



Issue Date: 01 July 2008

CASE NO.: 2008-SOX-30

IN THE MATTER OF

**ARNOLD SIEGEL,
Complainant**

v.

**ABM JANITORIAL SERVICES, INC.,
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. On January 23, 2008, by letter dated January 21, 2008, Complainant filed his complaint under the Act with OSHA alleging that he engaged in protected activity which resulted in his termination on June 29, 2006. In OSHA's determination dated February 7, 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 August 8, 2008. In his appeal, Complainant seeks a tolling of the filing date.

Concerned over whether this office enjoyed jurisdiction, on May 20, 2008, a Sua Sponte Order to Show Cause issued requiring Complainant to show cause why his complaint should be considered timely under the Act. To this Order, Complainant filed a response conceding his untimely filing but seeking a tolling. Respondent also replied and urged dismissal.

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 his response, Complainant concedes his complaint was untimely. Consequently, based on this unrefuted evidence, I find that Complainant became aware of the decision to alter his employment more than 90 days from the time that he filed his 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 his complaint; 2) the Complainant was in some way extraordinarily prevented from filing his claim; or 3) Complainant raised the issue in the wrong forum.

According to Complainant’s complaint filed with OSHA on January 23, 2008, his appeal to the Office of Administrative Law Judges dated March 14, 2008, and his reply to the show cause order, Complainant concedes the following events:

1. On June 29, 2007, Complainant was terminated from his employment with Respondent.

2. On July 2, 2007, Complainant filed an age discrimination complaint with EEOC and at that time also alleged he had been terminated due to protected whistleblower activity.

3. EEOC advised Complainant that EEOC had no jurisdiction over his whistleblower allegations and suggested that such action should be taken up with the State Attorney General’s office.

4. Not realizing that he was under a time constraint, Complainant admits he did nothing toward filing his whistleblower complaint until October of 2007 when he became aware that the State Attorney General’s office was not the correct forum for such an action.

5. On October 19, 2007, Complainant spoke with Joshua Paul at OSHA's Regional Offices and was informed that OSHA was indeed the correct forum for his whistleblower complaint, but unless tolled, such action should have been filed within ninety (90) days of his termination.

6. Despite the removal of any uncertainty on Complainant's part as to the proper agency for the filing of this whistleblower complaint, Complainant nevertheless did not file the subject complaint until January 23, 2008.

In this instance, Complainant was never misled by EEOC that his whistleblower complaint belonged at that agency, and even if EEOC mistakenly advised Complainant to pursue such action at the state level, that advice was corrected on October 19, 2007, when Mr. Paul of OSHA informed Complainant that theirs was the correct agency and absence tolling such action should have been initiated within ninety (90) days of his termination. Armed with this information, however, Complainant still filed no complaint with OSHA until January 23, 2008. Had Complainant acted promptly upon talking with Mr. Paul on October 19, 2007, his argument for tolling might have more substance, but Complainant's failure to promptly file once he learned of the time requirements defeats his tolling position.

In sum, the argument Complainant has made does not constitute extraordinary circumstances warranting tolling of the time requirement limitations.

ORDER

IT IS HEREBY ORDERED that Complainant's complaint is **DISMISSED** as untimely and the hearing scheduled in this matter for August 10, 2008, in **Phoenix, Arizona**, is **CANCELLED**.

So ORDERED this 1st day of July, 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).