

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 December 2008

CASE NO: 2009-SOX-00001

IN THE MATTER OF

**LAURA BUTLER,
Complainant**

v.

**ANADARKO PETROLEUM CORPORATION,
Respondent**

DECISION AND ORDER
DISMISSING COMPLAINT AS UNTIMELY

This matter arises under the employee protection provisions of the Sarbanes-Oxley Act of 2002, (the Act or SOX), 18 U.S.C. § 1514A, and its implementing regulations, 29 C.F.R. Part 1980, brought by Laura J. Butler (Complainant) against Anadarko Petroleum Corporation (Respondent). Complainant alleges Respondent terminated her employment as a result of engaging in activities which are protected under the Act.

FINDINGS OF FACT

Complainant was fired from her employment on May 22, 2006. On December 15, 2006, Complainant filed her complaint with the U.S. Department of Labor. After an investigation by the Department of Labor's Occupational Safety and Health Administration (OSHA), Complainant was notified by letter dated September 15, 2008 that her complaint was being dismissed because the protected activity could not have been a contributing factor in her termination since her supervisors had no knowledge of her protected activity. On October 5, 2008, Complainant filed a timely appeal with the Office of Administrative Law Judges. A Sua Sponte Order to Show Cause as to why her complaint should not be dismissed as not having been timely filed pursuant to the Act was issued on November 12, 2008. Complainant filed a response on November 21, 2008. In her response, Complainant argued that the time for filing of her complaint should be tolled because she filed the precise statutory claim in issue, but did so in the wrong forum. Respondent filed a response on December 19, 2008, arguing the complaint should be dismissed for being untimely filed.

Complainant does not dispute the fact that her employment was terminated on May 22, 2006, and that she did not file a complaint with DOL until December 15, 2006. Complainant has

been represented by counsel since at least March 2006. Complainant argues that she filed a complaint with the Federal Bureau of Investigation on June 27, 2006. On July 31, 2006, Complainant filed suit in the United States District Court of Texas alleging in part that Respondent terminated her employment in violation of the SOX. The SOX claim was eventually removed from the district court suit. The OSHA report also noted that the filing period had been tolled because Complainant's complaints of violation of the Act were filed within 90 days of the alleged adverse action, but were mistakenly filed in the wrong forum. However, as discussed below, neither the complaint with the FBI nor the district court suit can toll the Act's statute of limitations.

DISCUSSION

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 employees reasonably believe constitutes a violation of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission or any provisions of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A. A SOX complaint must be filed with the Secretary of Labor within 90 days of the alleged violation, i.e., when the discriminatory act has been both made and communicated to the complainant. 18 U.S.C. § 1514A(b); 29 C.F.R. § 1980.103(d).

The time limitation provisions under the Act are not jurisdictional and therefore may be subject to equitable tolling. Sch. Dist. of Allentown v. Marshall, 657 F.2d 16 (3rd Cir. 1981). Equitable tolling focuses on the complainant's inability, despite due diligence, to obtain vital information bearing on the existence of his or her complaint. Santa Maria v. Pac. Bell, 202 F.3d 1170, 1176 (9th Cir. 2000). 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 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. The party seeking the benefit of equitable tolling has the burden of establishing such tolling is warranted. Bost v. Fed. Express Corp., 372 F.3d 1233, 1242 (11th Cir. 2004). Furthermore, ignorance of the law will not generally support a finding of entitlement to equitable tolling. Carter v. Champion Bus, Inc., ARB No. 05-076 (ARB Sept. 29, 2006).

Complainant first asserts that equitable tolling should be applied because of the complaint she filed with the FBI. Attached to her Response, Complainant attached a copy of the FBI complaint. The only mention of SOX is that Complainant's attorney "fired off a letter to the CEO of Anadarko, Jim Hackett, offering to discuss mediation alternatives with Anadarko on the Discrimination Suit and notifying them that we had potential Whistleblower claims under the Sarbanes Oxley Act." Complainant also asserts that equitable tolling should be applied since she filed a complaint alleging a SOX violation with the district court on July 31, 2006. Count V, paragraph 45 alleges that "Plaintiff properly reported potential Sarbanes-Oxley Act violations to James T. Hackett, Chairman, Chief Executive Officer and President of Anadarko." Paragraphs 11 through 31 of the Complaint contain the factual allegations. There is no mention of SOX or any facts that would give rise to a SOX violation in these paragraphs.

To be considered the “precise complaint in the wrong forum,” her complaints must demonstrate that Respondent retaliated against her because of her complaints to management providing information regarding conduct that Complainant “reasonably believed constituted mail, wire, radio, TV, bank, or securities fraud, or violated any rule or regulation of the SEC, or any provisions of Federal law relating to fraud against shareholders.” Carter, ARB No. 05-076, at 8 (citing Harvey v. Home Depot, U.S.A., Inc., ARB Nos. 04-114, 115 (ARB June 2, 2006)). As discussed below, the previous complaints fail to satisfy this requirement.

Complainant’s previous complaints consist of facts alleging discrimination based on sex. Her complaints do not touch on any of the subjects outlined in §§ 1341, 1343, 1344, 1348, or any regulation of the Security and Exchange Commission. Thus, even though her filing with the FBI and district court was within the 90-day limit, she failed to file a claim which would arise under the Act’s whistleblower protection laws. “SOX specifically protects whistleblowers who provide information related to fraud or securities violations. Being discriminated against for sex, disability, or for reporting a possible petty theft, do not touch on the area of fraud or securities violations.” Azure v. Dominick’s/Safeway, 2007-SOX-00052, at 7 (ALJ Sept. 14, 2007). In addition, simply referencing the Act in her district court complaint does not remedy her failure to file a claim expressing a reasonable belief that Respondent was violating the provisions of the Act. Therefore, equitable tolling is not applicable as Complainant cannot be said to have filed the precise statutory claim in issue in the wrong forum.

Furthermore, Complainant’s ignorance of the law does not compel equitable tolling, especially in a case where a party is represented by counsel. See Moldauer v. Canandaigua Wine Co., ARB No. 04-022 (ARB Dec. 30, 2005). The fact that Complainant and her previous legal counsel did not know the need to file a SOX complaint with the Secretary of Labor within 90 days of the alleged violation is not a ground for tolling the statute of limitations. Complainant bears the burden of justifying the application of equitable modification principles. In considering whether attorney error constitutes an extraordinary factor for tolling purposes, the Board has consistently held that it does not because ultimately, clients are accountable for the acts and omissions of their attorneys. Higgins v. Glen Raven Mills, Inc., ARB No. 05-SDW-143 (ARB Sep. 29, 2006); Steffenhagen v. Securitas Sverige, AR, ARB No. 03-139, ALJ No. 03-SOX-024, slip op. at 4 (ARB Jan. 13, 2004); Kent v. Barton Protective Service, 84-WPC-1 (Sec’y Sep. 28, 1990) citing Smith v. American President Lines, Ltd., 571 F.2d 102, 109 (2d Cir. 1978) “once a complainant consults an attorney he has access to a means of acquiring knowledge of his rights and responsibilities, precluding application of equitable tolling considerations.”

I therefore find that the complaint filed with OSHA in December of 2006 is barred by the 90-day limitations period and that no circumstances exist which would justify tolling the Act’s statute of limitations.

Based on the foregoing, the complaint herein is untimely and must be dismissed.

ORDER

The complaint of Laura J. Butler is hereby **DISMISSED**.

So ORDERED.

A

**LARRY W. PRICE
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).