In the Matter of:

JAMES G. UBINGER,

COMPLAINANT,

v.

CAE INTERNATIONAL d/b/a/ EMIRATES-CAE FLIGHT TRAINING,

RESPONDENT.

ARB CASE NO. 07-083

ALJ CASE NO. 2007-SOX-036

DATE: August 27, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
James G. Ubinger, *pro se*, Fort Worth, Texas

For the Respondent:
Blake A. Bailey, Esq., Joel E. Geary, Esq., Grant B. Stock, Esq., *Brown McCarroll, L.L.P.*, Dallas, Texas

FINAL DECISION AND ORDER

The Complainant, James G. Ubinger, filed a complaint alleging that the Respondent, CAE International d/b/a/ Emirates-CAE Flight Training (CAE), retaliated against him when it terminated his employment in violation of the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act (SOX),[1] and its implementing

[1] 18 U.S.C.A. § 1514(A)(West 2007). SOX's section 806 prohibits certain covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to a covered employer or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud),

regulations.[2] On May 22, 2007, a Department of Labor Administrative Law Judge (ALJ) issued a [Recommended] Decision and Order Dismissing the Complaint and Cancelling Hearing (R. D. & O.), in which he concluded that Ubinger first conceded that he did not timely file his complaint within ninety days of the date on which CAE terminated his employment and then failed to proffer a legitimate basis for tolling the limitations period.[3] Upon review, we conclude that Ubinger failed in his burden to demonstrate the existence of a genuine issue of material fact regarding the question whether he was entitled to tolling of the limitations period. Accordingly, we accept the ALJ's recommendation, and we dismiss Ubinger's complaint.

BACKGROUND

Ubinger began working for CAE at its United Emirates Facility in Dubai as a flight examiner and instructor in July 2004.[4] While there, Ubinger became aware of what he believed were violations of copyright law in connection with the reproduction of training manuals.[5] He also concluded that the procedure CAE followed in fingerprinting pilots failed to comply with Homeland Security requirements.[6] Ubinger reported his conclusions to the Executive Vice President of Sales and Marketing at CAE Aviation in the UAE, Nick Leontidis.[7] Ubinger avers that he was interviewed about these allegations, provided legal counsel, and that CAE subsequently terminated his employment on March 31, 2006.[8]

Ubinger further states that CAE sent him to Dubai in July 2006 to cancel his work visa, a precondition to his receipt of his final wages and gratuities.[9] He averred that CAE

1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. Employees are also protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed relating to a violation of the aforesaid fraud statutes, SEC rules, or federal law.

2 29 C.F.R. Part 1980 (2007).

3 R. D. & O. at 3.

4 Complainant/Statement of Fact from James G. Ubinger to OSHA (Jan, 23, 2007).

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 Response to [ALJ's] Sua Sponte [Show Cause Order] at [2].

held his passport for twelve hours and only returned it when he signed, under duress, a release stating, among other things, that he would bring no claims against CAE as a result of the termination of his employment.[10]

Ubinger filed his SOX complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on January 23, 2007. OSHA investigated Ubinger's complaint and found that "there is no reasonable cause to believe that Respondent violated SOX."[11] In particular, the OSHA Acting Administrator found that Ubinger failed to allege a prima facie complaint because his complaint was untimely, CAE is not a covered employer, and his work site was not in the United States.[12]

Ubinger timely filed a request for hearing before a Department of Labor Administrative Law Judge.[13] Ubinger acknowledged that his complaint was untimely and he requested a waiver, alleging that he had no knowledge of "SOX 806." Accordingly, the ALJ issued a Sua Sponte Order to Show Cause, ordered Ubinger to demonstrate that his complaint is timely and permitted CAE to reply to Ubinger's showing. Both parties responded to the ALJ's Order.

The ALJ found that Ubinger had conceded that his complaint was untimely but failed to provide any legitimate justification warranting tolling of the limitations period.[14] Ubinger filed a timely appeal of the ALJ's R. D. & O. with the Administrative Review Board.[15] The Board issued a Notice of Appeal and Order Establishing Briefing Schedule and both parties filed briefs in response to it.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under SOX.[16] We review a recommended

---

10 *Id.*

11 Secretary's Findings (Jan. 7, 2007).

12 *Id.*

13 *See* 29 C.F.R. § 1980.106(a).

14 R. D. & O. at 3.

15 *See* 29 C.F.R. § 1980.110(a).

16 Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a).

decision granting summary decision de novo.[17] The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.[18] Accordingly, summary decision is appropriate if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based.[19] A genuine issue of material fact is one, the resolution of which, "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[20]

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.[21] "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'"[22] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[23]

Furthermore, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing."[24]

---

[17] The ALJ decided this case on the basis of a sua sponte Order to Show Cause. There was no hearing. Because the parties relied on evidence outside of the pleadings in response to the ALJ's Order, we review it as we would a motion for summary decision under 29 C.F.R. § 18.40 and review the ALJ's R. D. & O. de novo. *Accord Salsbury v. Edward Hines, Jr. Veterans Hosp.*, ARB No. 05-014, ALJ No. 2004-ERA-007, slip op. at 4 (ARB July 31, 2007).

[18] Fed. R. Civ. P. 56.

[19] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[20] *Bobreski v. United States EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

[21] *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (Dec. 13, 2002).

[22] *Bobreski*, 284 F. Supp. 2d at 73 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

[23] *Bobreski*, 284 F. Supp. 2d at 73.

[24] 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co.*, 1993-ERA-042, slip op. at 4-6 (Sec'y July 17, 1995).

DISCUSSION

An employee who alleges that his employer has retaliated against him in violation of SOX must file his complaint with OSHA within ninety days after the alleged violation occurred.[25] In this case, Ubinger concedes that CAE terminated his employment on March 31, 2006, and the record establishes that he knew that CAE had fired him no later than April 4, 2006. Therefore, regardless of whether the 90-day clock began running on March 31st or April 4th, Ubinger's complaint, filed on January 23, 2007, is untimely.

However, SOX's limitations period is not jurisdictional and therefore it is subject to equitable modification.[26] 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*.[27] In that case, which arose under whistleblower provisions of the Toxic Substances Control Act,[28] 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."[29]

Ubinger's inability to satisfy one of these elements is not necessarily fatal to his 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.'"[30] 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."[31]

---

[25] 18 U.S.C.A. § 1514A(b)(2)(D).

[26] *Accord Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-050, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128; ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30. 2001).

[27] 657 F.2d 16, 19-21 (3d Cir. 1981).

[28] 15 U.S.C.A. § 2622 (West 2004).

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

[30] *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).

[31] *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 152 (1984).

Ubinger bears the burden of justifying the application of equitable modification principles.[32] Ubinger did not directly address, in his ALJ or the Board filings, any of the tolling factors the Board has recognized. We recognize that Ubinger is acting pro se and we "construe complaints and papers filed by pro se complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude."[33] Nevertheless, interpreting Ubinger's filings in light of the recognized tolling factors, we conclude that Ubinger has failed to raise a material question of fact regarding the issue whether he is entitled to equitable tolling.

It appears that the primary bases on which Ubinger requests "waiver," i.e., equitable tolling, are that his complaints are serious, so no limitations period should apply and that he "had no knowledge of the SOX 806."[34] Neither argument is persuasive. Ubinger points to no precedent, nor are we aware of any case law that stands for the proposition that a party is not constrained by the limitations period if his or her complaints are serious. As CAE points out, if such were the law, limitations periods would have no legal force. Therefore we reject Ubinger's argument that the severity of CAE's alleged violations of the law warrant tolling of the limitations period.

Furthermore, ignorance of the law will generally not support a finding of entitlement to equitable modification. [35] Neither are we persuaded by Ubinger's argument that the Federal Aviation Administration inspector who investigated his

---

[32] *Accord Wilson*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

[33] *Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-003, slip op. at 6 (ARB Apr. 25, 2003); *see also Martin v. Akzo Nobel Chems., Inc.*, ARB No. 02-031, ALJ No. 2001-CAA-016, slip op. at 2 n.2 (ARB July 31, 2003). But while we have acknowledged that adjudicators must accord a party appearing pro se fair and equal treatment, a pro se litigant "cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance." *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 1997-ERA-052, slip op. at 10 n.7 (ARB Feb. 29, 2000), *quoting Dozier v. Ford Motor Co.*, 707 F.2d 1189, 1194 (D.C. Cir. 1983).

[34] Ubinger letter to Chief Administrative Law Judge (Mar. 14, 2007).

[35] *Wakefield v. Railroad Retirement Bd.*, 131 F.3d 967, 970 (11th Cir. 1997); *Moldauer v. Canandaigua Wine Co*., ARB No. 04-022, ALJ No. 2003-SOX-026, slip op. at 6-7 (ARB Dec. 30, 2005), *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 1999-ERA-014, 015, slip op. at 4-5 (ARB Aug. 31, 2000). *See also Felder v. Johnson*, 204 F.3d 168 (5th Cir. 2000)(court refused to toll a limitations period in case in which incarcerated pro se litigant claimed that he was unaware of the newly-enacted statute of limitations period and because of the inadequacies of the prison's library the law's text was inaccessible to him during the one-year period he had to file his claim).

fingerprinting complaint had an obligation to inform him that he could file a SOX complaint, nor by his allegation that CAE withheld his passport for twelve hours thus detaining him in Dubai on July 3, 2006. Even if July 3rd was the final day of the limitations period, a passport is not required to file a SOX complaint, nor is it necessary for a complainant to be in the United States to do so. Moreover, if Ubinger was aware of the SOX whistleblower provisions on July 3rd and CAE precluded him from filing, it seems highly unlikely that Ubinger would then wait an additional six months upon his return to the United States to file his SOX complaint. In any event, even if we agreed that CAE's detention of Ubinger merited tolling, the period of tolling would only have extended the deadline by one day (the length of the detention). But Ubinger did not file his complaint until more than six months later. Ubinger has simply failed to proffer a legally cognizable justification for his failure to file a timely complaint during the nine-month period between the termination of his employment and the date of his OSHA complaint.[36]

CONCLUSION

Ubinger has conceded that he did not file a timely SOX complaint and he has failed to raise a genuine issue of material fact regarding the question whether he is entitled to tolling of the limitations period. Accordingly, we **DISMISS** Ubinger's SOX complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

[36] Because we dismiss Ubinger's complaint on the ground that he failed to raise a genuine issue of material fact regarding the question whether he is entitled to tolling of the limitations period, we need not and do not reach CAE's arguments concerning SOX coverage and its extraterritorial application.