In the Matter of:

CAROLE COPPINGER-MARTIN,	**ARB CASE NO. 07-067**
COMPLAINANT,	**ALJ CASE NO. 2007-SOX-019**
v.	**DATE: September 25, 2009**
NORDSTROM, INC.,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Cecelia A. Cordova, Esq., Timothy Pauley, Esq., George Hunter, Esq., *Harrell, Connell, Cordova, Hunter & Pauley, PLLC,* Seattle, Washington

For the Respondent:
Randall P. Beighle, Esq., Karin E. Valaas, Esq., *Lane Powell LLC,* Seattle, Washington

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Sarbanes-Oxley Act of 2002 (SOX)[1] and its implementing regulations.[2] Carole Coppinger-Martin filed a complaint with the United States Department of Labor's Occupational Safety and Health

[1] 18 U.S.C.A. § 1514A (West Supp. 2005).

[2] 29 C.F.R. Part 1980 (2006).

Administration (OSHA) alleging that Nordstrom, Inc. violated the SOX by discharging her from employment. On April 4, 2007, a Labor Department Administrative Law Judge (ALJ) recommended dismissal of the complaint. We affirm.

BACKGROUND

The parties do not dispute the following background facts. Nordstrom hired Coppinger-Martin in 1999 as Chief Technical Architect in its Business Information Technology Systems Strategic Planning Group. In the summer of 2005, she complained to Dan Little, her immediate supervisor, that security vulnerabilities in Nordstrom's information systems exposed the company to potential Securities and Exchange Commission violations.[3]

In mid-November 2005, Little told Coppinger-Martin that her "job duties were being eliminated" and her employment would be terminated in January 2006.[4] Nordstrom, however, did not discharge Coppinger-Martin in January 2006,[5] and she continued to work for the company. Coppinger-Martin's last day of work was April 21, 2006.[6]

On July 19, 2006, a Nordstrom employee informed Coppinger-Martin that other employees were performing many of her former job duties. Coppinger-Martin obtained similar information in August 2006.[7] On October 13, 2006, Coppinger-Martin filed her SOX complaint with OSHA. She argued that the time period for filing her complaint began to run on July 19, 2006, the day she first learned that her job duties had not been eliminated. According to her, "Nordstrom management fraudulently misled [her] into subjectively and objectively believing that the reason for her termination was because her

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[3] Complainant's Response to Respondent's Motion to Dismiss for Failure to Present a Prima-Facie Case and Failure to File Within the Applicable Statute of Limitations (Complainant's Response) at 3; Respondent Nordstrom's Reply to Complainant's Brief (Respondent's Brief) at 10, n.5.

[4] Complainant's Response at 3-4.

[5] The parties dispute the reasons Coppinger-Martin was retained for three additional months following her original discharge date. *See* Petition for Review at 2; Respondent's Brief at 6-7.

[6] Decision and Order Granting Respondent's Motion to Dismiss and Order Dismissing the Complaint (D. & O.) at 1-2; Complainant's Response at 4.

[7] Complainant's Response at 6.

duties were eliminated."[8] OSHA denied the complaint, and Coppinger-Martin requested a hearing before an ALJ.

Prior to a hearing, Nordstrom moved to dismiss the complaint. The company argued that the 90-day limitations period governing Coppinger-Martin's SOX claim began to run in mid-November of 2005, when it informed her that her employment would be terminated in early 2006. Nordstrom also stated that, even assuming that the limitations period did not begin to run until her last day of employment on April 21, 2006, her October 13, 2006 filing was untimely.[9]

Coppinger-Martin responded by again asserting that the limitations period did not begin to run until July 19, when she learned that her job duties had not been eliminated. She argued that, because she "had no reason to know her termination was for engaging in SOX activity," she was entitled to equitable modification of the limitations period. She also requested that she be "allowed to conduct discovery on the issue of timeliness and equitable estoppel."[10]

On April 4, 2007, the ALJ issued a Decision and Order Granting Respondent's Motion to Dismiss and Order Dismissing the Complaint (D. & O.). Coppinger-Martin filed a Petition for Review of the D. & O. with the Administrative Review Board (the Board) on April 19, 2007. We have jurisdiction to review this matter.[11] We review the ALJ's findings of fact under the substantial evidence standard and conclusions of law de novo.[12]

DISCUSSION

An employee alleging retaliation under SOX must file a complaint within 90 days of the date on which the alleged violation occurred.[13] "[The] limitations period begins to

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[8] Complaint at 3.

[9] Motion to Dismiss for Failure to Present a Prima-Facie Case and Failure to File Within the Applicable Statute of Limitations (Motion) at 14-15.

[10] Complainant's Response at 15, 19.

[11] Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

[12] *See* 29 C.F.R. § 1980.110(b); *Matthews v. Labarge, Inc*., ARB No. 08-038, ALJ No. 2007-SOX-056, slip op. at 2 (ARB Nov. 26, 2008).

[13] 18 U.S.C.A. § 1514A(b)(2)(D) ("An action … shall be commenced not later than 90 days after the date on which the violation occurs."); 29 C.F.R. § 1980.103(d) ("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

run from the time that the complainant knows or reasonably should know that the challenged act has occurred."[14] Thus, the relevant date is when the employer communicates to the employee its intent to take an adverse employment action, rather than the date on which the employee experiences the adverse consequences of the employer's action.[15] In whistleblower cases, statutes of limitation run from the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision.[16] "Final" and "definitive" notice is a 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.[17]

The ALJ found that Coppinger-Martin did not file her complaint within 90 days of the date that Nordstrom notified her of the termination of her employment. Though she was told in mid-November 2005 that she would be terminated in January 2006, the ALJ noted that it was not clear whether this notification was final, definitive, and unequivocal because the termination was contingent upon completion and transfer of several projects and because the end date of her employment was extended for various reasons. Nonetheless, the ALJ found that the complaint was not timely filed because, even measuring the start of the 90-day limitations period from April 21, 2006, Coppinger-Martin's last day of work, her October 13, 2006 filing was untimely. The record supports this finding.

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may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.").

[14] *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 692 (11th Cir. 1982). *See also Ross v. Florida Power & Light Co.*, ARB No. 98-044, ALJ No. 1996-ERA-036, slip op. at 4 (ARB Mar. 31, 1999) (statute of limitations begins to run "on the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person with a reasonably prudent regard for his rights").

[15] *Snyder v. Wyeth Pharms*., ARB No. 09-008, ALJ No. 2008-SOX-055, slip op. at 6 (ARB Apr. 30, 2009), citing *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-053, slip op. at 36 (ARB Apr. 30, 2001).

[16] *See, e.g., Rollins, v. American Airlines,* ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 2 (ARB Apr. 3, 2007 (re-issued)); *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3 (ARB Aug. 31, 2005); *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 14 (ARB Feb. 28, 2003).

[17] *Larry v. The Detroit Edison Co*., 1986-ERA-032, slip op. at 14 (Sec'y Jun. 28, 1991). *Cf. Yellow Freight 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).

Coppinger-Martin argued to the ALJ that "equitable estoppel and equitable tolling" should be applied and her late filing excused.[18] She claimed that Nordstrom "misled [her] into subjectively and objectively believing that the reason for her termination was because her duties were eliminated."[19] She contended that equitable estoppel should apply because Nordstrom misrepresented that her termination was for budgetary reasons, and she did not learn that this was not true until July 19, 2006, when she was informed that Nordstrom employees were performing her job duties.[20] Under the doctrine of equitable estoppel, 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.[21] Applying equitable estoppel, Coppinger-Martin urged, would make her complaint timely because she filed it within 90 days of July 19, 2006.

The ALJ held that Coppinger-Martin did not show that she was entitled to equitable tolling or equitable estoppel. The ALJ accepted as true that Nordstrom misrepresented the reason for terminating her and that she did not learn that the stated reason was false until July 19. The ALJ then cited *School Dist. of City of Allentown v. Marshall*,[22] a case that we, too, frequently rely upon.[23] In that case, which arose under the whistleblower provisions of the Toxic Substances Control Act,[24] 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 the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.[25]

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[18] Complainant's Response to Respondent's Reply at 1.

[19] Complaint at 3.

[20] D. & O. at 3.

[21] *See, e.g., Pickett v. Tennessee Valley Auth.*, ARB No. 00-076, ALJ No. 2000-CAA-009 (ARB Apr. 23, 2003).

[22] 657 F.2d 16 (3d Cir. 1981). *See e.g., Hemingway v. Northeast Utils.*, ARB No. 00-074, ALJ Nos. 1999-ERA-014, -015, slip op. at 4 (ARB Aug. 31, 2000); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 2 (ARB Nov. 8, 1999).

[23] *See, e.g., McCrimmons v. CES Envtl. Servs.*, ARB No. 09-112, ALJ No. 2009-STA-035, slip op. at 5 (ARB Aug. 31, 2009); *Bedwell v. Spirit Miller NE, LLC*, ARB No. 09-094, ALJ No. 2009-STA-029, slip op. at 5 (ARB Aug. 27, 2009); *Jay v. Alcon Labs., Inc.*, ARB No. 08-089, ALJ No. 2007-WPC-002, slip op. at 6 (ARB Apr. 10, 2009).

[24] 15 U.S.C.A. § 2622 (West 2004).

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

But Coppinger-Martin's argument that she is entitled to equitable modification because Nordstrom misrepresented the reason for terminating her employment fails because, as the ALJ noted, our holding in *Halpern v. XL Capital, Ltd.*[26] precludes applying equitable tolling or equitable estoppel in this case. Like Coppinger-Martin, Halpern argued that his employer had tried to hide the real reason for terminating him and that, therefore, the limitations period did not begin to run until he became aware of his employer's retaliatory motivation for terminating him.[27] But we held:

> Neither the statute [SOX] 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 [his employer's] motivation for his suspension and firing did not affect his rights or responsibilities for initiating a complaint pursuant to the SOX.[28]

Concealing the reason for an adverse employment action does not toll the statute of limitations governing a whistleblower claim, nor does it estop the employer from asserting timeliness as a defense.[29] Moreover, if equitable tolling and equitable estoppel applied whenever an employer gave a non-discriminatory reason for its adverse employment decisions, it would be "'tantamount to asserting that an employer is equitably estopped whenever it does not disclose a violation of [a discrimination] statute.' ... If this were the case, the [time limit] for filing a charge would have little meaning."[30]

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[26] ARB No. 04-120, ALJ No. 2004-SOX-054 (ARB Aug. 31, 2005).

[27] *Halpern*, slip op. at 2.

[28] *Id*., slip op. at 5, citing *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.")).

[29] *See, e.g., Hill v. Tennessee Valley Auth,* 1987-ERA-023, -024, slip op. at 8-15 (Sec'y Apr. 21, 1994) and cases cited therein; *Lukovsky v. City & County of San Francisco,* 535 F.3d 1044, 1052 (9th Cir. 2008), citing *Guerrero v. Gates*, 442 F.3d 697, 706 (9th Cir. 2006) ("The complainant must point to some fraudulent concealment, some active conduct by the defendant 'above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time.'").

[30] *Olson v. Mobil Oil Corp*., 904 F.2d 198, 203 (4th Cir. 1990), citing *Blumberg v. HCA Mgmt. Co.*, 848 F.2d 642, 645 (5th Cir.1988).

In sum, the record herein supports the ALJ's finding that Coppinger-Martin did not file her complaint within 90 days of when she received final, definitive, and unequivocal notice that she had been terminated. And the ALJ correctly held that Coppinger-Martin did not adduce evidence that the filing period should be equitably tolled or that Nordstrom is estopped from challenging the timeliness of her complaint. We therefore **DISMISS** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge