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Issue Date: 17 April 2008

Case No.: 2008-SOX-00025

In the Matter of:

WILLIAM R. HICKERNELL,
Complainant,

v.

PENSKE TRUCK LEASING, INC.,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises out of a complaint filed by William R. Hickernell ("Complainant") against Penske Truck Leasing, Inc. ("Respondent"), under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A ("SOX" or the "Act"). The statute and implementing regulations (appearing at 29 C.F.R. Part 1980) prohibit retaliatory actions by publicly-traded companies (and their subsidiaries or agents) against employees who (1) provide information to their supervisors, federal regulatory or law enforcement agencies, or Congress, relating to activities that they reasonably believe to constitute violations of certain specified federal criminal statutes, any Securities and Exchange Commission regulations, or federal laws relating to fraud against shareholders, or (2) assist in investigations or proceedings relating to such activities. Title 29 C.F.R. §1980.103(d) requires an employee who has been subjected to retaliation to file a complaint within 90 days of the alleged retaliation. In this matter, Complainant failed to file a timely claim, and has not shown that he is entitled to equitable relief from the statutory time limits. Consequently, his claim must be dismissed.

I. PROCEDURAL HISTORY

Complainant's January 25, 2008, complaint was filed by the Occupational Safety and Health Administration (OSHA) on January 29, 2008. The Acting Regional Administrator for OSHA dismissed the complaint as untimely on February 4, 2008. Complainant requested a hearing with an administrative law judge by letter dated February 24, 2008. On March 17, 2008, I issued an Order to Show Cause as to why the claim should not be dismissed for failure to file a timely complaint. Complainant's response was received on April 2, 2008.

II. FACTUAL BACKGROUND[1]

A. COMPLAINT

Complainant resigned as a Project Manager with Respondent on November 19, 2004 after coming to believe that the controllers for Respondent and its subsidiary were engaged in fraudulent activity and embezzlement in order to increase the profitability of Respondent's partner, General Electric's Equipment Services (GE). In February of 2005, Complainant filed a claim for unemployment benefits with the Commonwealth of Pennsylvania. He informed the unemployment office that Respondent's Director of Corporate Billing had fraudulently created accounts at various brokerage houses for the purposes of embezzlement and had expected Complainant to participate in said activity. After Complainant reported the alleged embezzlement to the unemployment office, Respondent audited one of the accounts Complainant had been working on. The audit revealed a "drastic" discrepancy between the records held by Respondent and the records loaded into Respondent's database after Complainant resigned. Following the audit, Complainant was not approved for unemployment benefits.

Complainant reported that Respondent's employees started to gather information to justify their actions and to damage Complainant's credibility. Complainant alleges Respondent's employees misrepresented Complainant's reason for resignation to the Pennsylvania unemployment office. Complainant also alleges that Respondent's employees contacted Complainant's previous and current employer, T. Rowe Price, in 2006 for the purpose of gathering information and support in justifying their fraudulent business purposes and to damage Complainant's credibility. Complainant states that he delayed filing the SOX whistleblower complaint because of threats to his life and the lives of his family if he told the authorities about the activity he witnessed while working with Respondent.

B. OBJECTION TO OSHA FINDINGS

Complainant filed his SOX claim within 90 days of having reported his knowledge of attempts by employees of both Respondent and GE to cover up the embezzlement and wire fraud. The complaint was filed within 90 days of reporting continuous attempts of Respondent and GE to conceal the seriousness of the threats directed to him and his family by one of Respondent's consultants, especially after he reported the 2005 embezzlement to the Pennsylvania Unemployment Office in 2005. The complaint was filed within 90 days of reporting that both GE and Respondent's employees continually use personal information to justify "their enterprise of slander and libel." Complainant felt it was prudent to contact the FBI before filing a claim with the Department of Labor.

C. RESPONSE TO ORDER TO SHOW CAUSE

Complainant first alleged that GE's continuing violations of the SOX Act are having an adverse effect on his opportunity to have an unbiased judicial process. He then reported that

[1] In reaching my conclusion in this matter, I have assumed the truth of the allegations in the Complaint, in Complainant's objections to the decision of the Regional Administrator, and in his response to my Order to Show Cause. In light of his *pro se* status, I have not held him to the evidentiary standards that would ordinarily apply.

Respondent negligently handled the SOX violations that he reported to their Director of Billing in 2004 and the Pennsylvania unemployment office in 2005. Complainant argued that each reported violation was validated, however no legitimate attempt has been made on the part of the Respondent to make Complainant whole for the "financial, and professional damages incurred (and continue to incur) after reporting accounting fraud, embezzlement and wire fraud within their organization." Complainant sent two applications to Respondent's human resources department; one by online submission in October of 2005 and another via email the following December, both of which have gone unanswered. Executives of GE and Respondent began rewarding their employees for providing "malicious lies and slander needed to obstruct a proper (and timely) review of the violations" reported by Complainant.

Complainant reported that his life and the lives of his family members were in jeopardy, which could be confirmed by the FBI. Complainant alleged that a consultant hired by the Respondent threatened to murder Complainant or kill or kidnap his family members if he were to report what he had witnessed to the authorities. Complainant stated that Respondent continually attempted to minimize the seriousness of the threats made by the consultant. Complainant argued that the continued threats and the Respondent's attempts to minimize the seriousness of the threats warrant relief from the 90-day SOX filing requirement. Complainant is certain that his decision to speak to the FBI first is the reason why his family has not yet been harmed. Complainant expects the Department of Labor to encourage a complainant to take every step possible to promote the physical safety of family members before reporting SOX violations; regardless of the how long it might take. Complainant opined that Executives from both Respondent and GE "have long known about what I am reporting to you," and their only response has been to attempt to incriminate Complainant for things he has not done and to reward their "accomplices" with continued employment and financial incentives.

III. LEGAL FRAMEWORK

A. STANDARD FOR DISMISSAL

Although 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, does not address a motion to dismiss, 29 C.F.R. § 18.1 (a) provides that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move for dismissal on the grounds that a complaint does not state a claim upon which relief can be granted. Although the Rule refers to such dismissal on the motion of a party, it has been uniformly held that a Court may dismiss a complaint for failure to state a claim upon which relief can be granted when it is patently obvious that the complainant could not prevail on the facts as alleged in the complaint. Courts have the inherent power to take such action, or to find that a complaint is frivolous on its face. *See, Koch v. Mirza,* 869 F.Supp. 1031 (W.D.N.Y. 1994); *Washington Petroleum and Supply Co. v. Girard Bank,* 629 F.Supp. 1224 (M.D. Pa. 1983); *Johnson v. Baskerville*, 568 F.Supp. 853 (E.D. Va. 1983); *Cook v. Bates,* 92 F.R.D. 119 (S.D.N.Y. 1981). Such a conclusion is not a determination on the merits, but involves an inquiry as to whether, even assuming that all of the Complainant's allegations are true, he has stated a cause of action upon which relief can be granted. Assuming the truth of Complainant's allegations, I find that the Complainant failed to file a timely complaint, and has failed to show that he is entitled to relief from his untimeliness.

B. WHISTLEBLOWER PROTECTION PROVISIONS OF THE ACT

The Act provides whistleblower protection for employees of publicly-traded companies who provide information or participate in an investigation relating to violations of certain criminal statutes relating to fraud, rules or regulations of the Securities and Exchange Commission, or any provisions of Federal law relating to fraud against shareholders.[2] To be protected, the information must have been provided to the employee's superior or to another employee with the authority to investigate, discover, or terminate the misconduct, to federal law enforcement or regulatory personnel, or to members of Congress; or the employee must have participated in proceedings relating to the violation. Actions brought under the Sarbanes-Oxley Act are governed by the burdens of proof set forth under 49 U.S.C. §42121(b), the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21."). 15 U.S.C. §1514A(b)(2)(C); *Halloum v. Intel Corporation*, ARB No. 04-068, ALJ No. 2003-SOX-7 (ARB Jan. 31, 2006); see also 29 C.F.R. §1980.104 (discussing general burdens of proof for SOX claim).

To prevail at the adjudication stage of a SOX claim, a complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity; (2) the respondent knew that he engaged in the protected activity; (3) the complainant suffered an unfavorable personnel action, i.e., an adverse employment action; and (4) the protected activity was a contributing factor in the unfavorable action. *Halloum, supra*, ARB No. 04-068, slip op. at 6, citing *Getman v. Southwest Securities*, Inc., ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB July 29, 2005), *recon. denied* (ARB March 7, 2006). If a complainant proves the elements of his case by a preponderance of the evidence, the respondent may still 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. *Halloum*, ARB No. 04-068, slip op. at 6.

IV. DISCUSSION

A. PROTECTED ACTIVITIES

As discussed above, a "protected activity" under the Act consists of providing information regarding violations of certain criminal and/or securities laws to specified parties. Complainant has identified three communications that may qualify as "protected activities."

1. Report to Director of Billing

The first report identified by Complainant is his report on an unstated date in 2004 to the Director of Billing that the company was engaged in SOX violations. Complainant, however, has not shown that the Director of Billing was an employee of Respondent with the authority to investigate, discover, or terminate the misconduct, as required under the Act. Indeed, Complainant has elsewhere identified the Director of Billing as one of those involved in the

[2] Although Complainant has not stated with specificity what violations of law he believes took place, I will again assume for purposes of this decision that the information he provided to Respondent's Director of Billing, to the Pennsylvania unemployment office, and to the FBI were sufficiently detailed and involved violations of the statutes identified in Section 1514A.

alleged embezzlement and fraud. Consequently, it is highly doubtful that Complainant's report to the Director of Billing qualifies as a protected activity under SOX. Nonetheless, because the Director of Billing title implies that its incumbent is a corporate officer, I will assume for purposes of this decision that it does so qualify.

2. Communication to Pennsylvania Unemployment Office

After his resignation from Respondent, Complainant filed a claim for unemployment benefits with the Commonwealth of Pennsylvania. In that claim, he alleged to the unemployment office that employees of Respondent were involved in fraud and embezzlement.

To be a protected activity, information must be communicated to a federal investigative or law-enforcement agency, to a member of Congress or a Congressional committee, or to certain specified employees of the company where the violations allegedly occurred. Consequently, Complainant's report of alleged illegal activities to a non-federal entity is not a protected activity under SOX.

3. Report to the FBI

At an unspecified time between his resignation and his filing of the complaint in this matter, Complainant reported the alleged misconduct of Respondent's employees to the Federal Bureau of Investigation, obviously a federal law-enforcement agency. Accordingly, Complainant's report to the FBI qualifies as protected activity.

B. ADVERSE EMPLOYMENT ACTION

Under Section 806 of SOX, 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 the employee engaged in protected activity. 18 U.S.C. 1541A (a). In this matter, Complainant was no longer an employee during the alleged adverse employment actions. In general, an employer is subject to liability under SOX only for retaliation against its current employees. *See Harvey v. Home Depot, Inc.*, 2004-SOX-36 at 4 (ALJ) (May 28, 2004), *aff'd* Nos. 04-114 and 115 (ARB June 2, 2006) (with exception of blacklisting and interfering with a complainant's subsequent employment, SOX protects an employee from retaliation for protected activities while the complainant is employed by the employer).

1. Interference With Unemployment Claim

Complainant alleges that Respondent provided untruthful information to the Pennsylvania unemployment office in a successful attempt to prevent him from receiving state unemployment benefits.

At the time of the alleged interference, Complainant had resigned from his employment with Respondent and therefore was no longer Respondent's employee. Additionally, Complainant has not alleged that the interference with his unemployment claim involved the terms and conditions of any employment, either with Respondent or with T. Rowe Price or, for

that matter, with any actual or potential employer. Accordingly, I find that the interference, assuming that it did occur, was not an adverse employment action.

2. Contact with Former and Current Employer

Complainant alleges that in 2006, representatives of Respondent contacted his "previous/current" employer, T. Rowe Price, "for the purpose of proactively gathering information and people to collaborate [sic] their justifications for fraudulent business practices and further damage [Complainant's] credibility." Complainant has not, however, alleged that the contact had any effect on the terms and conditions of his employment with T. Rowe Price. Indeed, as of the date that Complainant filed his complaint, he was still employed at T. Rowe Price.

Arguably, Respondent's contact with Complainant's current employer was an attempt to have Complainant's employment terminated, a form of blacklisting that may be actionable under SOX. *See Harvey, supra*. Consequently, for purposes of this decision, Respondent's contact will be assumed to be an adverse employment action.

3. Failures to Rehire

Complainant alleges that he applied for two positions with Respondent in October and December of 2005, and that Respondent has not responded to those applications. The Act prohibits an employer from discriminating in any manner against "any employee with respect to the employee's compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activity. 18 U.S.C. § 1541A(a). Title 29 C.F.R. § 1980.101 defines the term "employee" to include "former employee." As a refusal to hire a former employee in retaliation for engaging in protected activities does implicate the former employee's terms, conditions, and/or privileges of employment, Respondent's two refusals to rehire Respondent upon his application constitute, for purposes of this matter, adverse employment actions.

4. Additional Actions

Complainant has also alleged that Respondent has continued to retaliate by gathering and using damaging personal information in order to justify their purportedly illegal business practices and to damage his credibility; by engaging in unspecified slander and libel; by rewarding other of Respondent's employees for "providing malicious lies and slander"; by engaging in continuing violations of SOX Title XI to the detriment of Complainant's ability to receive a fair hearing; and by stealing records from the public high school that Complainant attended. There is no claim by Complainant that these actions affected the terms or conditions of his previous or current employment. Consequently, I find that these additional actions alleged by Complainant do not constitute adverse employment actions.

C. TIMELINESS

1. Complainant Did Not Timely File His Complaint

A SOX complaint must be filed with the Secretary of Labor (OSHA) within 90 days of the alleged retaliation. 18 U.S.C. § 1514A(b). The regulations clarify that the alleged violation occurs "when the discriminatory decision has been both made and communicated to the Complainant." 29 C.F.R. § 1980.103.

Complainant filed his complaint on January 29, 2008. For that complaint to be timely, some retaliatory act must have occurred on or after October 31, 2007. Only three prior alleged acts by Respondent could conceivably qualify as adverse employment action: Respondent's alleged contact with Complainant's current employer and its refusal on two occasions to rehire Complainant. As the last of these occurred in 2006, at least 13 months before the complaint was filed, it is clear that the complaint was untimely.

2. Complainant Has Misconstrued the 90-Day Requirement

Complainant claims that he filed his complaint within 90 days of (1) reporting his knowledge of Respondent's ongoing attempts to cover up the fraudulent activity; (2) reporting Respondent's continuous attempts to diminish the seriousness of the threats issued by one of Respondent's consultants; and (3) reporting Respondent's continuous use of personal information to "justify their enterprise of slander and libel."

Complainant misunderstands the event that starts the 90-day clock for filing a SOX complaint. The filing period begins to run at the time of the retaliatory act, not at the time that Complainant reports a violation. That respondent may be continuing to violate Title XI of SOX is therefore immaterial to the issue at bench: whether Complainant filed his complaint within 90 days of any retaliatory act.

3. Complainant Is Not Entitled to Relief

Complainant argues that he should be granted equitable relief from the 90-day filing requirement because a consultant paid by Respondent had threatened to kill him and to kill or kidnap his family. He believes that he needed time to alert the FBI prior to filing a complaint with OSHA. Specifically, in his Response to the Order to Show Cause, Complainant argued that Respondent's continuous attempts to minimize the seriousness of its consultant's threats to Complainant and/or his family if he were to contact the authorities "are cause for relief from the 90-day SOX filing requirement – [Respondent] has purposefully tried [to] jeopardize both my families (sic) physical welfare and mine." Complainant is certain that his family remained unharmed because he made the decision to speak first with the FBI. Complainant opined that "under the circumstances [he] would expect the Department of Labor to encourage a complainant [to] take every step possible to promote his family's physical safety before reporting SOX violations of such a broad (and ongoing) scope – no matter how long it takes." As explained below, I do not find that equitable relief is appropriate for tolling the statute of limitations in this matter.

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 his 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)). *See also Harvey v. Home Depot U.S.A., supra.* 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). Complainant bears the burden of establishing grounds for applying equitable modification of the statutory time limitation. *See Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147, 151 (1984).

Complainant has not claimed that he was misled by Respondent, or that he raised the precise statutory claim in issue in the wrong forum. Further, I find that Complainant has not met his burden to establish that he was prevented in some extraordinary way from filing his claim.

First, Complainant has not alleged, or presented evidence to show, that the consultant who purportedly made the threats did so at the behest of Respondent. Second, it is clear that the alleged threat of violent retaliation did not prevent Complainant from providing both the FBI and the Pennsylvania unemployment office with much more incriminating information than he would have been required to disclose to the DOL in order to file a SOX complaint. Third, and more significantly, Complainant reported that the worst threats occurred shortly after his interaction with the unemployment office in February of *2005*, yet his complaint was filed in January of *2008*, nearly three full years later.

Complainant reported the threats to the proper authorities, and states that the FBI is aware of them and can verify them. It is unfathomable that it would take Complainant almost three years to inform the authorities of the violent threats. Complainant has not explained satisfactorily – or at all – why he could not have filed his SOX Complaint with the Regional Administrator at some point in that three-year period before October 31, 2007.

In sum, Complainant's actions in this case speak louder than his words in his pleadings and arguments. Therefore I find Complainant's allegations, if taken to be true, would not justify equitably tolling the statutory time limitation.

Therefore, I find that Complainant's claim under the Act is untimely, and that Complainant has not met his burden to show his entitlement to equitable tolling of the filing deadline. Accordingly, this matter is hereby DISMISSED WITH PREJUDICE.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
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, Suite S-5220, 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).