



**Issue Date: 16 September 2010**

**CASE NO.: 2009-SOX-00020**

**IN THE MATTER OF**

**MILES HYMAN,  
Complainant**

**v.**

**KD RESOURCES, L.L.C,  
PLATINUM ENERGY RESOURCES, INC.,  
and BRAESRIDGE ENERGY, L.L.C.,  
Respondents**

**DECISION AND ORDER ON REMAND  
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 Miles Hyman (Complainant) against KD Resources, et al, (Respondents). Complainant alleges Respondents terminated his employment as a result of engaging in activities which are protected under the Act.

Complainant was fired from his employment on June 5, 2008. On November 11, 2008, Complainant filed his complaint with the U.S. Department of Labor (DOL). After an investigation by the Department of Labor's Occupational Safety and Health Administration, Complainant was notified by letter dated December 4, 2008, that his complaint was being dismissed because it was not timely filed. On January 8, 2009, Complainant filed an appeal with the Office of Administrative Law Judges. A Sua Sponte Order to Show Cause as to why his complaint should not be dismissed as not having been timely filed pursuant to the Act was issued on January 16, 2009. Complainant filed a response on February 14, 2009. In his response, Complainant argued that the time for filing of his complaint should be tolled because he was involved in negotiations with Respondents concerning settlement and/or possible reinstatement.

In a Decision and Order dated March 18, 2009, the Court found that Complainant was terminated on June 5, 2008, and that he did not file a complaint with DOL until November 11, 2008, more than 90 days after his termination. The Court further found that the complaint filed

with DOL on November 11, 2008, was barred by the 90-day limitations period and that no circumstances existed which would justify tolling the Act's statute of limitations.

On March 31, 2010, the Administrative Review Board (ARB) issued a Decision and Order of Remand in the above-reference case. At issue before the ARB was whether Complainant's failure to timely file his complaint should be excused under the principle of equitable tolling or equitable estoppel.

The ARB affirmed the Court's finding that Complainant failed to invoke the standard for equitable tolling. As to the issue of equitable estoppel, the ARB held that Complainant had met the minimal requirements necessary to invoke equitable estoppel. The ARB left open for further consideration the issue of the timeliness of the complaint upon remand and an appropriately more fully developed evidentiary record.

As stated by Judge Beyer in his dissent, the ARB does not extend tolling principles to complainants who are represented by counsel. As noted by the majority, this Court was skeptical as to whether Complainant was pro se, but on the record before the Court and the ARB, there was nothing to indicate Complainant was not pro se. But, as noted by Judge Beyer, the attachments to Complainant's brief "establish that David Holmes of the Solomon Law Firm represented Hyman in post-termination negotiations in June 2008. Holmes sent a letter of representation to a KD attorney in which he requested modifications of a KD proposed settlement agreement." (Letter of June 13, 2008, "We represent Miles Hyman."). These attachments were not before this Court and were therefore not considered by the ARB in reaching its decision.

Per the order of the ARB, this Court gave the Parties an opportunity to develop the evidentiary record concerning Complainant's representation and whether equitable estoppel would apply. Initially, by Order date April 28, 2010, the Court bifurcated the hearing and gave the Parties sixty days to complete discovery on the issues of timeliness of the complaint and equitable estoppel. By Order dated June 11, 2010, the Court granted Complainant's request for additional time to respond to discovery until August 2, 2010. The Court ordered any motions for summary decision be submitted no later than August 16, 2010, with any response to be filed no later than September 1, 2010.

A conference call was held on August 9, 2010, with Complainant and counsel for KD. The Court was advised that Complainant had not responded to discovery requested by Respondents. Complainant advised that he had been ill and had been hospitalized with a lung infection. KD advised that Respondents intended to file for summary decision without the requested discovery. The Court advised Complainant that his response would be due on September 1, 2010 as per the previous Order.

The Court has received Motions to Dismiss from Respondents. Complainant has not filed a Response.

Respondents have filed the attachments to Complainant's brief that Judge Beyer found "establish that David Holmes of the Solomon Law Firm represented Hyman in post-termination

negotiations in June 2008” and other evidence of Complainant’s representation. In his brief filed with the ARB, Complainant repeatedly refers to acts taken by “Complainant’s lawyer” in reference to his termination. (KD EX B). On June 12, 2008, Mr. Holmes and Complainant agreed that Solomon Law Firm would represent Complainant in connection with the severance agreement with KD. (KD EX C). The next day, Mr. Holmes wrote KD’s lawyer a letter stating “We represent Miles Hyman. We understand from Mr. Hyman that you are representing KD International in connection with Mr. Hyman’s termination.” (KD EX B-2). On June 16, 2008, KD’s lawyer sent a letter to Mr. Holmes in response to the June 12, 2008 letter. (KD EX B-3). Mr. Holmes responded on June 16, 2008, advising that “Mr. Hyman is studying his legal rights and options, and will proceed accordingly at the appropriate time.” (KD EX B-4). On October 16, 2008, Complainant forwarded correspondence regarding his termination to “my lawyer David Holmes.” (KD EX B, p 7). On November 10, 2008, Complainant files his complaint with OSHA with a request that “an opportunity be given to the complainant’s attorney to expand or refine the complaint.” (KD EX A). As noted in the Court’s March 18, 2009 Decision and Order, although Complainant stated he was not represented by counsel, his address was C/O David C. Holmes – Solomon Law Firm.

As stated by Judge Beyer in his dissent, the ARB does not extend tolling principles to complainants who are represented by counsel. The undisputed facts establish, and the Court finds, that Complainant was represented by Mr. Holmes as early as June 12, 2008. Complainant still regarded Mr. Holmes as “my lawyer” through October 16, 2008, when the limitations period had run.

I therefore find that the complaint filed with DOL on November 11, 2008, is barred by the 90-day limitation 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 Miles Hyman is hereby **DISMISSED**.

**So ORDERED.**

**A**

**LARRY W. PRICE  
ADMINISTRATIVE LAW JUDGES**

