In the Matter of:

RAJ DARYANANI, **ARB CASE NO. 08-106**

COMPLAINANT, **ALJ CASE NO. 2007-SOX-079**

v. **DATE: May 27, 2010**

ROYAL & SUN ALLIANCE, d/b/a ARROWPOINT CAPITAL CORP.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Raj Daryanani, *pro se*, Toronto, Ontario

For the Respondent:
Michael K. Ott, Esq., *Malone, Thompson, Summers & Ott,* Charlotte, North Carolina

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Wayne C. Beyer, *Administrative Appeals Judge*: with Judge Beyer concurring.

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Sarbanes-Oxley Act of 2002 (SOX) and its implementing regulations. 18 U.S.C.A. § 1514A (Thomson/West Supp. 2009); 29 C.F.R. Part 1980 (2009). Raj Daryanani filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Royal & SunAlliance d/b/a Arrowpoint (Royal & SunAlliance) violated the SOX by terminating his

employment in retaliation for engaging in protected activity.[1] On April 8, 2008, a Labor Department Administrative Law Judge (ALJ) recommended dismissal of the complaint as untimely filed. We affirm.

BACKGROUND

At the time of Daryanani's employment, Royal & SunAlliance Insurance Group PLC of London owned Royal & SunAlliance USA and Royal & SunAlliance Canada. Motion for Summary Judgment (Mot. for S.J.) at 3-4. Royal & SunAlliance Canada hired Daryanani on October 11, 2004, for what he believed was a multi-year project as a claims executive to review complex insurance claims. Resp. Br. at 2. As part of his employment, Daryanani performed services for Royal & SunAlliance USA, and claimed he was an employee of Royal & SunAlliance USA, though initially Daryanani chose to stay on Royal & SunAlliance Canada's payroll.[2]

In September 2003, before Daryanani's employment began, Royal & SunAlliance announced that it was selling the renewal rights to its United States operations as part of its global restructuring. Resp. Br. at 3, 4. Shortly before Memorial Day of 2005, Royal & SunAlliance offered Daryanani an alternative role as settlement specialist, which Daryanani refused. Mot. for S.J. at 4; Opp. Mot. for S.J. at 5. Royal & SunAlliance notified Daryanani on October 17, 2005, that his position would be eliminated as part of a reduction-in-force. Opp. Mot. for S.J. at 6. As part of the termination, Royal & SunAlliance offered Daryanani a severance package in exchange for a full release of any claims against Royal & SunAlliance, which Daryanani executed on December 2, 2005, and became effective on December 16, 2005. Resp. Br. at 4; Mot. for S.J. Ex. 5.

Daryanani alleged that during the Memorial Day meeting, in which he was offered the alternative position, he "raised questions with [Royal & SunAlliance] about ethical issues relating to a change of direction and potential leveraged buyout by existing Senior Management at [Royal & SunAlliance]." Opp. Mot. for S.J. at 5. Daryanani claims that after this meeting, he began to receive a cold shoulder and reduced responsibilities.

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[1] In March 2007, Arrowpoint Capital Corp., a Delaware company owned and operated by former Royal & SunAlliance USA employees, acquired the remaining U.S. assets of Royal & SunAlliance. Respondent's Brief (Resp. Br.) at 3-4.

[2] Resp. Br. at 4, 18; Opposition to Motion for Summary Judgment (Opp. to Mot. for S.J.) at 2, Aff. at 1. Neither Royal & SunAlliance USA nor Royal & SunAlliance Canada is registered under Section 12 or required to file under Section 15(d) of the Exchange Act of 1934. Section 806 covers companies registered under Section 12 or required to file under Section 15(d) of the Exchange Act. 18 U.S.C.A. § 1514A. Because the ALJ resolved this case on timeliness grounds, and we affirm the ALJ's Recommended Decision & Order (R. D. & O.), we do not address the coverage of Royal & SunAlliance under the Act.

Daryanani filed this claim with OSHA on March 29, 2007, alleging that he was terminated in violation of SOX for raising ethical issues concerning a management-led leveraged buyout. OSHA dismissed Daryanani's claim on August 7, 2007, on the grounds that it was untimely filed and that Royal & SunAlliance was not covered under the Act. OSHA Findings and Order at 1, 2. Daryanani filed objections to OSHA's determination and requested a hearing with an ALJ.

Before the ALJ, Royal & SunAlliance filed a motion for summary decision arguing that Daryanani's claim was time-barred, Royal & SunAlliance was not subject to SOX, and that Daryanani has failed to offer any evidence that he was terminated in retaliation for activity protected under the SOX. Mot. for S.J. at 6; Resp. Br. at 5. Daryanani responded, opposing the motion for summary decision and requesting discovery. On December 19, 2007, the ALJ denied in part Royal & SunAlliance's motion for summary judgment. The ALJ requested supplemental briefing solely on timeliness and coverage. In the same order, the ALJ denied Daryanani's discovery request, finding that the issues of timeliness and coverage could be addressed without discovery.

In its supplemental motion for summary judgment, Royal & SunAlliance reiterated that Daryanani's complaint was untimely, that Royal & SunAlliance was not covered under the Act, and added that Daryanani signed a release and waiver of all claims. Supp. Mot. for S.J. at 2, 6, 9. In opposing the motion on the timeliness ground, Daryanani claimed that his filing was timely because he "filed his claim within 90 days of becoming aware that raising questions about potential ethical and financial impropriety had been the likely cause of his termination." Supp. Opp. Mot. for S.J. at 6. Alternatively, Daryanani claimed that the SOX filing period should be equitably modified because Royal & SunAlliance misled him by failing to notify him of SOX in the severance agreement and delayed its counter-signature to the severance agreement until after SOX's 90-day filing deadline had expired. Supp. Opp. Mot. for S.J. at 12-13. Daryanani also argued he needed discovery on the timeliness and coverage issues. Supp. Opp. Mot. for S.J. at 2-3, 5, 14-15. On April 8, 2008, the ALJ issued an order dismissing Daryanani's claim on the ground that it was filed untimely. Daryanani appealed his case to the Administrative Review Board (ARB or Board).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The Board reviews an ALJ's recommended grant of summary judgment de novo. *Levi v. Anheuser Busch Cos., Inc.*, ARB Nos. 06-102, 07-020, 08-006, ALJ Nos. 2006-SOX-037, -108; 2007-SOX-055, slip op. at 6 (ARB Apr. 30, 2008). The standard for granting summary decision is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-026, slip op. at 3 (ARB Dec. 30, 2005). Thus, pursuant to 29 C.F.R. § 18.40(d) (2009), the ALJ may issue summary decision "if the pleadings, affidavits, material obtained by discovery or

otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."

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. *Smale v. Torchmark Corp.*, ARB No. 09-012, ALJ No. 2008-SOX-057, slip op. at 5-6 (ARB Nov. 20, 2009). "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.'" *Bobreski v. U.S. Envtl. Prot. Agency*, 284 F. Supp. 2d 67, 73 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party." *Bobreski*, 284 F. Supp. 2d at 73. 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." 29 C.F.R. § 18.40(c).

DISCUSSION

An employee alleging retaliation under SOX must file a complaint within ninety days of the date on which the alleged violation occurred.[3] 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. *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, -128, ALJ No. 1997-ERA-053, slip op. at 36 (ARB Apr. 30, 2001). In whistleblower cases, statutes of limitation run from the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision. *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). "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. *Larry v. The Detroit Edison Co*., 1986-ERA-032, slip op. at 8 (Sec'y June 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).

Royal & SunAlliance notified Daryanani on October 17, 2005, that it was eliminating his position, and his termination was effective on December 16, 2005. Daryanani filed his

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

complaint with OSHA on March 29, 2007, approximately seventeen months after he received notice of the elimination of his position. The ALJ found that Daryanani did not file his complaint within ninety days of the date that Royal & SunAlliance notified him of his termination. The record supports this finding.

Darayanani's case, however, does not end there. Similar to other whistleblower statutes, the SOX's limitations period of ninety days is not jurisdictional, and therefore it is subject to equitable modification, i.e., equitable tolling and equitable estoppel. *Halpern*, ARB No. 04-120, slip op. at 4. As we have said before, equitable tolling and equitable estoppel are different and distinct concepts in equity. *Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020 (ARB Mar. 31, 2010). "Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights." *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir. 1991), *quoting Felty v. Graves-Humphreys*, 785 F.2d 516, 519 (4th Cir. 1986).

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. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981). In that case, which arose under the whistleblower provisions of the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (Thomson Reuters 2009), 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." *Allentown*, 657 F.2d at 20 (internal quotations omitted). However, as the ARB has noted, the court in *Allentown* expressly left open the possibility that other situations might also give rise to equitable estoppel.[4] *See Halpern*, ARB No. 04-120, slip op. at 4 (three categories identified in *Allentown* not exclusive); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 3-4 (ARB Nov. 8, 1999). *Accord Hood v. Sears Roebuck & Co.*, 168 F.3d 231, 232 (5th Cir. 1999). An additional basis recognized as giving rise to equitable estoppel, potentially applicable to the facts of this case, is "where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights." *Bonham v. Dresser Indus.*, 569 F.2d 187, 193 (3d Cir. 1978).

Daryanani bears the burden of justifying the application of equitable modification principles. *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995) (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling). Daryanani opposed Royal & SunAlliance's motion for summary judgment on timeliness grounds by claiming Royal & SunAlliance should be estopped from raising a timeliness defense because it omitted to include SOX in the release of the severance agreement and because it failed to counter-sign the severance agreement until after the 90-day statute of limitations had expired. In response, the ALJ found that Royal & SunAlliance did not mislead or deceive Daryanani into signing the severance package. R. D. & O. at 6. In so holding, the ALJ

[4] "We do not now decide whether these three categories are exclusive, but we agree that they are the principal situations where tolling is appropriate." *Allentown*, 657 F.2d at 20.

noted that Daryanani conceded that he did not file a SOX claim until he learned, in January or February of 2007, that the buyout was successful, which triggered his belief that the ethical concern he raised before the Memorial Day meeting was a possible retaliatory motive for his termination. The ALJ concluded that the clock did not begin to tick when Daryanani learned of a possible motive for his termination, but rather when he was given notice of his termination. *Halpern*, ARB No. 04-120, slip op. at 5 ("[n]either the statute nor its implementing regulations indicate that a complainant must acquire evidence of retaliatory motive before proceeding with a complaint. [A complainant's] failure to acquire evidence of . . . motivation for his suspension and firing did not affect his rights or responsibilities for initiating a complaint . . . .").

Daryanani argues on appeal that the ALJ erred in finding that the statute of limitations should not be equitably modified. Daryanani claimed, before the ALJ and the Board on appeal, that Royal & SunAlliance "deceived" him when it delayed counter-signing the severance release agreement until after the ninety days had passed and intentionally omitted mentioning SOX in the release. Compl. Br. at 6-7. We disagree. As noted above, courts apply equitable estoppel when the defendant's conduct interferes with the plaintiff's ability to exercise his rights. *Rhodes*, 927 F.2d at 878. Daryanani fails to persuade us that Royal & SunAlliance's actions warrant modification of SOX's 90-day filing period. Contrary to Daryanani's allegations, Royal & SunAlliance was not obligated to inform Daryanani of the potential causes of action, the potential deadlines under those statutes, or to take specified actions within the deadlines of known or unknown statutes.[5]

Daryanani further claims that the ALJ erred in considering equitable modification as part of the prima facie case rather than requiring these issues be raised as affirmative defenses. Compl. Br. at 9, 21. Daryanani misstates the procedural context. Daryanani filed a complaint with OSHA. On appeal from OSHA's findings, Royal & SunAlliance moved for summary decision in part on the ground that Daryanani failed to file a timely complaint. Daryanani was given a full opportunity to respond to Royal & SunAlliance's motion, in which case he could supplement any material contained in his complaint. We do not find the ALJ erred in considering the motion for summary decision. 29 C.F.R. § 18.40.

Daryanani also argues that the ALJ erred in awarding summary decision prior to discovery and in denying Daryanani's discovery request. Compl. Br. at 12, 15, 22-26. The ALJ denied discovery, reasoning that the issue of timeliness and coverage could be resolved without discovery. As to discovery motions, the Board has held that ALJs have wide discretion to limit the scope of discovery and will be reversed only when such evidentiary rulings are arbitrary or an abuse of discretion. *See Robinson v. Martin Marietta Servs., Inc.*, ARB No. 96-075, ALJ No. 1994-TSC-007, slip op. at 4 (ARB Sept. 23, 1996). We find no abuse of discretion.

[5] We note that the severance agreement contained a clause expressly recommending that Daryanani obtain counsel. If Daryanani had obtained counsel, counsel would have the responsibility to be aware of the statute and its filing obligations.

While a particular case in which a complainant alleges equitable modification might require discovery to resolve the issue, this is not one of those cases.[6] Daryanani requested discovery concerning Royal & SunAlliance's (a) termination of Daryanani (b) its policies and procedures for preparing severance agreements and releases, which omit mention of SOX claims and (c) its policies and procedures for not counter-signing termination agreements and releases until after the expiration of 90-day statute of limitations has run, and (d) any other policies undermining remedies of employees. Compl. Br. at 5, 15. Even with extensive discovery as requested, we do not feel Daryanani would satisfy the criteria for equitable estoppel or tolling. As we note above, we are not persuaded that the reasons Daryanani offers, and requests to supplement with discovery, warrant equitable tolling. Following the notice of his termination in October of 2005, Daryanani could have filed, and was not impeded by Royal & SunAlliance from filing, a SOX claim with OSHA before, during, or after his severance negotiations as long as he filed within ninety days of his notice of termination. The fact that he did not know of, and was not informed of, the statute and its filing deadlines does not warrant equitable modification. The responsibility of discovering a cause of action and filing a timely complaint is with the complainant.

Moreover, even if Daryanani had alleged colorable grounds for tolling or estoppel, this would not excuse waiting a year and a half to file his complaint. While a statute of limitations can be tolled or estopped based on qualifying conditions, these equitable modification periods do not run indefinitely. The Supreme Court has noted that equitable relief from limitation periods is "typically extended ... only sparingly." *Irwin v. Dep't of Veterans Admin.*, 498 U.S. 89, 96 (1990). Courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Wilson*, 65 F.3d at 404, *quoting Irvin*, 498 U.S. at 96. A complainant must file within a reasonable time after the disability excusing his or her untimely filing is lifted or discovered. *Cf. Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 453 (7th Cir. 1990) ("We hold that a plaintiff who invokes equitable tolling to suspend the statute of limitations must bring suit within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information."). Daryanani alleges that the employer took actions in December of 2005 and January of 2006 which misled him and caused him to fail to file a timely complaint. Daryanani then waited until March of 2007 – approximately fifteen months after the alleged conduct – to file a complaint. Other than his concession that he became aware of a possible motivation for his termination in January or February of 2007, which we have stated is not a ground for equitable modification, Daryanani has not provided any justification for the excessive delay in filing. Thus, even if Royal & SunAlliance engaged in active misconduct preventing Daryanani from timely filing his claim in December of 2005 or January of 2006, Daryanani did not act diligently to justify applying the principles of equitable modification to his claim filed in March of 2007.

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[6] *See, e.g., Rivera v. Quarterman*, 505 F.3d 349, 354 (5th Cir. 2007) (remanding where "[t]he record before the court is not sufficiently developed for us to engage in the fact-intensive determination of whether equitable tolling is appropriate."); *Cantor v. Perelman*, 414 F.3d 430, 441 (3d Cir. 2005).

CONCLUSION

We have reviewed the entire record herein. The ALJ thoroughly and fairly examined all of the evidence and considered the parties' arguments. After viewing the evidence and drawing inferences in the light most favorable to Daryanani, the ALJ found that there was no question of material fact regarding the timeliness of Daryanani's complaint and dismissed the complaint as untimely. Since the record contains no evidence that Daryanani filed a SOX complaint within 90 days of the alleged adverse action and since Daryanani has failed to raise a question of material fact regarding the applicability of equitable modification, the ALJ properly dismissed Daryanani's claim. Thus, we **AFFIRM** his order dismissing the claim and **DENY** the complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Administrative Appeals Judge Wayne C. Beyer, concurring:

This case is before us on the ALJ's denial of Daryanani's complaint and denial of his motion for reconsideration. I concur in the result denying Daryanani's complaint, because it was untimely filed. I write to emphasize two supplemental points.

First, Daryanani entered into an Agreement and General Release, under which, for valuable consideration, with time for reflection and review by counsel, he released "ALL CLAIMS" against Royal & SunAlliance (Royal). The settlement agreement and release was effective in releasing any claims Daryanani had arising from his employment. *E.g.*, *Zandford v. Prudential-Bache Securities*, 112 F.3d 723, 727 (4th Cir. 1997) ("[T]he very nature of a general release is that the parties desire to settle all matters forever. A general release . . . not only settles enumerated specific differences, but claims of every kind or character . . .."). *See also* 66 Am. Jur. 2d *Release* § 28 (2001). Thus, even though the release did not specifically enumerate a potential SOX claim, contrary to Daryanani's position, that is of no legal significance.

Although on appeal to us Royal does not raise Daryanani's release of his SOX claim as a separate defense, the settlement and release figures into the discussion. Daryanani received notice of his termination on October 17, 2005, to become effective on December 16, 2005. He executed the settlement agreement and release on December 2, 2005. He notes that Royal did not execute the agreement until January 31, 2006, more than 90 days after Daryanani received

notice of his termination. The argument that he somehow relied on Royal to his detriment has no merit. He had already executed a document that released "ALL CLAIMS" against Royal and he would not necessarily have known whether Royal would execute it before or after the 90-day period ran. Accordingly, he had no basis for relying on when Royal would execute the document.

Nor did pending settlement negotiations with Royal make a difference. Even if, contrary to my argument that Daryanani had entered into an enforceable settlement agreement, one took the position that Daryanani was merely involved in settlement negotiations with Royal, that argument would fail as well. And this is my second point: settlement discussions do not toll the limitations period. *Beckmann v. Alyeska Pipeline Service Co.*, ARB No. 97-057, ALJ No. 1995-TSC-016 (ARB Sept. 16, 1997); *Hyman v. KD Resources*, ARB No. 09-076, ALJ No. 2009-SOX-20 (ARB Mar. 31, 2010) (Beyer, J, dissenting). Thus, Daryanani missed the filing deadline for his SOX complaint and his late claim is not made timely under equitable tolling or estoppel principles.

WAYNE C. BEYER
Administrative Appeals Judge