hillenbrand, filed on August 4, 2006, set out the Complainant's allegations, but did not name MainSource. In any event, because I find that the Complainant's August 4, 2006 filing was untimely, it is not necessary to resolve this dispute.

Accordingly, IT IS HEREBY ORDERED that the Complainant's complaint under the Sarbanes-Oxley Act is dismissed.

SO ORDERED.

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LINDA S. CHAPMAN
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, 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).