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Issue Date: 12 May 2008

Case Nos. 2007-SOX-00028
2007-SOX-00029

In the Matter of:

RON REYNOLDS,

and

JASON COLLINS,
Complainants,

v.

DAVE & BUSTERS, INC.,
Respondent.

ORDER OF DISMISSAL

These cases arise from complaints filed by Ron Reynolds and Jason Collins with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). Complainants allege that Dave & Busters, Inc. (D&B), discriminated against them 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 provide 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

Messrs. Collins and Reynolds filed their complaints with OSHA on August 17, 2006, alleging that they were terminated on pretextual grounds under the Act. OSHA dismissed the complaints on January 23, 2007, finding that D&B was not a publicly-traded company as of the date of the termination of complainants' employment and therefore was not subject to the Act. On February 22, 2007, complainants appealed OSHA's decision, asserting that they were placed on administrative leave prior to the date on which D&B ceased being a publicly-traded company.

On July 19, 2007, respondent filed a motion for summary decision seeking dismissal of the complaints, arguing that: (1) D&B was not a publicly traded company, and therefore not subject to the Act, when it made and communicated its decisions to terminate complainants, and (2) complainants failed to file their complaints with the Department of Labor within 90 days of their placement on paid administrative leave and therefore their administrative leave-based complaints are time-barred.

Complainants, on August 13, 2007, submitted their response to D&B's motion for summary decision. Complainants argue that their administrative leave-based complaints should be equitably tolled and that respondent is equitably estopped from raising the defense of limitations due to respondent's conduct in preventing complainants from submitting timely complaints.

Respondent filed a brief in support of its motion for summary decision on September 20, 2007, wherein it again moved for summary decision on both of complainants' allegations of retaliatory action. With regard to the allegation that complainants were terminated in violation of the Act, D&B claims it was not an employer subject to the Act at the time the decision to terminate the complainants was made. In response to the second argument, premised on complainants' placement on paid administrative leave, D&B maintains that this argument fails because (1) complainants failed to administratively exhaust their complaints; (2) the claims are time-barred; and, (3) equitable modification to the limitations period is inapplicable to these complaints.

The next day, complainants filed a brief in support of their response to D&B's motion for summary decision, again asserting that principals of equitable tolling and equitable estoppel. Complainants further argue that an administrative law judge has discretion to deem a claim timely under 29 C.F.R. 1980.115 as justice requires.[1]

Findings of Fact

The following facts are not disputed by the parties. D&B hired Mr. Reynolds in May of 1998 as a Network Administrator and the company hired Mr. Collins in April of 2005 as a Senior Network Administrator. (CB2 at 1). When the complainants were hired, D&B was a publicly traded company. During the period of their employment, complainants came to believe that D&B was violating some of its licensing agreements with computer software companies. (CB2 at 1).

By February of 2006, complainants had reported the alleged violations to the members of D&B's information technology management team. (CX1 A). On February 24, 2006, Mr.

[1] Respondent's motion for summary decision shall be cited as "RB1 at -." Attached to that brief are eight exhibits, which shall be cited as "RX1 A" through "RX1 I." Respondent's brief in support of its motion for summary decision shall be cited as "RB2 at -." Attached to that brief are twelve exhibits, which shall be cited as "RX2 A" through "RX2 L."

Complainants' response to respondent's motion for summary decision shall be cited as "CB1 at -." Attached to that brief are two exhibits, which shall be cited as "CX1 A" and "CX1 B." Complainants' brief in support of its response to respondent's motion for summary decision shall be cited as "CB2 at -."

Collins reported the same to Nancy Duricic, D&B's Vice President of Human Resources. Mr. Collins specifically mentioned to Ms. Duricic that he required protection from retaliation under SOX's anti-retaliation provision and he indicated that Mr. Reynolds also had information regarding the alleged software violations. (CX1 A). Mr. Collins was placed on paid administrative leave on February 27, 2006. He was told by Human Resources that he was being placed on leave for his own protection while his claims were being investigated. (CX1 A).

Mr. Reynolds solicited licensing information from a D&B vendor on March 1, 2006, which he forwarded by e-mail from his work address to his home address. (CX1 B). He then forwarded the information to Mr. Collins' work e-mail address. Mr. Reynolds was placed on paid administrative leave on March 3, 2006. He was informed by Ms. Duricic that he was being placed on leave so as not to compromise D&B's investigation of its licensing shortages pursuant to an audit. Both complainants allege that they were led to believe the leave was only to be for the duration of the audit. (CB2 at 2).

On March 8, 2006, D&B merged with another entity and ceased being a publicly-traded company. (RB1 at 4). Complainants were informed by D&B's Human Resource Department on March 22, 2006 that the investigation should be wrapped up within the next week. (CX1 A; CX1 B). In April of 2006, Mr. Collins received a telephone call on his personal phone from one of D&B's outside vendors. The vendor stated that upon calling D&B to speak with Mr. Collins, he was informed by a D&B employee that Mr. Collins had been terminated and replaced. (CX1 A). Mr. Collins contacted Human Resources and was told that the company would not make such an employment decision without first discussing it with the employee in question. (CX 1 A).

Both complainants were informed in May of 2006 that they were to have a meeting with Ms. Duricic, but this meeting was rescheduled due to a medical emergency. (CX1 A; CX1 B). Complainants attended the rescheduled meeting on May 23, 2006 and they were both terminated on this date.

On May 25, 2006, complainants' attorney sent a letter to D&B's general counsel, indicating that he represented the complainants with respect to their "wrongful termination" and requested the company to take "immediate steps to safeguard all documents and electronic evidence in this matter…" (RX1 G). D&B registered its debt with the SEC on July 26, 2006 and thus became subject to the provisions of the Act. (RX1 H). Complainants filed their initial complaints on August 17, 2006.

Discussion and Applicable Law

Respondent is seeking summary decision of this matter based on its status as a non-publicly traded company on the date of complainants' terminations, and/or on the grounds that complainants failed to timely file their administrative leave-based compaints.

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 complainants to prove their allegations. Rather, they must only allege the material elements of their *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 is that summary decision should be granted because it was not subject to the Act at the time of complainants' termination. The Act only applies to 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. 78o(d))." 18 U.S.C. § 1514A (2007). The relevant time period for determining whether a company is publicly-traded as defined by Section 1514A is when the company takes the allegedly discriminatory action. *Roulett v. American Capital Access,* 2004-SOX-78 (ALJ Dec. 22, 2004) (holding that an employee could not bring a claim for relief when his employer was not subject to the requirements of the Act on the date he was terminated); *Lerbs v. Bucca di Beppo Inc.,* 2004-SOX-8 (ALJ June 15, 2004) (holding that the date of the employer's retaliatory act determines whether the Act applies); *Kunkler v. Global Futures & Forex Ltd.,* 2003-SOX-6 (ALJ April 24, 2003).

The record clearly indicates that respondent ceased being a publicly-traded company on March 8, 2006, and the complainants were terminated on March 22, 2006. Complainants have offered no evidence to dispute this fact. Therefore, on the date of their terminations, D&B was not subject to the provisions of the Act. As a result, I find that the complainants' terminations are not actionable.

Respondent next asserts that complainants cannot now argue that their placement on administrative leave was an adverse action because they failed to administratively exhaust their

complaints.[2] In their response to OSHA's denial of their complaint, the complainants essentially sought to amend their complaints to include their placement on administrative leave as part of D&B's adverse actions.[3] Respondent argues that claims based on acts or omissions not alleged in the initial complaint or an amendment thereto are not actionable. Based on this argument, respondent asserts that summary decision should be granted because complainants did not allege the administrative leave was an adverse action in their initial complaints. However, I find that complainants have properly amended their complaints to include the administrative leave based claims and therefore respondent's argument on this issue is not well-taken.

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges (OALJ) permit the amendment of complaints pursuant to 29 C.F.R. § 18.5(e). In pertinent part, an administrative law judge may permit a complaint to be amended when "the amendment is reasonably within the scope of the original complaint, the amendment will facilitate a determination of a controversy on the merits of the complaint and there is no prejudice to the public interest and the rights of the parties." *Gonzalez v. Colonial Bank*, ARB No. 05-060, 2004-SOX-00039 (ARB May 31, 2005); *McClendon v. Hewlett-Packard Co.* No. CV-05-087-S-BLW, 2006 WL 318813, at *2 (D. Id. Feb. 9, 2006); 29 C.F.R. § 18.5(e)(2006). The general rule is that amendments to complaints should be "freely granted." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Reno v. Westfield Corporation, Inc.*, 2006-SOX-00030 (ALJ February 23, 2006).

When considering whether to allow amendment, courts have considered whether the original complaint is of a completely different nature than the amended complaint and the stage at which the possible amended action is introduced to the opposite party. An amendment cannot be an attempt by a party to completely change theories after the hearing, where they have "reassessed the field, decided [their] old argument was lame, and now seek a fresh mount in a new direction." *U.S. v. Slade*, 980 F.2d 27, 30 (1st Cir. 1992). *See Kelley v. Heartland Express, Inc. of Iowa*, 1999-STA-00029 (ALJ March 24, 2000) (holding that amendment would not be permitted where complainant made no reference to additional protected activities in his complaint, interrogatories, or at the hearing and only brought up the additional issues in his post-hearing brief).

In *Kingoff v. Maxim Group LLC*, Case No. 2004-SOX-00057 (ALJ July 21, 2004), the complainant's initial complaint alleged that he was constructively discharged by his employer in violation of SOX. After OSHA denied the complaint because it was untimely, the complainant attempted to amend the complaint by alleging that the employer filed an arbitration action against him and sent him numerous correspondence within the 90-day limitation period. *Id.* The

[2] D&B was still a publicly traded company when they placed complainants on paid administrative leave; therefore, the company was subject to the provisions of the Act as of the date Collins and Reynolds were both placed on leave.

[3] Complainants did not file a separate motion to amend their complaints, but they stated in their appeal of OSHA's denial that "[c]omplainants were placed on administrative leave prior to the date on which Respondent ceased being a publicly-traded company," essentially attempting to add their placement on administrative leave as adverse action to their initial complaints. Likewise, in their response to D&B's motion for summary decision, complainants admit that they did not adequately assert this argument in their initial complaints, but requested that I still review the argument as it was presented and discussed in respondent's motion. (CX1 at 2). Taken together, I construe these statements as an attempt by complainants to amend their original complaints.

administrative law judge denied the attempted amendment, stating that the later allegations of violations were of a "drastically different type than that which is contained in the complaint." *Id.*

The facts in the present case are quite distinguishable from those in *Kelley* and *Kingoff*. First, unlike the adverse actions in *Kingoff,* it is clear from the facts submitted in this case that Mr. Reynolds' and Mr. Collins' placement on administrative leave were closely related to their terminations. Each action stemmed from the same sequence of events, and the complainants' terminations appear to be based on the same actions as the administrative leave. The placement on administrative leave was not of a "drastically different type" than the actual terminations.

Furthermore, unlike the complainant in *Keller,* complainants in these cases made reference to their placement on administrative leave in the initial complaints through their personal statements accompanying the complaints, although they did not allege this was adverse action. Complainants specifically listed their placement on administrative leave as adverse action in their appeal to the OALJ. In their response to respondent's motion to dismiss, complainants again specifically mention their placement on administrative leave as part of employer's adverse actions. Respondent's counsel cannot contend they were unaware of the attempted amendment as they thoroughly briefed the issue in both their motion for summary decision and their supporting brief.

Based on the above, I find that the amendment is reasonably within the scope of the original complaints, the amendment will facilitate a determination of a controversy, and there is no prejudice to the rights of the parties. Therefore, I find that the complaints have been properly amended to include the complainants' placement on administrative leave as an adverse action on the part of the employer.

Respondent's next argument, that the administrative leave-based 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 believes 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). D&B informed complainants that it was placing them on administrative leave on February 27, 2006, and March 3, 2006, respectively. Complainants had 90 days from the date of communication to file complaints with OSHA. They did not file their complaint until August 17, 2006, well past the 90-day limitation period. This delay renders their administrative leave-based complaints untimely.

Despite the fact that complainants concede that their administrative leave-based claims are untimely, complainants argue that they are entitled to pursue these claims based on application of the doctrines of equitable estoppel and equitable tolling. Complainants' counsel argues, *inter alia*:

> Complainants were specifically misled by Respondent, through its agents and employees, as to its intent to terminate Complainants until such time as Respondent would no longer be subject to the Act due to a well-known and upcoming private sale. Complainants were isolated and misled until right before the time limitation for filing a complaint from the date of placement on administrative leave had run so as to avoid the appearance of impropriety and to set up this extraordinary circumstance as a way to prevent Complainants from exercising their rights under the Act.

(CB2 at 5). As a result, complainants request that respondent's motion for summary decision be denied. (CB2 at 7).

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. 1981). 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 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). A finding of equitable estoppel may be supported by various considerations, including: (1) the complainant's actual and reasonable reliance on the defendant's conduct or representations, (2) evidence of improper purpose on the part of the respondent, or of the respondent's actual or constructive knowledge of the deceptive nature of its conduct, and (3) the extent to which the purposes of the limitations period have been satisfied. *Id.*

The statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file is the consequence of either a "deliberate design by the employer" or actions that the employer should "unmistakably have understood would cause the employee to delay filing his charge." *Price v. Litton Systems, Inc.,* 694 F.2d 963 (4th Cir. 1987). An employee's hope for a continuing employment relationship cannot toll the statute absent some employer conduct likely to mislead an employee into "sleeping on his rights." *Id.* Mere silence on the part of the employer regarding an employee's rights under the Act is not enough to actively mislead an employee regarding his cause of action, especially when the employee is

represented by counsel. *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 03-SOX-026 (ARB December 30, 2005).

When considering the reasonableness of the complainant's reliance on the respondent's conduct or representations, several factors must been weighed. First, courts have considered whether or not the complainant was represented by counsel. *Guy v. SBC Global Services,* Case No. 2005-SOX-113 (ALJ December 14, 2005) (complainant who specifically retained counsel within the 90 day limitation period not entitled to equitable estoppel because it was within the parameters of the counsel's representation to advise complainant of her legal recourse); *Brady v. Direct Mail Management, Inc.*, 2006-SOX-16 (January 5, 2006) (holding that there was no conduct by the respondent which complainant could have relied on for not timely-filing complaint when the facts indicate claimant first retained counsel well within 90 days of the alleged adverse action).

Another factor is the complainant's knowledge and awareness of his or her rights at the time of the adverse action. *Id.* (holding that the complainant could not prevail on an equitable estoppel claim where she admitted in her complaint that she was aware of her rights under the Act before the alleged adverse action even took place). In *Piles v. Lee Hecht Harrison, LLC,* Case Nos. 2005-SOX-00055, 2005 SOX-00056 (ALJ November 5, 2005), complainants alleged that the respondent acted in "bad faith" by using an investigation process as a stall tactic in order to prevent the complainants from filing a timely complaint. The facts indicate that the complainants were terminated from their positions but were listed as "project eligible" and maintained access to respondent's computer systems while the respondent pursued an investigation into complainants' whistleblower complaints. Complainants allege that they were entitled to equitable estoppel because the respondent had conducted ploys designed to discourage complainants from taking legal action by creating hope that complainants would get their jobs back. Specifically, complainants cited to continuous communication about the ongoing investigation as one ploy, and their continued access to respondent's computer system as another ploy. *Id.* Complainants labeled these ploys as "smoke screens and delay tactics" to lull them into untimely filing their complaint. *Id.*

After reviewing the facts in the light most favorable to the complainants, the administrative law judge in *Piles* found no evidence in the record to support a conclusion that the respondents acted in bad faith and he found the term to be no more than an "unsubstantiated accusation." The respondent never suggested that the complainants await the results of the investigation before filing a complaint. Furthermore, no evidence submitted indicated that the circumstances of the complainants' terminations were any different from terminations of other employees. In fact, the judge found that the respondent's actions were more of an attempt to mitigate the harshness of the decision to terminate employment. The complainants were not permitted to use their hope that respondent's investigation would be timely completed as grounds for equitable relief. *See also Szymonik v. Tymetrix, Inc.*, Case No. 2006-SOX-50 (ALJ March 8, 2006) (holding that a "tolling agreement" entered into by both parties could not be a basis for equitable estoppel where the complainant did not allege that respondent affirmatively prevented him from filing a complaint and the respondent never made any representation concerning the legal efficacy of their agreement).

In the present case, complainants essentially argue that they were misled by the respondent as to D&B's intentions in order to dissuade complainants from timely filing their complaints. Their argument is almost identical to that presented by the complainants in *Piles.* Messrs. Reynolds and Collins argue that they were under the impression that they would remain on administrative leave until an investigation into their complaints was complete, and therefore D&B misled them into sleeping on their right to file complaints until respondent was no longer subject to the Act. This argument is not well taken.

Complainants have offered no evidence that D&B acted in bad faith. A mere coincidence in dates does not amount to a showing of bad faith on the part of the respondent. D&B never suggested that complainants await the results of the audit before filing their complaints, and the record indicates that complainants were well aware of their potential rights under the Act *before* they were even placed on administrative leave; Mr. Collins even specifically mentioned SOX whistleblower protection during a meeting with the human resource department.[4] I fail to see how these facts would support a finding that complainants were actively misled with regard to their rights under the Act.

Complainants stated that respondent "cut off communication and complainants' means of discovering the true facts." (CX1 at 6). It is unclear to which "true facts" complainants are referring. They were aware of their rights under SOX, they had reason to suspect D&B was violating licensing agreements, and they were placed on administrative leave almost immediately after reporting the alleged licensing violations. A reasonable complainant would have understood this series of events to possibly constitute SOX violations, especially in light of complainants' heightened knowledge of their rights. Complainants had more than enough time to file their complaints after being placed on administrative leave. Like the complainants in *Piles,* Mr. Reynolds' and Mr. Collins' belief that they would be reinstated to their previous positions cannot serve to toll the statute. Complainants do not allege that respondent prevented them from filing complaints or otherwise hid any necessary information.

Furthermore, complainants were represented by counsel within the 90 day limitation period. The failure of complainants and/or their counsel in ascertaining the date upon which D&B would cease being a publicly traded company cannot be imputed upon D&B. Complainants freely admit that the merger of D&B was a widely publicized event.[5] Diligent work could have uncovered the fact that, upon merger, D&B had the possibility of no longer being a publicly traded company. It remained complainants' responsibility to file their complaints as early as possible to meet the administrative leave-based complaints' filing deadline. Complainants do not allege that D&B attempted to hide the fact that it would be merging with another company and would no longer be subject to the Act.

[4] Mr. Collins told Ms. Duricic, the human resource director, that he "specifically requested amnesty under SOX whistleblower protection" in a February 24, 2006 meeting. (CX1 A). Likewise, Mr. Reynolds stated that Mr. Collins discussed SOX issues with him prior to their placement on administrative leave. (CX1 B).

[5] Complainants referred to the potential merger as a "well-known and upcoming private sale." (CB2 at 7).

Even if complainants' allegations of bad faith were supported by any evidence, which based on the facts of the case seems highly unlikely[6], the respondent's actions would not rise to the level of warranting equitable estoppel. Equitable estoppel requires an active misrepresentation on the part of the respondent, and mere silence is not enough. Assuming, *arguendo,* that respondent was (1) aware that its upcoming merger would create a brief window of opportunity where it could terminate complainants and not be subject to the Act; and (2) intended to capitalize on this event, these acts would not constitute an active misrepresentation of any activity that prevented complainants from filing their complaints. Complainants essentially had access to all the pertinent information and could have filed timely complaints, despite any "scheme" developed by respondent. Both complainants were aware of their rights when they were first placed on administrative leave. It was not respondent's duty to warn complainants when their limitations period would expire or whether or not D&B would be a publicly-traded company on the date of their terminations.

Clearly, the outcome of this decision would change if complainants were alleging that D&B actively tried to conceal the fact that it was merging with another company or specifically told complainants to not file their complaints while they were placed on administrative leave.[7] Complainants do not make these allegations and therefore they have not provided sufficient evidence to warrant equitable estoppel.

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

[6] Respondent points out several critical flaws in complainants' accusations that D&B actively prevented them from timely filing their complaints. First of all, based on the chronology of events, complainants still had time to file complaints based on their administrative leave even *after* D&B terminated their employment. If complainants were under the impression that D&B had placed them on administrative with the intent to reinstate them after the audit, their termination on May 23, 2006 should have dispelled such hopes and complainants should have filed their complaints almost immediately after being terminated. It seems unlikely that D&B would plan such an elaborate scheme to prevent complainants from filing complaints, and then still give them enough time to do so after being terminated. It would have been more logical for D&B to wait another week until the time limitation period as to the administrative leave-based complaints had completely expired before terminating their employment, thereby completely preventing complainants from having the opportunity to file timely complaints. Furthermore, if D&B orchestrated complainants' terminations so as to avoid being subject to the Act, then it would have been more logical for the company to have fired complainants on March 9, 2006, the day after it went private. Instead, D&B continued to pay complainants' full salaries for two months before terminating their employment.

[7] In their sworn statements, complainants both state that they were told that D&B was "wrapping up the investigation" on March 22, 2006. Mr. Reynolds was also informed by human resources that D&B would not tell other employees about his employment statements without telling Mr. Reynolds first. According to Mr. Reynolds, he "felt reassured and did not perceive that, based on the tone and content of [his conversation with human resources], that … [he] was to be terminated." (CX2 A). This contact does not rise to the level of active misrepresentations or an attempt to delay complainants from filing their complaints. Respondent merely informed complainants that it was performing an investigation and never made any direct request of complainants to delay filing their complaints. It appears any delay was more of an effort to mitigate the harshness of the termination, especially in light of the fact that complainants still received their full salaries while on leave.

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 complainant's ignorance of the applicability and regulations of the Act is not an extraordinary circumstance which might justify application of equitable tolling. The complainant must show that his or her ignorance of the limitations period was caused by circumstances beyond the party's control. Circumstances beyond complainant's control include physical or mental incapacity. *Stoll v. Runyon,* 165 F.3d 1238 (9th Cir. 1999); *Miller v. Marr,* 141 F.3d 976 (10th Cir. 1998).

The doctrine of equitable tolling is generally unavailable to a complainant who is represented by counsel. Courts have "uniformly held that a complainant who consults an attorney has access to a means of acquiring knowledge of his rights and responsibilities, and cannot assert equitable tolling." *Lotspeich v. Starke Memorial*, Case No. 2005-SOX-14 (ALJ March 3, 2005); *Kent v. Barton Protective Service,* Case No. 1985-WPC-1 (Sec'y Sept. 28, 1990). Attorneys are presumptively aware of the legal recourse available to their clients, and this constructive knowledge of the law's requirements is imputed to a complainant. *Mitchell v. EG&G (Idaho),* Case No. 1987-ERA-22 (Sec'y July 22, 1993). Lack of due diligence on the part of a complainant or the complainant's attorney is insufficient to justify application of equitable tolling. *South v. Saab Cars USA, Inc.*, 28 F.3d (2nd Cir. 1994).

With respect to the first possible basis for tolling the statute, as discussed above, complainants have not alleged, nor do the undisputed facts establish, that respondent misled them in any way regarding their cause of action. There is no evidence that D&B ever did or said anything to dissuade complainants from initiating legal action of any kind regarding what they viewed as SOX violations.

Similarly, with regard to the second ground which might support application of equitable tolling, complainants have failed to demonstrate any extraordinary circumstances that may have prevented them from timely asserting their rights under the Act. Complainants clearly were not ignorant of their rights under the Act, and nothing in the undisputed facts indicate that complainants were mentally incapacitated or physically prevented from filing complaints. Furthermore, as respondent's counsel correctly notes, complainants were represented by counsel at least four days before the limitations period expired as to Mr. Collins, and at least a week before the period expired as to Mr. Reynolds. (RX2 G). Equitable tolling is therefore not available to complainants because they consulted an attorney who should have had access to a means of acquiring knowledge about the correct adverse action on which to base the initial complaint and the controlling time limitations.

Finally, the third situation under which the doctrine might apply, filing a proper complaint but mistakenly doing so in the wrong forum, does not apply here. There is no evidence submitted by complainants that they filed a complaint in any other forum. Therefore, complainants have failed to show that they are entitled to equitable tolling.[8]

[8] Complainants have also petitioned for me to deem their complaints as timely under 29 C.F.R. §1980.115, which grants an ALJ discretion to waive any rule or issue that justice or the administration of the Act require. For the

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the complaints of Ron Reynolds and Jason Collins under the Sarbanes-Oxley Act are dismissed on the grounds they were untimely filed.

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DONALD W. MOSSER
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).

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reasons set forth in this decision, I find that complainants have failed to present any evidence as to why justice would require waiving the time restraints in this claim and I decline to do so.