In the Matter of:

KEITH G. FARNHAM,

COMPLAINANT,

v.

INTERNATIONAL MANUFACTURING SOLUTIONS,

RESPONDENT.

ARB CASE NO. 07-095

ALJ CASE NO. 2006-S0X-111

DATE: February 6, 2009

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Keith G. Farnham, *pro se,* El Paso, Texas

For the Respondent:
Paul Gay, *The Law Offices of David Pierce,* El Paso, Texas

FINAL DECISION AND ORDER DISMISSING COMPLAINT

The Complainant, Keith G. Farnham, filed a complaint alleging that the Respondents, International Manufacturing Solutions (IMS) and David G. Coburn, constructively discharged him 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 regulations.[2] On June 18, 2007, a

[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

Department of Labor Administrative Law Judge (ALJ) issued a [Recommended] Decision and Order (R. D. & O.) finding that Farnham failed to carry his burden of establishing that he was entitled to tolling of the 90-day limitations period for filing a complaint alleging a violation of the SOX whistleblower protection provisions. Upon review, we conclude that Farnham failed to establish that we should toll the limitations period because he had a reasonable concern for his safety precluding the timely filing of his SOX complaint. Accordingly, we accept the ALJ's recommendation and we dismiss Farnham's complaint as untimely.

BACKGROUND

The Complainant, Keith Farnham, was a manufacturing manager for IMS in El Paso, Texas from September 2004 until he resigned from his position on February 3, 2005.[3] In September and October 2004, Farnham traveled to Juarez, Mexico with Coburn, who he believed to be an IMS officer.[4] Farnham attested that prior to arriving in El Paso he had heard of violence in Juarez, but he did not know the extent of the violence until he moved to El Paso.[5] Farnham alleged that during the September trip to Juarez, Coburn informed him that he had ties to the Juarez drug cartel family named Fuentes and that "'if anyone ever (expletive) with me . . . I've got friends.'"[6] Farnham stated that he interpreted Coburn's statement as a veiled threat that he took seriously and believed that it was intended to lay "the ground rules for their business relationship."[7] Two weeks later when Coburn was having problems with a supplier that would not give him credit, Farnham asked Coburn why he did not have his "friends" take care of the problem for

---

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), 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] Affidavit of Keith G. Farnham (Complainant's Exhibit (C. Ex.) A-9) at 1, 5.

[4] *Id.* at 1.

[5] *Id.*

[6] *Id.* at 2.

[7] *Id.*

him and Coburn replied, "'This isn't that serious . . . I don't pull my big guns out for this kind of stuff.'"

In January 2005, Wells Fargo Bank denied Coburn a loan for IMS.[8] Farnham attested that Coburn told him that he was embarrassed by what his background check had revealed.[9] Consequently, Farnham conducted a background search of his own on the public record and discovered that Coburn had been charged with assault to commit bodily harm and a drug/alcohol violation and that he was being "pursued by U.S. Bancorp."[10] He also researched Fuentes and found that the FBI and the U.S. Marshals Office were seeking Fuentes.[11]

In mid-January 2005, Farnham encountered an employee of Plastic Source, Inc., Coburn's "Chap[ter] 11 company"[12] who was crying.[13] When Farnham asked her why she was upset she replied, "'David Coburn just called . . . he screamed at me that we were all like a bunch of (expletive) Viet Cong that needed to be burned out.'"[14]

Farnham became concerned about some of Coburn's business practices, worried that he could become liable for Coburn's misfeasance, and concluded that Coburn was attempting to entrap him.[15] On February 3, 2005, he sent an e-mail to Coburn stating that he was leaving IMS immediately. Farnham attested that "I was intentionally non-confrontational because I did not want Coburn to suspect that I knew that he was engaging in white-collar crime. I was attempting to "'back away.'"[16] Farnham submitted the affidavits of three IMS employees each of which stated that IMS "officials" made "threats," and attested identically that the threat was, "[i]f anyone contacts the

---

8 *Id.* at 4.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* at 3.

13 *Id.* at 5.

14 *Id.* at 4-5.

15 *Id.*

16 *Id.* at 5.

Department of Labor, they are going to be terminated."[17] The affidavits did not identify when the threats were allegedly made or specifically who made them.[18]

In mid-February 2005, Farnham approached federal law enforcement officials with the information he had.[19] He told them of Coburn's alleged ties to the drug cartel and of his suspicions that Coburn had misappropriated corporate funds.[20] Farnham contended that shortly thereafter, a former co-worker, in whom Farnham had confided, informed Coburn of Farnham's intent to cooperate with law enforcement.[21]

In February 2005, Farnham was hired by the Toro Company.[22] Beginning in March 2005, he confided in Robert Schmidt, a co-worker, about "his fears of retaliation from alleged Juarez drug cartel members that his former employer's [sic] (International Manufacturing Solutions, Inc) president (David Coburn) claimed to have ties to."[23]

On May 6, 2005, the Respondents filed a civil suit against Farnham alleging that he tortiously interfered with the Respondents' loan transactions, per se slandered Respondent Coburn, and intentionally inflicted emotional distress on Respondent Coburn.[24] The Respondents sought actual damages, punitive damages, pre and post judgment interest and injunctive relief. Farnham stated that "[i]t was at this point that my fear of retaliation from the Respondent's cartel associates took hold of me."[25]

In October 2005, Farnham filed a counter claim in the civil suit that Coburn had initiated. Farnham contended that the "delay was primarily based on my unwillingness to make public certain facts about the Fuentes family . . . ."[26] He told his attorney, J. Eduardo Cadena, that he "feared the possibility" that the Respondents would retaliate

---

17 Affidavit of Jim Blackwell, C. Ex. A-10; Affidavit of Phillip Marin, C. Ex. A-10; Affidavit of Marcus Land, C. Ex. A-12.

18 *Id.*

19 C. Ex. A-9 at 6.

20 *Id.*

21 Complainant's Brief to the Administrative Review Board (Comp't's br.) at 16.

22 Affidavit of Robert Schmidt, C. Ex. A-14.

23 *Id.*

24 C. Ex. A-7 at 1-3.

25 C. Ex. A-9 at 6.

26 *Id.*

against him if he took legal action against them.[27] Two days after filing the counterclaim, he contacted a bankruptcy attorney "intending to stop the civil proceedings and withdraw from any confrontation with the Respondents."[28] In January 2006, "the Respondents filed an adversary motion against [Farnham's] bankruptcy"[29] "in order to continue the civil suit."[30]

In 2005, Farnham's wife noted that her husband's mental and physical health deteriorated.[31] He began taking anti-depressant drugs that someone purchased for him in Juarez.[32] He began sleeping with a handgun and walking through the house and yard at night.[33] He placed various weapons in hidden locations in their home to be prepared in case there was an invasion.[34] She convinced him to seek medical help in mid-2006.[35] Farnham saw Dr. Francisco Marquez, a psychiatrist, in July 2006.[36] Dr. Marquez noted that Farnham had decreased concentration and a decreased appetite.[37] He indicated that Farnham was negative for suicidal or homicidal ideations, but believed that he was being followed and was always checking to see if someone was there.[38] He further noted that Farnham believed that he was being targeted because the Juarez drug cartel is very powerful.[39] Dr. Marquez diagnosed Farnham with major depressive disorder, anxiety, and alcohol abuse.[40]

---

27 Affidavit of J. Eduardo Cadena, C. Ex. A-13.

28 C. Ex. A-9 at 6.

29 *Id.*

30 Comp't's br. at 19.

31 Affidavit of Vickie Farnham, C. Ex. A-15.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 R. D. & O. at 6.

37 *Id.*

38 *Id.* at 6-7.

39 *Id.* at 7.

40 *Id.*

On January 14, 2006, Farnham e-mailed Congressman Sylvestre Reyes, asking for protection as a corporate whistleblower under the SOX and he subsequently wrote the Congressman a letter dated March 8, 2006.[41] The letter included a lengthy recitation of factual assertions concerning IMS, Coburn, and the Eureka Company as a subdivision of Electrolux Home Care Products, which he alleged is a publicly traded company.[42] The letter alleged that the Respondents had retaliated against him under the SOX.[43]

On May 2, 2006, Congressman Reyes forwarded the letter to the Department of Labor (DOL), which in turn forwarded it to the DOL's Occupational Safety and Health Administration (OSHA) on or about June 6, 2006.[44] OSHA treated the letter as a formal complaint and conducted an investigation.[45] It issued a decision concluding that Farnham failed to timely file his complaint.[46] Farnham requested a hearing on his complaint and the case was referred to the Office of Administrative Law Judges.[47]

IMS filed a motion for summary decision based on untimeliness and a lack of jurisdiction.[48] The ALJ found that Farnham's submissions were sufficient to create a genuine issue of material fact as to whether the principle of estoppel should apply and his failure to file within the time limits was due to Coburn's actions. Consequently he denied the Respondents' motion.[49]

The ALJ bifurcated this case and informed the parties that the hearing would only deal with the issues of timeliness and jurisdiction under the Act.[50] The parties subsequently waived their rights to appear in person and agreed to submit the case on the written record.[51]

---

41 *Id.* at 1.

42 *Id.*

43 *Id.*

44 *Id.* at 2.

45 *Id.*

46 *Id.*

47 *See* 29 C.F.R. § 1980.106(a).

48 R. D. & O. at 2.

49 *Id.*

50 *Id.*

51 *Id.*

The ALJ concluded in his R. D. & O. that the event that triggered the running of the 90-day limitations period was the termination of Farnham's employment on February 3, 2005.[52] He rejected Farnham's argument that the adverse action that triggered the limitations period was the civil suit the Respondents filed on May 6, 2005, because Farnham failed to establish that this lawsuit was an adverse action under the SOX.[53] Accordingly, the ALJ found that the last date on which Farnham could have filed a timely SOX complaint was May 4, 2005.[54] For purposes of this opinion, the ALJ considered the letter of March 6, 2006, to be a valid SOX complaint, even though OSHA did not receive this complaint until June 6, 2006.[55] Since Farnham did not file his complaint by May 4, 2005, the ALJ considered whether Farnham had established grounds for tolling the limitations period.[56]

Farnham argued that the limitations period should be tolled because he feared retaliation from the Respondents if he filed a SOX complaint.[57] The ALJ concluded that "[t]he critical question is whether a reasonable person with the same information would have been afraid to file and should be allowed an additional period to file."[58] The ALJ ultimately found that Farnham had failed to carry his burden of establishing that he failed to file because of the Respondents' actions.[59] The ALJ acknowledged that Farnham had expressed some concerns about the Respondents to his family and co-workers, but he concluded that Farnham's actions spoke louder than his words.[60] Specifically, the ALJ found that the facts that Farnham continued working for the Respondents after Coburn bragged of the drug cartel connection, that he felt safe enough to contact the FBI to inform on the Respondents, that he filed a counter suit to the Respondent's civil suit, and that he contacted a number of co-workers to discuss his concerns convinced the ALJ that

---

[52] R. D. & O. at 11. The ALJ assumed for purposes of this decision only that Farnham's resignation from employment constituted a constructive termination. *Id.* at 11, n.40.

[53] *Id.* at 11.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 12.

[60] *Id.*

he was not dissuaded from filing his complaint by fear of retaliation.[61] He also noted that even accepting for the purpose of argument that at one time Farnham was deterred from taking legal action against the Respondents, the fact that he filed a civil suit against the Respondents demonstrated that as of October 2005, this was no longer true.[62] Nevertheless, Farnham still waited more than 120 days to file his OSHA complaint in March 2006.[63] Accordingly, the ALJ found that Farnham failed to carry his burden of establishing that he was entitled to tolling of the 90-day limitations period.[64]

Farnham filed a timely petition requesting the Administrative Review Board (ARB) to review the R. D. & O.[65] The Board issued a Notice of Appeal and Order Establishing Briefing Schedule and both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final agency decisions under the SOX to the ARB.[66] Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard.[67] 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."[68] We must uphold an ALJ's factual finding that is supported by substantial

---

61 *Id.*

62 *Id.*

63 *Id.* The ALJ noted that even if the initial January 14, 2006 e-mail to Congressman Reyes was considered to be a complaint, it was filed eleven months after the Respondents constructively terminated his employment and 92 days after Farnham filed his civil suit against the Respondents. *Id.* at 12, n.42.

64 *Id.*

65 *See* 29 C.F.R. § 1980.110(a).

66 *See* Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1980.110.

67 *See* 29 C.F.R. § 1980.110(b).

68 *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). *See also Getman v. Sw. Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

evidence even if there is also substantial evidence for the other party, and even if we "would justifiably have made a different choice had the matter been before us de novo."[69]

In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee acts with "all the powers [the Secretary] would have in making the initial decision …."[70] Therefore, the Board reviews an ALJ's conclusions of law de novo.[71]

DISCUSSION

An employee who alleges that his employer has retaliated against him in violation of SOX must file his complaint with OSHA within 90 days after the alleged violation occurred.[72] In this case, the Respondents constructively terminated Farnham's employment on February 3, 2005, and the Respondents filed a civil suit against Farnham on May 6, 2005. Therefore, regardless whether either of the two actions is considered a violation, Farnham's complaint, filed at the earliest on January 14, 2006, or at the latest on March 8, 2006, as the ALJ found, is untimely.

However, SOX's limitations period is not jurisdictional and therefore it is subject to equitable modification.[73] But the Supreme Court has noted that equitable relief from limitations periods is "typically extended ... only sparingly."[74] In determining whether the Board should toll a statute of limitations, we have been guided by the discussion of equitable modification of statutory time limits in *School Dist. v. Marshall.*[75] In that case, which arose under the whistleblower provisions of the Toxic Substances Control Act,[76] 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

---

69 *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *See also Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051 (ARB June 29, 2006).

70 5 U.S.C.A. § 557(b) (West 1996).

71 *See Getman*, slip op. at 7.

72 18 U.S.C.A. § 1514A(b)(2)(D).

73 *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).

74 *Irwin v. Veterans Administration*, 498 U.S. 89, 96 (1990).

75 657 F.2d 16, 19-21 (3d Cir. 1981).

76 15 U.S.C.A. § 2622 (West 2004).

when "the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum."[77]

Farnham's inability to satisfy one of these elements is not necessarily fatal to his claim, however courts "'have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.'"[78] 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."[79]

Farnham bears the burden of justifying the application of equitable modification principles.[80] He argues that his reasonable fear that Coburn would retaliate against him based on his knowledge of Coburn's past acts and relationship with a drug cartel should excuse his failure to timely file his complaint within 90 days of either his constructive discharge or the filing of a civil suit against Farnham by the Respondents.[81] The ALJ accepted, for purposes of this litigation only, that Farnham's resignation from employment was a constructive termination, but rejected Farnham's argument that the civil suit the Respondents filed against him constituted adverse action under the SOX. We too will accept, for purposes of this litigation only, that the resignation constituted a constructive termination and agree with the ALJ that Farnham failed to prove that the civil suit was adverse action.

The SOX defines adverse action as discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against an employee in the terms and conditions of his or her employment.[82] Farnham has failed to establish how filing a civil suit against Farnham alleging that he tortiously interfered with the Respondents' loan transactions, per se slandered Respondent Coburn, and intentionally inflicted emotional distress on Respondent Coburn injured him in any way in relation to "the terms and condition of his employment." In any event, for purposes of deciding the

---

77 *Allentown*, 657 F.2d at 20 (internal quotations omitted).

78 *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).

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

80 *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).

81 Comp't's br. at 26-27.

82 18 U.S.C.A. § 1514A (a).

issue here, whether Farnham timely filed a SOX complaint, it makes no difference whether the civil suit constituted an adverse action under SOX because Farnham failed to file his complaint within 90 days of the date the Respondents filed this suit.

Thus we turn to the issue whether Farnham has established that the limitations period should be tolled. Assuming that fear of retaliation would constitute an extraordinary event precluding timely filing, we agree with the ALJ that Farnham has failed to carry his burden of establishing that his alleged fear was reasonable. To establish duress sufficient to toll the running of the limitations period, Farnham must do more than simply allege a subjective fear that the Respondents might retaliate against him.[83] Instead, he must show some act or threat by the Respondents that precluded him from exercising his free will and judgment and prevented him from exercising his legal rights.[84]

Most significantly, Farnham has not alleged that the Respondents made any specific threats against him either before or after he was constructively discharged. Moreover, when the Respondents concluded that Farnham had interfered with the Respondents' loan transactions, per se slandered Respondent Coburn, and intentionally inflicted emotional distress on Respondent Coburn, Coburn did not threaten Farnham that he would have his friends take care of him or "pull out his big guns;" instead, the Respondents responded by simply filing a lawsuit to seek redress through the courts.

Furthermore, we agree with the ALJ that the actions Farnham took following the termination of his employment, amply demonstrate that the Respondents did not deprive him of his free will and judgment or prevent him from seeking his legal rights. Not only did Farnham instigate an FBI investigation of the Respondents' business activities, but he discussed his plans to pursue the Respondents with former co-workers, even after he concluded that his plans had been revealed to the Respondents by at least one of these co-workers; he filed a counter suit in response to the Respondents' lawsuit; and he complained to Congressman Reyes about the Respondents' business dealings. These are not the actions of an individual who has lost his free will and judgment. Therefore we conclude, as did the ALJ, that Farnham's actions speak louder than his words.

Moreover, we note that Farnham alleged that when the Respondents filed the civil suit on May 6, 2005, "[i]t was at this point that my fear of retaliation from the Respondent's cartel associates took hold of me."[85] Given that Farnham was constructively discharged on February 3, 2005, more than 90 days passed between his constructive termination and the date on which Farnham states that the fear of retaliation from the Respondents took hold of him. Farnham has failed to provide any basis for tolling the limitations period between the

---

[83] *See Olson v. Federal Mine Safety & Health Review Comm'n,* 381 F.3d 1007, 1014 (10th Cir. 2004); *Moses v. Phelps Dodge Corp.*, 818 F. Supp. 1287, 1289 (D. Ariz. 1993).

[84] *Moses,* 818 F. Supp. at 1289.

[85] C. Ex. A-9 at 6.

date of his constructive discharge and the date he alleges his fear of retaliation took hold of him and ostensively precluded him from filing his complaint. Accordingly we accept the ALJ's recommendation and **DISMISS** Farnham's complaint because he neither timely filed his complaint nor established that he was entitled to tolling of the limitations period.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge