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Issue Date: 05 December 2008

CASE NO: 2008-SOX-00065

In the Matter of:

STEVEN J. KEOUGH,
Complainant,

v.

SURMODICS, INC.,

And

BRUCE J. BARCLAY,
Respondents.

ORDER DENYING MOTION TO RECONSIDER AND DECISION AND ORDER DISMISSING COMPLAINT

Background

This proceeding arises under 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. § 1514A[1] ("Sarbanes-Oxley" or "SOX"). The Complainant objected to the Secretary's findings and requested a *de novo* hearing.

Complainant is acting *pro se*, however, he is an experienced attorney with over twenty years of legal experience.

On June 14, 2008, Complainant filed (by mailing) a "Whistle Blower Complaint" with the Secretary of Labor. It was received by the Secretary on June 18, 2008. This 18-page complaint alleged that the Respondents, "SurModics" and Bruce J. Barclay (CEO) retaliated against the Complainant when he was terminated on March 13, 2008. Compl. at 2. Complainant alleged eighteen (18) separate "Counts" of violations of a variety of statutes. Specifically, Complainant alleged that the CEO, Bruce R. Barclay, and SurModics:

1. breached the employment contract with employee;
2. conducted a bad faith termination of employee;
3. misrepresented (Barclay) his authority and his intended actions;
4. was in violation of "SOX" corporate compliance standards and U.S. Sentencing Commission Guidelines;
5. violated section 409 of "SOX";

[1] Title VII of the SOX is designated the Corporate and Criminal Fraud Accountability Act of 2002. Section 806, the employee protection provision, protects employees who provide information to a covered employer or a federal agency or Congress relating to alleged violations of 18 U.S.C.A. § 1341 (mail fraud), 1343 (wire, radio and television fraud), 1344 (bank fraud) or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders.

6. CEO and counsel violated sections 806 and 1107 of "SOX" and "general anti-retaliation provisions";
7. violated section 802 of "SOX";
8. frustration of purpose and misrepresentation by CEO to the investing public;
9. violation of CEO of U.S. Code Title 15, Chapter 105, the Defense Production Act of 1950, the Homeland Security Act of 2002 and the National Industrial Security Program;
10. extortion and attempted illegal coercion and blackmail by the CEO of employee during the termination process;
11. intentional infliction of emotional distress;
12. violation of the Human Rights Act of Minnesota, unfair discriminatory practices relating to employment, reprisals and other related federal claims protected under various EEOC sections of the law;
13. conversion of corporate resources for private purposes, fraud, waste and abuse of SurModic's resources, violation of shareholder's expectations of good judgment and best efforts by CEO on behalf of the company and reckless conduct by CEO to the detriment of company shareholders;
14. CEO terminated employee in bad faith;
15. fraud and fraud in the inducement;
16. slander and defamation against employee and un-named fellow employee;
17. violation of implied covenant of good faith, duty of candor and fair dealing by SurModics and CEO; and
18. failure of CEO and SurModics to adhere to goals of equity plan, abuse by CEO of limited authority vested in him.

On June 19, 2008, Complainant filed an "amended and supplemented complaint" with the Secretary. In essence, this Amended Complaint added two more "Counts" to the previous complaint:

19. violation of duty of disclosure to investing public regarding acquisition of Brookwood Pharmaceuticals;
20. the Board of Directors of SurModics, and specifically the Audit Committee and its counsel repeatedly violated "SOX" corporate compliance standards.

The Complainant, in his prayer for relief in the Original and the Amended Complaints, requested eight separate types of far-reaching relief. See Compl. at 17; and Am. Compl. at 19.

On August 8, 2008, upon investigation of the Complaint, the Regional Administrator, OSHA, dismissed the Complaint as untimely because the Complainant had not filed the Complaint within the requisite ninety (90) day period from the adverse personnel action.

On September 3, 2008, the Complainant's "Notice of Objection and Request for Hearing" dated August 30, 2008 was received in the Office of Administrative Law Judges (OALJ). The Complainant's objection was timely filed with OALJ. The matter was then assigned to the undersigned for hearing.

A telephone conference call with both parties was conducted on September 12, 2008. Complainant requested leave to amend his complaint[2] in order to rectify certain "typographical errors" he had found in his Amended Complaint subsequent to its submission to the Secretary of Labor. The

[2] The Original Complaint had already been amended by the June 19, 2008, modification, which added two additional counts.

undersigned granted Complainant leave to amend "only typographical errors" and instructed him that the Court would not allow any "substantive changes."

An "Amendment to Complaint" dated September 16, 2008 was filed by the Complainant and an objection to the Complainant's Amendments 1, 4 and 5 was filed by the Respondents. Specifically, Complainant moved to amend the date of March 13, 2008 to March 18, 2008.[3]

Since the direction from the Court was clear and unambiguous that an amendment for correction of "typographical errors only" would be allowed, amendments 1, 4 and 5 were disapproved by my Order dated September 24, 2008.

On October 14, 2008, Respondent filed a Motion to Dismiss and Memorandum in Support thereof, dated October 13, 2008. On November 14, 2008, Complainant filed a Motion to Dismiss the Respondent's Motion to Dismiss and a Motion to Reconsider the Order Denying Portions of the Complainant's Proposed Amendment to the Complaint.[4] Respondents filed a Reply Memorandum In Support of their Motion to Dismiss and Opposition to Complainant's Motion to Reconsider (dated November 26, 2008) on November 28, 2008.

I will address the Complainant's Motion to Reconsider my earlier decision concerning modification of the pleadings first.

MOTION TO RECONSIDER

Discussion

Complainant's September 16, 2008, "Amendment to Complaint" requested ten (10) specific changes to the already Amended Complaint. Respondent did not object to those changes which were merely "typographical" in nature but objected to amendments 1, 4 and 5, stating that they were actually "factual changes" and were clearly "substantive" in nature.

I agreed with the Respondents' argument and did not allow the Complainant's request to make the substantive changes in 1, 4 and 5.

Complainant's Position

Complainant now requests reconsideration of my decision and in support of his argument that he should be allowed to amend his Amended Complaint, avers that the "plain language" of paragraph 6 of the Original Complaint "establishes adequate reason" to rule that the complaint was timely filed, thereby supporting his latest requested amendments. Paragraph 6 states in its entirety:

> "It is believed that the alleged retaliatory action occurred *on or about* (emphasis added) March 18, 2008, which was the date of delivery of a termination letter by CEO Barclay of SurModics to Employee."

[3] Hoping to thereby avoid the 90-day statute of limitations which was the basis for the dismissal of the complaint below.
[4] This was actually the Amended Complaint.

Complainant also relates the conversation between himself and the CEO on March 13, 2008, in which the CEO suggests that they "take the weekend and on Tuesday morning let's review this together" as supportive of his position that March 18th was the date of the adverse action, not March 13th.

Complainant further states that he waited to file "until after a long promised and long awaited initial settlement meeting with a counsel for the Respondents and the Vice President for Human Resources" which occurred on June 13, 2008. See Compl. Br. at 4. Complainant states he "wanted to ensure that the filing of the Complaint was actually necessary."

Since the meeting did not result in a settlement, the Complainant states he then mailed the Complaint on June 14, 2008 (a Saturday).[5]

Complainant asserts that "Simply stated, there is clear evidence in the original un-amended Complaint filed June 14, 2008, to support timely filing of the Complaint," and that he should be allowed to amend the date to March 18, 2008.

Complainant additionally claims the meeting between himself and the CEO of March 13, 2008 was "very perfunctory" and states he did not believe he had been "fired" by the CEO during that meeting. Complainant does relate that the CEO "uttered several statements relating to loss of confidence, and then requested and subsequently rescinded such request for a letter of resignation" from him.

Respondents' Position

Respondents submitted a Reply Memorandum in Support of Their Motion to Dismiss and Opposition to Complainant's Motion to Reconsider, which was dated November 26, 2008, and received by OALJ on November 28, 2008.

Respondents aver that the Complainant's early references to March 13, 2008, as the date of termination of his employment are "obviously not a typo." They note that the date (March 13) is repeated in the Original and Amended Complaints, as well as in documents submitted with the Complainant's Opposition to the Respondent's Motion to Dismiss. Respondents allege that the Complainant's brief and exhibits also "contain numerous false allegations that disparage SurModics, Mr. Barclay, and the Company's employees and counsel."

Respondents state that the Complainant's attempt to modify the dates is "a bald attempt to rewrite history." They aver that four separate documents authored and submitted by the Complainant "flatly contradict that representation. Specifically, they point to the following documents:

1. the June 14th Complaint;
2. the June 19th Amended Complaint;
3. a draft U. S. District Court Complaint, dated May 1, 2008; and
4. a meritless ethics complaint, dated April 28, 2008.[6]

[5] The Original Complaint was actually received by DOL on June 18, 2008.

Res. Br. at 1, 2.

Respondents further argue that the Complainant cannot "erase his repeated assertions that his employment was terminated on March 13 by now making contradictory allegations."

ORDER DENYING MOTION TO AMEND

I have reconsidered my previous decision denying Complainant's request to make substantive changes to his Amended Complaint.

I **HEREBY AFFIRM** my previous decision and **HEREBY DENY** the Complainant's request with respect to allowing proposed amendments 1, 4 and 5. Substantive modification of this critical date would be improper at this stage of the proceedings. Complainant is attempting to "change history" by refuting his own claim and the vast amount of evidence showing the adverse personnel action actually occurred on March 13, 2008. *See, Camfield Tires, Inc. v. Michelin Tire Corp.,* 719 F.2d 1361 (8th Cir. 1983).

RESPONDENTS' MOTION TO DISMISS

Respondents' Position

Respondents moved to dismiss this case on three bases:

1. That Mr. Keough's Complaint is untimely;
2. that Mr. Keough has not stated a "Sarbanes-Oxley" Whistleblower Claim; and
3. that Mr. Keough's remaining claims are outside the jurisdiction of this Court.

With respect to the first basis, the Respondents argue that the Claimant "knew unequivocally" on March 13, 2008, that his employment was to end at the meeting between the Complainant and the CEO, Respondent Barclay. Respondents state further that it "does not matter that the parties met on a later date to discuss specific terms of a severance package" nor that "his last day of employment was at a later date." They argue that "what matters is the date when Mr. Keough first became aware of the alleged employment action – March 13, 2008." See Resp. Br. at 9.[7]

Complainant's Position

Complainant responds that his pleadings complied with the "short and plain statement" requirements of Rule 8(a). He states that the Complainant "alleged with clarity that retaliatory action occurred on or about March 18, 2008, which was the date of presentation to Complainant of a proposed Separation Agreement and Release by CEO Barclay…" Compl. Br. at 9.

Complainant states that he "never resigned and did not believe he had been fired" at the March 13, 2008 meeting with the CEO. He then questions why the CEO would rescind his request for an

[6] The ethics complaints filed by the Complainant against Mr. Phillips and Ms. Noecker have been dismissed.

[7] Further discussion of the Respondents' position on the second and third bases supporting their Motion is not necessary in light of my decision in their favor on the first basis, as discussed below.

(immediate) resignation and why he (CEO) would let five days go by to further discuss the matter. The Complainant suggests that the CEO's actions are "suggestive of being unprepared to fire anyone during the March 13th meeting." Compl. Br. at 10.

Complainant argues in the alternative that even if the filing was untimely, he should be entitled to the "equitable tolling" of the limitations of the SOX provisions for the following reasons:

1. The Complainant sought the assistance from (sic) the Securities and Exchange Commission email fraud hotline on June 4th, and fully cooperated with the officials from that office. He claims his email was a "good faith effort" to seek the assistance of the "ultimate agency in this type of matter, and to "more promptly prevent further misconduct by the Respondents from harming investors." (Compl. Br. at 14).
2. The negotiations actions of Respondents "were designed to cause the Complainant to miss the 90 day filing date. In this regard, the Respondents knew of the Complainant's intent to file a Complaint relating to Sarbanes-Oxley retaliatory violations, and had in their possession a draft complaint similar to the June 14 Complaint."[8] Complainant alleges that he had notified the Respondents and the SurModics Board of Directors "many times" of his objection to his "resignation" on March 13, 2008.[9] (Compl. Br. at 14, 15).
3. The Complainant also argues that the "unusual behavior of Respondent Barclay at the brief meeting of March 13" is cause for the "equitable tolling." Complainant avers that the "unclear and quite equivocal as to what he (Barclay) was telling" the Complainant. (Compl. Br. at 16).[10]

Preliminary Discussion

SOX and its implementing regulations[11] prohibit retaliatory actions by publicly-traded companies[12] 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 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.

Actions brought under SOX 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

[8] See Complainant's Exhibit E to his brief, which is a "Draft" Complaint to the Federal District Court of Minnesota, dated May 1, 2008.
[9] See Exhibits E and F, Compl. Br.
[10] It is unclear exactly what "prong" of the equitable tolling doctrine Complainant is alleging in this regard. For the purposes of this decision, I will assume he is raising this set of "facts" to substantiate either prong 1 or 2, or both.
[11] 29 C.F.R. Part 1980
[12] As well as their subsidiaries or agents.

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 07 (ARB Jan. 31, 2006).

Title 29 C.F.R. §1980.103(d) and 18 U.S.C. § 1514A(b)(2)(D) require an employee who has been subjected to retaliation to file a complaint within 90 days of the alleged retaliation. This statute of limitations period begins to run from the time that the Complainant "knows or reasonably should know that the challenged act has occurred."[13] 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(d).

"Strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826, 100 S.Ct. 2486, 65 L.Ed.2d. 532 (1980); *Prybys v. Seminole Tribe of Florida*. 95 CAA 15 (ARB Nov. 27, 1996).

Although 29 C.F.R. Part 18, Rules for 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 may be granted. Courts have the inherent power to take such action, or to find that a complaint is frivolous on its face. *See, Koch v. Mizra,* 869 F. Supp. 1031 (W.D.N.Y. 1994); *Johnson v. Baskerville,* 568 F.Supp. 853 (E.D.Va. 1983). Such a conclusion is not a decision 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.

Equitable Tolling Doctrine

I have considered the "equitable tolling" doctrine as it might conceivably apply to this case and as argued by the Complainant. This doctrine is not applicable to the facts of this case and is not supported by any viable evidence.

Generally, tolling the statute of limitations is proper under any of the following circumstances:[14]

1. when the defendant has actively misled the plaintiff respecting the cause of action;[15]
2. when the plaintiff has in some extraordinary way been prevented from asserting his rights; or

[13] *Allen v. U.S. Steel Corp.,* 665 F.2d 689, 692 (11th Cir. 1982). *See also Ross v. Florida Power & Light Co.,* ARB No. 98-044, ALJ No. 1996-ERA-036, slip op. at 4 (ARB Mar. 31, 1999)(statute of limitations begins to run "on the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person with a reasonably prudent regard for his rights").

[14] These will hereinafter be referred to as the "three prongs" of the doctrine.

[15] Or in some cases where "there is a complicated administrative procedure, and an unrepresented, unsophisticated complainant receives misleading information from a responsible government agency, a time limit may be tolled." See *Carter v. Champion Bus, Inc.,* ARB No. 05-076, ALJ No. 2005-SOX-23 (ARB Sept. 29, 2006)

3. where the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.[16]

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 whatever 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 limitations. *See Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147, 151 (1984).

First Prong

Complainant alleges that the "negotiation actions" of Respondents' were "designed to cause Complainant to miss the 90 day filing date." He further states that the "Respondents knew of the Complainant's intent to file a Complaint relating to Sarbanes-Oxley retaliatory violations, and had in their possession a copy of a draft complaint substantially similar to the June 14 Complaint."[17] The "repeated delays" to arrange a settlement meeting with the Vice President for Human Resources is also cited by Complainant as evidence of the Respondents' "misleading" tactics. Compl. Br. at 14.

Additionally, Complainant mentions his email and "dealings" with the SEC as part of his argument that he is entitled to equitable tolling. There is no legal or factual support proffered for the allegation that the SEC in some way misled the Complainant or that the Respondents' (or SEC) interfered in some manner with Complainant's ability to file a SOX claim with the proper agency, the Department of Labor.[18] I could find no indication whatsoever of any attempt by the SEC to mislead the Complainant at any junction during the running of the time period.[19] Complainant's argument that the SEC is the "ultimate" agency to deal with these matters, or that he "filed" with the SEC, is not supported by the evidence he provided and is simply not credible.

Since the Complainant's third listed basis for claiming that equitable tolling should be granted is somewhat convoluted, for the purposes of this decision, I will assume he is also arguing that the "unusual behavior" of the CEO in some inarticulated way misled him into filing late.

Findings

I find the Complainant was not misled by the Respondents (collectively or individually) or any other agency or entity as defined in the statute. The Respondents had no obligation to facilitate the

[16] *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 20 (3rd Cir. 1981)(citing *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978).
[17] One must wonder why the "substantially similar complaint" was not forwarded to the DOL as required when it was most certainly drafted well in advance of the expiration of the period.
[18] This is specifically laid out in the statute along with the address and other particulars for filing a SOX claim.
[19] Nor was there any by any other agency.

Complainant's SOX claim – their only obligation was not to actively mislead him.[20] Mere silence by the Respondents is not a basis to find equitable tolling, particularly when the Complainant has counsel[21] or is an experienced attorney himself. See *Moldauer v. Canandaigu Wine Co.,* ARB 04-022, ALJ No. 2003-SOX-26 (ARB Dec. 30, 2005); see also *Halpern v. XL Capital, Ltd.,* ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Aug. 31, 2005).

None of the Respondents' actions or omissions rises to the level necessary to find they actively misled Complainant. Nor did any responsible government agency provide the Complainant with any misleading advice or information. See *Carter v. Champion Bus, Inc.,* ARB No. 05-076, ALJ No. 2005-SOX-23 (ARB Sept. 29, 206).

I also find that the email and "dealings" the Complainant uses to support his argument for tolling can not reasonably be construed as "filings" under SOX.

Second Prong

The Complainant has not specifically articulated an argument under this prong of the doctrine. However, the convoluted argument he makes based on the "unusual behavior" of Respondent Barclay during the March 13, 2008, meeting might possibly be construed as falling into this category.

Finding

I find the Complainant has not shown that he has been prevented in some extraordinary way from asserting his rights. Even a liberal construction of any of his arguments does not satisfy this prong. Respondent Barclay's "angst"[22] notwithstanding, I find no basis for equitable tolling under this prong.

Third Prong

Complainant has claimed he mistakenly filed in the wrong forum.[23] He argues that seeking assistance from the SEC "Hotline" on June 4, 2008 and "fully cooperating" with officials of that agency was a "good faith effort" to seek the assistance of the "ultimate agency" in this type matter and to "prevent further misconduct by Respondents from harming investors." Compl. Br. at 14. He provided no further proof or clarification of his assertion.

Making a "good faith effort" does not qualify as a bona fide reason for the equitable tolling of the statute of limitations. The SEC was clearly not the appropriate agency to receive a SOX complaint.

Findings

[20] This is primarily applicable to unsophisticated claimants or those with mental handicaps; however, in an abundance of caution, I considered this for the sake of completeness.
[21] It is unclear when Complainant's counsel withdrew from his representation.
[22] Since this argument is not very well articulated by the Complainant, I find it does not support any rendition of facts that fall under the purview of any prong of the case law regarding "equitable tolling."
[23] Had he actually filed the Complaint with the Federal District Court for Minnesota, he might have a better argument.

The argument that merely talking to the SEC[24] should be construed as some form of "wrong forum" filing is without merit or basis in law or fact. Without finding that the email to the SEC or that correspondence with any other entities contained language sufficient to implicate activities covered by SOX, I do not find that these actions can be construed as mistakenly filing in the wrong forum. See *Guy v. SBC Global Services,* 2005-SOX-113 (ALJ Dec. 14, 2005); *Moldauer v. Canandaigua Wine Co.,* 2003-SOX-26 (ALJ Nov. 14, 2003). Complainant had retained counsel during the statutory period and is an experienced attorney in his own right. Additionally, there is no statutory authority for tolling the statute of limitations based on ignorance of the law.[25]

The facts are unassailable. I, therefore, find Complainant has failed in his burden of proof and find no "equitable tolling" of the statute.

Continuing Violation

Complainant arguably raised the issue of a "continuing violation" in order to try to extend the statutory limitations period beyond ninety days from the March 13, 2008 meeting. Compl. Br. at 22, 26. However, there is no claim by Complainant that any of the many alleged actions affected the terms or conditions of his previous (or present) employment.

After thorough review of the brief and supporting documents, I do not agree that any of these alleged complaints or activities constitute "continuing violations" such that the time for filing period would change and so find.[26]

Discussion

Complainant's version of the March 13, 2008, meeting is not in accord with the Respondents' version, with the version related in the Complainant's Original and Amended Complaints, or with the version found in the other documents he has submitted in support of his Response to Respondents' Motion to Dismiss.

Paragraph 6 of the original Complaint (paragraph 7 of the Amended Complaint) relates a somewhat different account than Complainant alleges. It states:

> "On March 13, 2008, during what was supposed to have been a routine status meeting between Employee and CEO Barclay, Barclay told Employee that CEO was "frustrated and angry" with Employee's judgment concerning the Orthopedics Business Unit Tigris bead project. When told by CEO that CEO no longer trusted Employee's judgment in orthopedics and was *relieving him from that position,* (Emphasis added) CEO Barclay then added that he no longer trusted

[24] His email of June 4, 2008.

[25] The Complainant has civil legal recourse against his attorney should he feel that any advice he received was false or misleading.

[26] Although not relevant to the determination on this motion, a brief review of all the 20 "counts" would indicate very few, if any, constitute actual activities that could conceivably be protected under SOX. Those that "might" are similarly subject to the period of limitations and predate the March 13, 2008, meeting.

Employee's legal judgment. Employee then asked whether CEO was requesting his resignation. CEO said yes. Employee then asked whether it was necessary to receive such resignation(s) soon, and CEO said "Yes, today". Employee then was about to leave and CEO said "Actually, don't give me a letter of resignation. Let's instead take the weekend and on Tuesday morning let's review this together."

Paragraph 30 (of both Complaints) states, in pertinent part:

"Despite Employee never resigning and CEO Barclay *terminating the Employee on March 13, 2008* (Emphasis added)…"

Paragraph 64 (of both Complaints) states in pertinent part:

"CEO Barclay referred during the *termination meeting with Employee on March 13, 2008…"* (Emphasis added).

Addressing Complainant's argument that "…paragraph 6 of the Complaint filed June 14th established adequate reason to rule that the Complaint was timely filed" requires an analysis of the overall allegations of the Original Complaint (June 14); the Amended Complaint (June 19); the draft Federal District Court Complaint, dated May 1, 2008 (Exhibit E, Compl. Br.); Complainant's email to the SEC of June 4, 2008 (Exhibit A, Compl. Br.); the Separation Agreement and Release, signed by Complainant on March 18, 2008 (Exhibit B, Compl.Br.); the "Affidavit" signed by the Complainant on November 12, 2008 (Exhibit D, Compl. Br.); and Complainant's "Office of Lawyer's Professional Responsibility Complaint Form" dated April 28, 2008. (Enclosure to Exhibit E, Compl. Br.).

Paragraph 6 cannot be taken out of the context as the Complainant would argue. Merely stating something happened "on or about" a date in one paragraph does not change the overall context of the information in the document within its "four corners." Nor would such extrapolation change the actual event. It is obvious to the casual reader that the meeting of March 13, 2008 resulted in an "adverse personnel action" being taken by the CEO. The totality of the evidence strongly shows that the Complainant was fully aware that an adverse personnel action of some sort occurred. There is no reasonable objective conclusion other than the Complainant was being removed from his position, in one way or another, at that meeting. The facts support that this was the threshold event and "final and unequivocal notice" of his termination. Notice of an adverse action is based on objective, not subjective standards. See *Sneed v. Radio One, Inc.,* ARB No. 07-072, ALJ No. 2007-SOX-18 (ARB Aug. 28, 2008).

Both the Original and Amended Complaints contain unambiguous language that the Complainant was aware of a request for a "resignation" or a "termination" on March 13, 2008. It is irrelevant for the purposes of the statute whether it was a request for a resignation or termination which was discussed

during the March 13 meeting. Either action is "an adverse personnel action" and commences the running of the time period under SOX.

On June 4, 2008, the Complainant sent an email to the SEC in which he states he is "preparing a whistleblower filing via the Secretary of Labor." See Exhibit A, Compl. Br. There was no indication of any manner of obstruction or hindrance to the filing of a SOX Complaint from any source at the time of the email. By that time, the Complainant had already "drafted" the substance of his complaint in the 17-page Federal "Complaint and Demand for Jury Trial." The SEC email predates the actual mailing of the Original Complaint by ten days. Had Complainant merely mailed the complaint[27] on June 4, 2008, there would be no issue as to timeliness to address.

The Separation Agreement and Release (Exhibit B, Compl. Br.) refers to a "previous discussion" concerning the termination of the Complainant's employment. Since the Agreement was dated and *signed by both parties* (Emphasis added) on March 18, 2008, and since the only previous "discussion"[28] occurred on March 13, 2008 in the meeting between the Complainant and CEO Barclay, it can only be concluded that the Complainant, in signing this Agreement, agreed that an "adverse personnel action" took place on March 13, 2008. The Complainant had several days to mull over the pending action in between the meetings. He still chose to sign the Agreement on March 18, 2008.[29] There is certainly no proof that he could not have made "pen and ink" changes to certain terms and conditions had he disagreed with them. The Complainant could have refused to sign the Agreement outright.

Complainant submitted and "Affidavit" in support of his reply to the Motion to Dismiss, which can be found in Exhibit D of his brief. In this affidavit, the Complainant attests that the CEO told him "he no longer trusted" his judgment "concerning the Orthopedics Business Unit Tigris bead project." Additionally, the CEO told the Complainant that "he no longer trusted" his judgment in orthopedics, or his "legal judgment" and "was relieving" him from that position. These statements, standing alone, would describe an "adverse personnel action" to any reasonably prudent and intelligent individual.

Despite the fact the CEO may have informed the Complainant that he didn't want his letter of resignation right then and that they "would review this together" on the following Tuesday, March 18, 2008,[30] the CEO's strong statements were certainly enough to put the Complainant on actual and explicit notice of an adverse personnel action.

In his "Affidavit," the Complainant also states that he "never resigned" and that he "was never told he was fired." However, in his May 1, 2008 letter to the Chairman of the Audit Committee,

[27] Or if he had mailed a copy of his federal court "draft complaint."
[28] Complainant's own account.
[29] Although he later rescinded same.
[30] This is the Complainant's version of the discussion which is contested by the Respondents; however, for the purposes of this decision, I will assume, *arguendo*, that the Complainant's version is accurate.

SurModics, the Complainant stated "I did not resign, I was *peremptorily fired* (Emphasis added) by Bruce Barclay in one of his fits of pique." See Enclosure 1, Exhibit E, Compl. Br. The Complainant also stated that "Bruce specifically requested that *I not submit a resignation letter when my termination was being discussed*. " (Emphasis added). The only time this could have happened, based on the overwhelming documentation submitted by the Complainant, himself, was in the "perfunctory" meeting of March 13.[31]

The draft Federal District Court Complaint includes the identical language found in the Original Complaint filed in this matter. The Complainant's "draft," dated May 1, 2008, is replete with statements indicating that the meeting of March 13, 2008, between Complainant and the CEO, was the date when the "adverse personnel action" took place. See Enclosure 2, Exhibit E, Compl. Br.

The complaint letter addressed to the Office of Lawyers Professional Responsibility, signed by the Complainant and dated April 28, 2008, states unequivocally that the Complainant "was involuntarily terminated during a discussion with my boss, the Chief Executive Officer" and did not resign. See Enclosure 5, Exhibit E, Compl. Br.

The Complainant provides no credible rationale for his failure to timely file the "SOX" Complaint. It is apparent that he missed the deadline, albeit by only two days,[32] due to his own oversight and has only himself to blame. As an attorney, he is more aware than a non-attorney of the importance of due dates and statutes of limitation. The Complainant was very knowledgeable of the law, a fact supported by the extensive pleadings he prepared alleging a multitude of violations of SOX and other statutes and regulations. He cited SOX provisions throughout his pleadings and memoranda and cannot credibly argue at this late date that he was misled or that he did not know when the 90 day period ended.[33]

Inexplicably, the Complainant had his entire Complaint drafted *at least by May 1, 2008*, a full month and ten days prior to the expiration of the "deadline." His argument that he was waiting to see what happened in the meeting with SurModics does not justify or excuse his failure to meet the time period for filing under SOX.[34] Waiting to file was his choice and there is no credible evidence that the Respondents interfered in any way.

Complainant is an experienced attorney who was a Senior Vice President and Chief Intellectual Property Counsel at SurModics. While some consideration must be given to unrepresented claimants in any case, the amount of consideration necessary varies from case to case, based on the experience, intellectual and educational level of the claimant. I have considered the Complainant's level of education and experience prior to making my decision in this case. The Complainant was very knowledgeable of

[31] Of note, in paragraph 4, page 2 of the same document, the Complainant relates he has "already taken actions necessary to qualify under the Sarbanes-Oxley Whistleblower provisions…"
[32] Proximity such as this only counts in a game of horseshoes.
[33] Indeed, ignorance of the law is generally an insufficient basis to establish equitable tolling of filing requirements. *Moldauer v. Canandaigua Wine Co.,* ARB No. 04-022, ALJ No. 2003 SOX 26 (ARB Dec. 30, 2005).
[34] Indeed, a retained attorney would be liable for damages in a legal malpractice suit for such omission.

the statutes involved, particularly the Sarbanes-Oxley Act, and cites the provisions of the statutes throughout his pleadings, correspondence and memoranda. He refers to the "Whistleblower" provisions under which he can claim status and has exhaustively listed the elements he claims satisfy the provisions of SOX. He has an understanding of SOX and has been able to provide adequate legal motions and briefs in support of his position.

While not providing him the latitude I would provide an unsophisticated or uneducated complainant or a non-attorney, I have, indeed, provided him latitude commensurate with his status.

It is patently clear that the Complainant was very aware that the CEO had taken an "adverse personnel action" during the March 13, 2008, meeting. Whether the action is characterized as "involuntary termination," "coerced resignation" or "voluntary resignation" is irrelevant to the determination of this motion. The Complainant is "precluded from eliminating the damage done in prior evidence by providing later, contradictory evidence; subsequent statements may only explain and clarify prior statements, rather than contradict them." *Camfield Tires, Inc. v. Michelin Tire Corp.,* 719 F.2d 1361 (8th Cir. 1983).

The statute of limitations begins to run on the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person with reasonably prudent regard for his rights.[35] The Complainant certainly falls into this category of individual.

Prior to the determination by the Administrator that the claim was not filed in a timely manner, the Complainant certainly believed he had been either terminated or forced to resign on March 13, 2008. After he filed his first ("Original") Complaint on June 14, 2008, he amended that Complaint on June 19, 2008. Conspicuously, he clearly considered March 13, 2008, as the date he was given notice of an adverse personnel action, which was clearly made and communicated by the CEO to him personally during their meeting. By his own written words, the Complainant admits that March 13, 2008, was the defining date.

Complainant is an experienced attorney, capable of drafting legal documentation, briefs and memoranda. While he is an unrepresented claimant in this matter, he is far from being an unsophisticated claimant. He was knowledgeable enough to draft the federal complaint, his several SOX complaints and other legal documents in this matter. The ninety day statutory period for filing complaints under this statute is strictly enforced. Complainant has failed in his attempt to "put the cat back into the bag."

DECISION

In deciding this issue, I have considered all the pleadings and particularly the Complainant's Response to the Respondent's Motion to Dismiss. I find the Complainant's arguments wanting.

[35] See footnote 13.

Even assuming, *arguendo,* that the Complainant's allegations concerning retaliatory actions are true in this case, based on all the above, I find that the Complainant's claim under SOX is untimely and that Complainant has not met his burden to show his entitlement to an equitable tolling of the filing deadline.

Accordingly, that part of the Respondents' Motion to Dismiss, alleging that the Complainant has failed to state a claim upon which relief may be granted by filing an untimely complaint, is **GRANTED** and this matter is **HEREBY DISMISSED WITH PREJUDICE.**

It is unnecessary to address the remaining two issues raised in the Respondents' Motion to Dismiss, since they are now rendered moot.

IT IS SO ORDERED.

A

ROBERT B. RAE
U. S. Administrative Law Judge

Washington, D.C.