In the Matter of:

ED HENRICH, **ARB CASE NO. 05-036**

COMPLAINANT, **ALJ CASE NO. 04-SOX-51**

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

ECOLAB, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Kurt C. Banowsky, Esq., ***Banowksy, Betz & Levine, Dallas, Texas***

For the Respondent:
James D. Jordan, ***Munsch, Hardt, Kopf & Harr PC, Dallas, Texas***

FINAL ORDER DISMISSING APPEAL

This case arose when the Complainant, Ed Henrich, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Ecolab, Inc., discriminated against him in violation of the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX).[1] Ecolab failed to timely file its petition for review with the Administrative Review Board and thus, we must determine whether Ecolab has carried its burden of establishing that it is entitled to equitable tolling of the limitations period. Finding that Ecolab has failed to carry its burden, we dismiss its appeal.

[1] 18 U.S.C.A. § 1514A (West 2002).

BACKGROUND

SOX section 806 protects employees against retaliation by companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934[2] and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934[3] or any officer, employee, contractor, subcontractor, or agent of such companies because the employee provided information to the employer, a Federal agency or Congress relating to alleged violations of 18 U.S.C. 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. In addition, SOX protects employees against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such violation or alleged violation.[4]

To prevail on a SOX whistleblower complaint, a complainant must prove that he engaged in activity the statute protects, that the respondent subjected him to an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action.[5] If the complainant makes this showing, he is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.[6]

On November 23, 2004, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) in this case. The ALJ found that Henrich had established that he engaged in protected activity and that Ecolab was aware of at least some of that activity but that Henrich failed to establish that the protected activity was a contributing factor in Ecolab's decision to terminate Henrich's employment. Thus, the ALJ recommended that Henrich's complaint be dismissed.

Henrich timely petitioned the Administrative Review Board to review the R. D. & O. on December 9, 2004.[7] Ecolab, Inc. filed a document entitled "Respondent's Cross-Petition for Review" on December 21, 2004. In response, the Board issued an order

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[2] 15 U.S.C. § 781.

[3] 15 U.S.C. § 78o(d).

[4] 68 FR 31864 (May 28, 2003).

[5] 18 U.S.C.A. § 1541A(b)(2)(C).

[6] *Id. C.f., Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. 7-10 (ARB Jan. 30, 2004)(under analogous statute, Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 (West 2003)).

[7] The Board has assigned Henrich's appeal ARB No. 05-030.

requiring Ecolab to show cause why the Board should not dismiss its untimely petition for review. Both Ecolab and Henrich responded to the Board's Order to Show Cause.

DISCUSSION

The regulations establishing the time limitations for filing a petition for review of an Administrative Law Judge's recommended order under SOX provide:

> **Any party** desiring to seek review, including judicial review, of a decision of the administrative law judge, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, **must file a written petition for review with the Administrative Review Board ("the Board"),** which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the administrative law judge will become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the Board. . . . **To be effective a petition must be filed within ten business days of the date of the decision of the administrative law judge.**[8]

SOX's interpretive regulations do not provide for the filing of a "cross-petition."[9] Ecolab did not file a petition for review within ten business days of the date of the ALJ's R. D. & O. But this limitations period is not jurisdictional and therefore is subject to equitable modification.[10] In determining whether the Board should toll a statute of limitations, the Board has been guided by the discussion of equitable modification of statutory time limits in *School Dist. of Allentown v. Marshall.*[11] In that case, which arose under whistleblower provisions of the Toxic Substances Control Act,[12] the court articulated three principal situations in which equitable modification may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when

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[8] 29 C.F.R. § 1980.110(a) (emphasis added).

[9] *See* 29 C.F.R. Part 1980.

[10] *Accord Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-50, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. Tennessee Valley Auth.*, ARB No. 98-11, ALJ No. 98-128, slip op. at 40-43 (ARB Apr. 30. 2001).

[11] 657 F.2d 16, 19-21 (3d Cir. 1981).

[12] 15 U.S.C.A. § 2622 (West 2004).

"the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum."[13]

Ecolab's inability to satisfy one of these elements is not necessarily fatal to its claim, 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.'"[14] Furthermore, while we would consider an absence of prejudice to the other party in determining whether we should toll the limitations period once the party requesting modification identifies a factor that might justify such modification, "[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures."[15]

Ecolab bears the burden of justifying the application of equitable modification principles.[16] It has not alleged that any of the previously recognized *Allentown* situations are applicable to its failure to timely file its petition for review. Instead it argues essentially that it was ignorant of the Board's procedure and in any event the Board's procedure is inefficient because it would require a party to file an unnecessary protective appeal to preserve it rights in cases in which it would not choose to appeal unless the other party did. Accordingly, Ecolab argues that Congress could not have intended that it be required to file a petition for review within ten business days of the ALJ's R. D. & O.

The fact that a party did not know that the law required it to timely file a petition will generally not support a finding of entitlement to equitable tolling.[17] SOX's regulations are clear: any party desiring to file a petition for review must do so within ten business days of the date of the administrative law judge's recommended decision. There are no regulations providing for the filing of a cross-petition. If Ecolab's counsel was unsure whether the ten-day limitation applied to Ecolab's appeal, it could have simply contacted the Board to inquire as to the applicable limitations period. Counsel did not do so.

In support of its argument that "it is difficult to believe that Congress could have intended" that Ecolab be required to file a protective appeal, Ecolab states in its response to our Show Cause Order, "the Federal Rules of Appellate Procedure and, on information

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[13] *Allentown*, 657 F.2d at 20 (internal quotations omitted).

[14] *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).

[15] *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984).

[16] *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

[17] *Accord Wakefield v. Railroad Retirement Board*, 131 F.3d 967, 970 (11th Cir. 1997).

and belief,[18] every state court's rules of procedure, grant an appellee a reasonable period of time within which to file a cross appeal upon the opposing party's appeal of a trial court's ruling." As an example, Ecolab cites FRAP 4(a)(3), which provides that if one party files a timely appeal, any other party may file an appeal within 14 days of the date when the first party filed its appeal. But FRAP 4(a)(3) applies to appeals as of right.

SOX appeals are not appeals as of right; the Board has 30 days to decide whether to accept an appeal.[19] FRAP 5(b), applicable to appeals by permission, provides that any party may file an answer in opposition to a petition or a cross-petition within seven days after the initial petition is served. But the initial petition is not submitted for approval until after the time has run for the cross-petition. Accordingly under the FRAP, a party may have to file a "potentially unnecessary and wasteful appeal in order to ensure the preservation of its own appellate rights."[20] While Ecolab's statement that "No forum of which Respondent is aware places the winning party at trial in such an untenable position, and it is difficult to believe that Congress could have intended such a result"[21] may literally be true in that Ecolab may not have been aware of FRAP 5, the rules do in fact require a party to file a protective appeal that ultimately may be unnecessary.

Furthermore, Congress intended that SOX cases be expedited to the extent administratively feasible.[22] Adding time for filing of cross-petitions either after the initial appeal is filed or after the Board accepts the initial appeal would not further Congressional intent to expedite SOX adjudications. Accordingly, finding no reason to toll the limitations period in this case, we **DISMISS** Ecolab's appeal, ARB No. 05-036.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

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[18] "On information and belief" appears to be legalese for "Counsel didn't actually research the question in all fifty states – this is my best guess." Such statements reflect a lack of substantiation for the position argued and we give such arguments the insubstantial weight that they merit.

[19] 29 C.F.R. § 1980.110(b).

[20] Response of Ecolab to Order to Show Cause at 2.

[21] *Id.*

[22] *See* 18 U.S.C.A. § 1514A(b)(1)(B), (2)(A).