



**Issue Date: 19 September 2008**

**CASE NO: 2008-SOX-60**

**IN THE MATTER OF**

**STEPHANIE JONES,  
Complainant**

**v.**

**FIRST HORIZON NATIONAL CORPORATION,  
Respondent**

**DECISION AND ORDER DISMISSING  
THE COMPLAINT AND CANCELLING HEARING**

**Background**

This case arises under Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A. By letter dated June 4, 2008, Complainant filed her complaint under the Act with OSHA alleging that she engaged in protected activity which resulted in her termination on November 1, 2006. In OSHA's determination dated July 11, 2008, OSHA ruled that Complainant's claim was untimely. Complainant appealed OSHA's determination, and the matter is now before the Office of Administrative Law Judges set for formal hearing on October 15, 2008. In her appeal, Complainant seeks a tolling of the required filing date with OSHA.

Prior to trial, Respondent filed a Motion for Summary Decision seeking dismissal of Complainant's SOX complaint on the grounds the same was untimely filed. Complainant has responded conceding her untimely filing with OSHA, but seeking a tolling.

## Discussion and Findings

29 C.F.R. § 1980.103 provides 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.” In other words, the Complainant’s date of awareness is the commencement date for the filing of a complaint. *See* in this regard *Marc Halpern v. XL Capital, LTD*, ARB Case No. 04-120 (Aug. 31, 2005).

In her response, Complainant concedes her complaint was not filed with OSHA within 90 days of her termination. Consequently, I find that Complainant became aware of the decision to alter her employment more than 90 days from the time that she filed her OSHA complaint and that unless tolled, Complainant’s complaint is untimely.

Turning to the issue of tolling, in *Halpern, supra*. the Board recognized three instances when such relief might be granted: 1) when the Respondent misled the Complainant concerning the filing of her complaint; 2) the Complainant was in some way extraordinarily prevented from filing her claim; or 3) Complainant raised the issue in the wrong forum.

The following facts are acknowledged by both parties:

1. On September 21, 2006, prior to her termination, Claimant filed an EEOC complaint alleging she had been discriminated against because of her race and sex in violation of Title VII of the Civil Rights Act of 1964. On September 22, 2006, EEOC issued a Notice of Right to Sue;

2. On November 1, 2006, Complainant was terminated from her employment with Respondent.

3. On December 12, 2006, following her termination, Claimant filed a second EEOC complaint alleging she had been discriminated against in retaliation for filing an EEOC complaint in violation of Title VII of the Civil Rights Act of 1964. On April 11, 2007, EEOC issued a Notice of Right to Sue.

4. On June 26, 2007, Complainant filed suit in the U. S. District Court for the Northern District of Texas alleging claims of race discrimination and retaliation for complaining of race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964. By order dated August 13, 2008, Complainant’s complaint was dismissed on Summary Judgment in favor of the Respondent.

5. On August 23, 2007, two months after filing her suit in the District Court and ten months after her termination, Complainant filed a third EEOC complaint alleging disparate treatment in the terms and conditions of her workplace dating from February 2006 until her discharge on November 1, 2006. On October 30, 2007, EEOC issued a Notice of Right to Sue.

6. On June 4, 2008, 19 months after her termination, Complainant filed a letter with OSHA alleging a Section 806 SOX violation.

7. On July 11, 2008, OSHA dismissed Complainant's SOX complaint as untimely, and on August 6, 2008, Complainant appealed that dismissal to this office.

In her 2008 letter to OSHA written by her attorney and dated June 4, 2008, it is alleged Complainant believes she was terminated because of her "whistleblowing" "Job Performance Rebuttal" letter of July 10, 2006, accusing "loan, bank and securities fraud", yet she inadvertently filed that portion of her retaliation claim with EEOC rather than with the Department of Labor. In support of Complainant's argument, attached to her appeal is her "Job Performance Rebuttal" letter of July 10, 2006, which consisted of 4 pages and concluded with accusations of fraudulent conduct on Respondent's part, all of which she maintains was forwarded to EEOC following her September 2006 and December 2006 complaints. (Appx. pages 3-6).

Because of the last paragraph of that letter (Appx. page 6), Complainant urges either her SOX claim should be considered timely filed, though in the wrong forum, or she should be granted equitable tolling because both the EEOC and her then attorney failed to instruct her to file a whistleblower complaint with the Department of Labor.

Complainant bears the burden of justifying the application of equitable modification, and in this instance I do not agree with Complainant that due diligence has been demonstrated on her part. To the contrary, I find Complainant failed to preserve her legal rights regarding her SOX claim, and I find no genuine issue of material fact related to Complainant's entitlement to equitable tolling.

Complainant alleges that it is sufficient that her July 10, 2006, letter was presented to EEOC after the filing of both her EEOC September 21, 2006 and December 12, 2006, complaints. However, in neither instance were allegations made in those complaints that Complainant's employment had been affected by any protected whistleblower activities. In fact, no such allegation was made in any of the three EEOC complaints Complainant filed, nor were they made in the Federal District Court lawsuit. What Complainant alleged in those instances was sex and race discrimination as well as retaliation for filing her EEOC complaints.

Complainant knows she never filed a whistleblower complaint as evidenced by her own affidavit of June 18, 2008, and attached to her OSHA appeal wherein she stated under oath:

I engaged attorney Robert Behrendt and requested on several different occasions, that he file a whistleblower complaint regarding mortgage fraud being committed by loan officers and the cover-up by David Scaff. I gave Behrendt several examples of mortgage fraud being committed by several individuals. Behrendt stated he was unfamiliar with whistleblower complaints and that he would do some research regarding the matter. Behrendt later told me that it was too late for him to include it in my complaint because the time had expired and that the EEOC was not the right entity I should have reported it to (Appx. pages 13, 14).

As pointed out by Respondent in their Motion for Summary Decision, a client cannot avoid the consequences of an omission on the part of his or her chosen attorney representative. If she could not persuade her attorney to act, she should have gotten new counsel or acted on her own as she had done in the EEOC complaints. However, despite Complainant's confession that she knew a whistleblower complaint should be filed, following the termination of her first lawyer's services on March 25, 2008 and the hiring of her present counsel on April 17, 2008, no whistleblower complaint was filed with OSHA until June 4, 2008.

The rebuttal letter of July 10, 2006, was given to EEOC only to bolster Complainant's Title VII claims, not as an attempt to file a whistleblower claim. Consequently, while I do not find Complainant's letter of July 10, 2006, to be a timely filing of a SOX claim, even if it were the claim was abandoned. The EEOC Right to Sue granted on April 11, 2007, was exercised by Complainant on June 26, 2007, by her filing of her complaint in the Federal District Court alleging only a Title VII violation.

As far as Complainant's argument that EEOC somehow mislead her, I find no evidence of such. Nor do I accept Complainant's allegations of confusion over which agency she should have filed her whistleblower complaint with. Ignorance of the law is no excuse for untimely filing, and neither is it relevant to a tolling assertion that the facts of the claim may possibly have merit.

## **ORDER**

**IT IS HEREBY ORDERED** that Complainant's complaint is **DISMISSED** as untimely and the hearing scheduled in this matter for October 15, 2008, in Dallas, Texas is **CANCELLED**.

**So ORDERED** this 19th day of September, 2008, in Covington, Louisiana.

**A**

**C. RICHARD AVERY**  
**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).