In the Matter of:

WILLIAM J. McCLOSKEY, **ARB CASE NO. 08-123**

COMPLAINANT, **ALJ CASE NO. 2005-SOX-093**

v. **DATE: August 31, 2010**

AMERIQUEST MORTGAGE CO.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
William McCloskey, pro se, Philadelphia, Pennsylvania

For the Respondent:
James B. Wright, Esq., Cynthia L. Fair, Esq., *Buchalter Nemer*, San Francisco, California

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

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 2010); 29 C.F.R. Part 1980 (2009). William McCloskey filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Ameriquest Mortgage Company violated the SOX by terminating his employment in retaliation for engaging in protected activity. On July 16, 2008, a Labor Department Administrative Law

Judge (ALJ) recommended dismissal on the grounds that Ameriquest was not a covered employer and the complaint was untimely filed.[1] We affirm.

BACKGROUND

McCloskey was an account executive with Ameriquest from December 1, 2004, until his termination on March 1, 2005. McCloskey filed a complaint with the Occupational Safety and Health Administration (OSHA) on June 16, 2005, claiming Ameriquest terminated his employment in violation of the SOX. OSHA determined that McCloskey was not a complainant under the Act because Ameriquest was not a covered employer and, furthermore, that McCloskey's complaint was untimely filed. McCloskey objected to OSHA's determination, and the case was assigned to an ALJ for hearing.

Pursuant to Ameriquest's motion to dismiss, the ALJ concurred with OSHA and granted summary decision to Ameriquest on the grounds that Ameriquest was not a covered entity under Section 806 and that McCloskey filed his complaint outside of the 90-day filing deadline under Section 806.[2] The ALJ further held that McCloskey did not satisfy any of the criteria for equitable modification. D. & O. at 5-6. McCloskey appealed the ALJ's D. & O. to the 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 decision 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

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[1] In 2005, an ALJ granted default to McCloskey when Ameriquest failed to appear at the hearing and failed to file responsive pleadings. On review, the ARB remanded the case to the ALJ, finding McCloskey did not properly serve Ameriquest. *McCloskey v. Ameriquest Mortgage Co*., ARB No. 06-033, ALJ No. 2005-SOX-093 (ARB Feb. 29, 2008). The current decision and order (D. & O.) under review is the ALJ's decision following remand.

[2] 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."). McCloskey did not file a response to Ameriquest's motion to dismiss.

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).

DISCUSSION

As noted above, the ALJ held that McCloskey's claim was untimely and that he had not satisfied the criteria for equitable modification. McCloskey does not appear to contest the ALJ's finding that, on its face, his June 16, 2005 complaint to OSHA was untimely. Instead, McCloskey argues that the filing deadline should be equitably modified.

We conclude that the record supports the ALJ's conclusion that McCloskey did not satisfy the criteria for equitable modification in the form of equitable tolling or equitable estoppel. 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 Co.*, 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/West 2010), 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.[3] *See Halpern v. XL Capital Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 4 (ARB Aug. 31, 2005) (three categories identified in *Allentown* not exclusive); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No.

[3] "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.

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 by the Board as giving rise to equitable estoppel, occurs if "the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights." *Hyman*, ARB No. 09-076, slip op. at 7, *citing Bonham v. Dresser Indus. Inc.*, 569 F.2d 187, 193 (3d Cir. 1978).

McCloskey argues his complaint should be equitably construed as timely because Ameriquest had a burden to inform him of SOX, and it failed to do so. McCloskey argues this burden accrues because Ameriquest's officers are required to certify financial reports pursuant to Section 302 of SOX.[4] McCloskey also argues that he timely filed a precise statutory claim in the wrong forum when he sent a March 1, 2005 e-mail to the SEC and a March 2, 2005 letter to the Pennsylvania Department of Banking. ALJX-1.

We disagree. Applying the law to McCloskey's case, we concur with the ALJ's legal analysis and conclusion that McCloskey failed to satisfy any grounds for equitable tolling or estoppel. We note that a complainant is responsible for his or her own litigation, and Ameriquest did not have a burden to inform him of Section 806 and its filing deadlines. *Daryanani v. Royal & Sun Alliance*, ARB No. 08-106, ALJ No. 2007-SOX-079, slip op. at 6 (ARB May 27, 2010). We find any requirements under Section 302 of SOX, a provision requiring officers to certify financial reports, inapposite to McCloskey's case. While McCloskey argues that he engaged in communications with the SEC on March 1, 2005, and sent a letter on March 2, 2005, to the Pennsylvania Department of Banking, we concur with the ALJ and his analysis that those communications were not "the precise statutory claim in issue" filed in the wrong forum to justify tolling SOX's 90-day filing deadline.[5]

Our conclusion is buttressed by the fact that in response to McCloskey's e-mail to the SEC, the SEC informed him on or about March 1, 2005, that he had not selected the right forum and that the whistleblower provision of Section 806 has a short filing deadline. The SEC's March 1 response:

> Pursuant to our conversation, I am enclosing information regarding possible sources of legal assistance. As I indicated, the U.S. Securities and Exchange Commission is not authorized to render legal or financial advice …. However, you may wish to consult a lawyer specializing in securities laws and/or labor law to explore any remedies that may be available to you. As I indicated further, there may be very short deadlines under the Sarbanes-Oxley Act in

[4] Section 302 requires principal executive officers and principal financial officers to certify in annual and quarterly reports that the reports meet the conditions specified in Section 302. 15 U.S.C.A. § 7241 (Thomson/West 2010).

[5] D. & O. at 5-6; 29 C.F.R. § 1980.103(b) ("No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations."); *Levi*, ARB Nos. 06-102, 07-020, 08-006, slip op. at 12.

> connection with seeking whistleblower protection. Moreover, there are specific procedures that must be followed in order to ensure protection.

ALJX-6 (disc, "left side," at 19). Thus, even if we were to find McCloskey's communications to be valid SOX complaints filed in the wrong forum, McCloskey would not benefit from any equitable modification given that he had notice shortly after March 1, 2005, that his communication was not directed to the appropriate forum, that he had specific procedures to follow, and the whistleblower provision of SOX has a short filing deadline. Instead, McCloskey waited until June 16, 2005, to file with OSHA. *Hillis v. Knochel Bros. Inc.*, ARB Nos. 03-136, 04-081, -148, ALJ No. 2002-STA-050, slip op. at 8-9 (ARB Mar. 31, 2006) (noting that the tolling of the statute's deadline was only tolled while the complainants were unaware that they had filed in the wrong forum).

Because we concur with the ALJ that McCloskey filed an untimely complaint and has not satisfied the criteria for equitable modification, we do not discuss, and make no findings of fact or conclusions of law concerning, the ALJ's holding on coverage and any assignments of error in regard to that issue.

CONCLUSION

For the foregoing reasons, we affirm the ALJ's finding that McCloskey's Section 806 complaint filed with OSHA against Ameriquest Mortgage Company was untimely. Thus, we **AFFIRM** the ALJ's Decision and Order and **DENY** the complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge