In the Matter of:

MARC HALPERN, **ARB CASE NO. 04-120**

COMPLAINANT, **ALJ CASE NO. 2004-SOX-00054**

v. **DATE: August 31, 2005**

XL CAPITAL, LTD.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Marc Halpern*, pro se, Exton, Pennsylvania*

For the Respondent:
Christopher Lowe, Esq.*, Seyfarth Shaw LLP, New York, New York*

FINAL DECISION AND ORDER

This case arises under Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (West Supp. 2005), and its implementing regulations found at 29 C.F.R. Part 1980 (2004). Marc Halpern filed a complaint on April 15, 2004, alleging that XL Capital Ltd. violated the SOX when it terminated his employment. For the following reasons, we dismiss the complaint.

BACKGROUND

In 2003, XL employed Halpern as its Vice President of Technical Services. Complainant's Initial Brief, Exhibit (CX) C-6. XL suspended Halpern from that position on September 29, 2003, for allegedly exceeding his authority while working on the Hillsdale Heights Revitalization Program. CX C-1. Halpern sent an electronic mail message (e-mail) to several individuals on October 1, 2003, including XL's Executive

Management and Ethics Code Compliance Director, stating, "I am now on suspension and presumably soon to be terminated, for something related to my project work at the Hillsdale Heights Revitalization Program in Mobile, Ala." *Id.* Halpern received an e-mail message on October 14, 2003, from Charles Barr, General Counsel for XL America (the parent company of the subsidiary of XL Capital that employed Halpern), in which Barr told Halpern, "I do not understand exactly why you feel the need to anticipate the outcome of our review or conclude there will be any untoward action regarding your employment." CX C-6.

Cathy Lewis, XL's Vice President for Human Resources, attempted to contact Halpern by telephone on January 7, 2003, to tell him that his employment had been formally terminated. Respondent's Response to Order to Show Cause at 3. Lewis mailed a letter to Halpern on January 8, 2004, notifying him of the effective date of the termination (January 12, 2004) and the reasons for the termination. *See id.,* Declaration of Cathy Lewis, Exhibit A. Halpern returned Lewis' phone call on January 8, 2004, and during their conversation Lewis informed Halpern of the content of the termination letter. Respondent's Response to Order to Show Cause at 4.

Halpern filed a complaint on April 15, 2004, with the Occupational Safety and Health Administration (OSHA) alleging that XL violated the SOX when it terminated his employment. Administrative Law Judge (ALJ) Exhibit 1. OSHA denied the complaint on May 5, 2004, because it was untimely. Halpern appealed OSHA's determination to the Office of Administrative Law Judges, and on May 26, 2004, an ALJ issued an "Order to Show Cause Why the Complaint Should Not be Dismissed as Untimely." Halpern's response to the order contended that the limitations period governing his complaint did not begin to run until he became aware of XL's retaliatory motivation for terminating his employment. He also stated that XL "made every effort including perjury to hide the actual cause of [his] termination." ALJ Exhibit 4.

The ALJ issued a Recommended Decision and Order (R. D. & O.) on June 7, 2004, recommending dismissal of Halpern's complaint. The ALJ found that the limitations period began to run on September 29, 2003, when XL informed Halpern that it would be terminating his employment. R. D. & O. at 3. The ALJ also held that, even if XL had not told Halpern about the termination until January 12, 2004 (his last day of work), his complaint was still untimely because Halpern did not file it within 90 days of January 12, 2004, as the SOX requires. *Id.* Halpern requested reconsideration of the R. D. & O. on June 7, 2004, and the ALJ issued a Recommended Supplemental Decision and Order affirming the R. D. & O. on June 14, 2004. Halpern timely filed a Petition for Review with this Board seeking review of the R. D. & O.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX. *See* Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002); *see also* 29 C.F.R. § 1980.110.

Pursuant to the regulations implementing the SOX, the Board reviews the ALJ's factual determinations under the substantial evidence standard. *See* 29 C.F.R. § 1980.110(b). Therefore, we will not disturb the ALJ's findings if they are supported by substantial evidence. Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). However, the Board reviews an ALJ's conclusions of law de novo. *Getman v. Southwest Securities, Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8 (July 29, 2005); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Jan. 8, 2004) (under analogous provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century).

DISCUSSION

A. Halpern's complaint is untimely.

An employee alleging retaliation in violation of the SOX must file his complaint within 90 days after the alleged violation occurred. 18 U.S.C.A. § 1514A(b)(2)(D);[1] 29 C.F.R. § 1980.103(d).[2] The date that an employer communicates to the employee its intent to implement an adverse employment decision marks the occurrence of a violation, rather than the date the employee experiences the consequences. *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 97-ERA-53, slip op. at 36 (ARB Apr. 30, 2001). *See Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become apparent); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (limitations period began to run when the tenure decision was made and communicated rather than on the date his employment terminated).

In whistleblower cases, statutes of limitation, such as section 1514A(b)(2)(D), run from the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision. *See, e.g., Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 14 (ARB Feb. 28, 2003). "Final" and "definitive" notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. "Unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities. *Larry v. The Detroit Edison Co.*, 86-ERA-32, slip op. at 14 (Sec'y June 28, 1991). *Cf. Yellow Freight*

---

[1] "An action … shall be commenced not later than 90 days after the date on which the violation occurs."

[2] "Time for filing. Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination."

Sys., Inc. v. Reich, 27 F.3d 1133, 1141 (6th Cir. 1994) (three letters warning of further discipline did not constitute final notice of employer's intent to discharge complainant).

The ALJ found that Halpern knew on September 29, 2003 (the date of his suspension) that he was going to be fired. R. D. & O. at 3. The ALJ also found that Halpern acknowledged in his October 1, 2003 e-mail that XL intended to terminate his employment. *Id.* We do not disturb either of those findings. However, the ALJ failed to discuss the e-mail Barr sent to Halpern on October 14, 2003. Barr's message casts doubt on whether Halpern received "final, definitive, and unequivocal notice" of XL's decision regarding his employment status. We therefore do not concur with the ALJ's conclusion that the limitations period began to run on September 29, 2003.

Although Barr's e-mail indicates that XL may not have made a final determination about Halpern's employment status before October 14, 2003, XL verbally informed Halpern on January 8, 2004, that he had been fired and on that same day provided him with written confirmation of the termination. We conclude this is the date upon which the limitations period began to run. Halpern did not file his complaint until April 15, 2004. By doing so he exceeded the 90-day filing period governing the SOX. We therefore concur with the ALJ's ultimate conclusion that the complaint is untimely.

B. Halpern has not shown that he is entitled to equitable tolling.

Halpern requests that we conclude that he timely filed his complaint based upon the principles of equitable tolling. Complainant's Initial Brief at 15. The principles of equitable tolling guide the Board in determining whether to relax the limitations period in a particular case. Accordingly, the Board has recognized three situations in which tolling 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 rights; or (3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.[3] These categories are not exclusive[4] but courts "'have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.'"[5]

With regard to the first category, Halpern contends that he was misled because

---

[3] *See Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3-4 (ARB Nov. 8, 1999).

[4] *Id.* at 3.

[5] *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995), quoting *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). *See also Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984) (pro se party who was informed of due date, but nevertheless filed six days late was not entitled to equitable tolling because she failed to exercise due diligence).

XL made "false assurances" that his termination "was not imminent" and thereby "lulled [him] into refraining from filing a timely retaliation claim." Complainant's Initial Brief at 7, 11-12. In support of this contention Halpern cites Barr's October 14, 2003 message, in which Barr told Halpern that he did not understand why Halpern "felt the need to anticipate the outcome of [their] review or conclude there will be any untoward action regarding [his] employment." CX C-2. As stated above, any uncertainty this message may have created was clarified when Lewis provided Halpern with unequivocal written and verbal notice of XL's final termination decision on January 8, 2004. Halpern does not allege that XL attempted to mislead him after January 8, 2004. We therefore conclude that Halpern was not misled regarding his cause of action.

The second tolling category requires Halpern to show that he was, in some extraordinary way, prevented from asserting his rights. In this regard, Halpern contends that he was unaware of XL's unlawful motivation for terminating his employment because XL withheld information bearing on his SOX claim. Petition for Review at 4. But under the SOX, the filing period begins to run "not later than 90 days after the date on which the violation occurs." 18 U.S.C.A. § 1514A(b)(2)(D). Neither the statute nor its implementing regulations indicate that a complainant must acquire evidence of retaliatory motive before proceeding with a complaint. Halpern's failure to acquire evidence of XL's motivation for his suspension and firing did not affect his rights or responsibilities for initiating a complaint pursuant to the SOX. *See Wastak v. Lehigh Valley Health Network*, 333 F.3d 120, 126 (3d Cir. 2003), citing *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994) ("a claim accrues in a federal cause of action upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong."). We therefore conclude that Halpern's failure to acquire such evidence does not constitute an extraordinary circumstance warranting tolling of the limitations period.

With regard to the third exception for invoking equitable tolling, Halpern does not argue that he mistakenly commenced an action pursuant to the SOX in another forum. We therefore conclude that Halpern has not met any of the requirements for equitable tolling of the limitations period governing his complaint.

C. Halpern has not shown that he is entitled to equitable estoppel.

Finally, Halpern requests that we accept his complaint as timely pursuant to the doctrine of equitable estoppel. Under this doctrine, a late filing may be accepted as timely if an employer has engaged in "affirmative misconduct" to mislead the complainant regarding an operative fact forming the basis for a cause of action, the duration of the filing period, or the necessity for filing. *See, e.g., Pickett v. Tennessee Valley Auth.*, ARB No. 00-076, ALJ No. 2000-CAA-9 (ARB Apr. 23, 2003).

Halpern's equitable estoppel argument is identical to his tolling argument, *i.e.*, that XL misled him into believing that he would not be fired. As stated above, this argument fails because XL did not mislead Halpern regarding his termination.

CONCLUSION

Halpern has failed to show that his complaint was timely filed. He has also failed to show that the filing period should be equitably tolled or that XL Capital Ltd is estopped from challenging the timeliness of his complaint. We therefore **DISMISS** the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge