**U.S. Department of Labor**

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

**In the Matter of:**

**STEPHANIE JONES,** **ARB CASE NO. 09-005**

**COMPLAINANT,** **ALJ CASE NO. 2008-SOX-060**

**v.** **DATE: September 30, 2010**

**FIRST HORIZON NATIONAL CORPORATION,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***
**Jim Walker, Esq., *Jim Walker & Associates, PLLC*, Irving, Texas**

***For the Respondent:***
**Whitney K. Fogerty, Esq., *Ogletree, Deakins, Nash, Smoak & Stewart, P.C.*, Memphis, Tennessee**

**Before: Joanne Royce, *Administrative Appeals Judge*; Paul M. Igasaki, *Chief Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge***

## FINAL DECISION AND ORDER

The Complainant, Stephanie Jones, filed a retaliation complaint under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act, 18 U.S.C.A. § 1514(A) (Thomson/West Supp. 2010)(SOX) and its implementing regulations, 29 C.F.R. Part 1980 (2009). 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), 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.

Jones alleged that her former employer, First Horizon National Corporation (First Horizon), violated the SOX whistleblower protection provisions by discharging her on November 1, 2006, because she engaged in protected activity. In 2006, Jones filed EEOC complaints alleging race and sex discrimination as well as retaliation for complaining about race and sex discrimination. In 2007, Jones also filed a lawsuit to pursue these claims. However, it was not until June 4, 2008, that Jones filed her initial complaint of unlawful retaliation with the United States Department of Labor. The Department's Occupational Safety and Health Administration (OSHA) dismissed Jones' claim as untimely filed.

Jones then filed a request for a hearing with the Office of Administrative Law Judges (OALJ) and her case was assigned a hearing date. First Horizon filed a motion for summary decision because Jones' complaint was not filed within 90 days of any adverse action. Jones responded to the motion and requested that it be denied. Upon consideration of the motion for summary decision and Jones' response, the ALJ issued his Decision and Order (D. & O.) dismissing Jones' complaint as untimely. Jones filed a petition requesting the Administrative Review Board (ARB or the Board) to review the D. & O. We affirm.

## BACKGROUND

The ALJ summarized the pertinent facts of record in his D. & O. at 2-3. They are as follows:

On September 21, 2006, Jones filed an EEOC complaint alleging that First Horizon discriminated against her based on her race and sex and that it retaliated against her in violation of Title VII of the Civil Rights Act of 1964. On November 1, 2006, First Horizon terminated Jones' employment. On December 12, 2006, Jones filed a second EEOC complaint claiming violations of Title VII of the Civil Rights Act. The EEOC issued notices of right to sue based on both complaints.

On June 26, 2007, Jones filed suit in the United States District Court for the Northern District of Texas alleging claims of race discrimination and retaliation for complaining of race and sex discrimination in violation of Title VII of the Civil Right Act of 1964. By order dated August 13, 2008, the court dismissed Jones' complaint on summary judgment in favor of First Horizon.

On August 23, 2008, Jones filed a third EEOC complaint alleging disparate treatment in the terms and conditions of her workplace dating from February 2006 until November 1, 2006. The EEOC issued a right to sue letter.

On June 4, 2008, Jones filed a letter with OSHA alleging a SOX violation. On July 11, 2008, OSHA dismissed Jones' complaint as untimely. Jones objected to OSHA's findings and requested a hearing, attaching several documents, including her prior EEOC claims and a job performance appraisal that she had submitted along with her EEOC claims. Complainant's Request for Hearing at App. 3-6 (August 12, 2008).

Jones concedes that she did not timely file her SOX complaint within its 90-day statute of limitations. Indeed her complaint was not filed until over a year and a half after her termination. However, Jones claims that the doctrine of equitable tolling should be applied to preclude dismissal of her SOX complaint because she filed her SOX-related complaint in the wrong forum. The ALJ held that Jones did not satisfy any of the criteria for equitable modification and dismissed her complaint.

Jones timely appealed the ALJ's D. & O. to the Board. The Board issued a Notice of Appeal and Order Establishing Briefing Schedule and both parties filed briefs in response.

## 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, 2006-SOX-108; 2007-SOX-055, slip op. at 6 (ARB Apr. 30, 2008) (citing *Nixon v. Stewart & Stevenson Servs., Inc.*, ARB No. 05-066, ALJ No. 2005-SOX-001, slip op. at 6 (ARB Sept. 28, 2007)). 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) (2010), 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. *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 (ARB Dec. 13, 2002). "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. Envt'l Prot. Agency*, 284 F. Supp. 2d 67, 73 (D.D.C. 2003) (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). *See Webb v. Carolina Power & Light Co.*, 1993-ERA-042, slip op. at 4-6 (Sec'y July 17, 1995).

## DISCUSSION

Employees alleging employer retaliation in violation of the SOX must file their complaints with OSHA within 90 days after the alleged violation occurred (i.e., "when the discriminatory decision has been both made and communicated to the complainant"). 29 C.F.R. § 1980.103(d). It is undisputed that Jones did not file her complaint until June 4, 2008, which was over a year and a half after First Horizon terminated her employment on November 1, 2006.

In determining whether the Board should toll a statute of limitations, we rely on 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,[1] the court articulated three principal situations in which equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; and (3) 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).

Although Jones' inability to satisfy one of these elements is not necessarily fatal to her claim, courts "'have generally been much less forgiving in receiving late filings where the

[1] 15 U.S.C.A. § 2622 (West 2004).

claimant failed to exercise due diligence in preserving [her] legal rights.'" *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). Furthermore, ignorance of the law is generally not a factor that warrants equitable modification. *Flood v. Cendant Corp.*, ARB No. 04-069, ALJ No. 2004-SOX-016, slip op. at 4 (ARB Jan. 25, 2005). Jones bears the burden of justifying the application of equitable modification principles. *See Wilson*, 65 F.3d at 404.

Jones argues that we should toll the limitations period because she filed in the wrong forum and because the EEOC and her former attorney failed to instruct her that she should file her claim with the Department of Labor. She argues that she has been reasonably diligent in pursuing her whistleblower claim because she filed with the EEOC, she asked her former attorney to file a whistleblower complaint on several occasions, and her new attorney filed the claim with the Department of Labor less than three months after joining the case. She asserts that the ALJ failed to consider all of her evidence and mischaracterized her 2008 affidavit. She also argued that the statute of limitations for SOX claims is permissive, not mandatory.

First Horizon notes that Jones' EEOC complaint identified race, sex, and retaliation related to race and sex as the categories of discrimination she encountered. There was no mention of protected whistleblowing, mortgage fraud, or securities violations on the face of her EEOC complaints. They argue that the one paragraph that mentioned fraud was contained in an exhibit appended to the EEOC complaint and was not the type of precise statutory complaint that would excuse Jones from filing in the correct forum. Additionally, First Horizon argues that Jones' ignorance of the law and any negligence or lack of knowledge on her attorney's part are not sufficient to invoke the doctrine of equitable tolling. First Horizon also asserts that Jones was not diligent in pursuing her complaint because she was aware of the mortgage fraud as early as June 2006, but did not want to "rock the boat" at that time.

The ALJ correctly concluded that Jones' EEOC claims do not precisely state a SOX whistleblower claim because they solely concern discrimination based on sex and race and retaliation for Title VII suits based on race and sex. Jones claims that her SOX allegations were contained in a letter she wrote in rebuttal to a negative job performance evaluation that First Horizon issued. In the letter, Jones referred to accusations of fraudulent conduct committed by loan officers at First Horizon. Jones forwarded this letter to the EEOC following both her September 2006 and December 2006 complaints to the EEOC. She argues that because she submitted this letter to the EEOC in connection with her EEOC complaints, her SOX claim should be considered timely filed in the wrong forum. However, as the ALJ explained, the letter appended to the EEOC complaint contained no allegation that her termination was related to any protected whistleblower activity alleged. D. & O. at 3.

Referencing concerns of potential corporate fraud in a letter appended to a complaint alleging sex and race discrimination does not constitute a precise statement of a SOX claim in

another forum. Although her letter rebutting her negative job performance evaluation contains a bare recital of background facts that might be considered protected activity under SOX, a passing reference to complaining about fraud, contained in a letter rebutting a performance appraisal, attached to an EEOC complaint is simply too tenuous and indirect a path to justify equitable tolling.

The ALJ also correctly concluded that equitable tolling was unwarranted in light of Jones' claim that her attorney failed to timely file a SOX complaint despite her repeated requests. D. & O. at 4. Again, ignorance of the law is generally not a factor that warrants equitable modification. *Flood*, ARB No. 04-069, slip op. at 4. Additionally, "ultimately clients must bear the consequences of the acts and omissions of their attorneys." *Moldauer v. Canadaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-026, slip op. at 6 (ARB Dec. 30, 2005) (*citing Pioneer Investment Services Co., v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396 (1993); *Malpass v. General Elec. Co.*, Nos. 1985-ERA-038, 39 (Sec'y Mar. 1, 1994)).

Jones' claim that the EEOC failed to instruct her how to file a SOX complaint does not justify application of equitable tolling. Because there was no evidence that either the EEOC or First Horizon "actively misled" her, equitable modification is inapplicable. *See Allentown*, 657 F.2d at 20. Neither the EEOC nor First Horizon was under any obligation to inform her of Section 806 and its filing requirements. *See Daryanani v. Royal & Sun Alliance*, ARB No. 08-106, ALJ No. 2007-SOX-079, slip op. at 6 (ARB May 27, 2010).

## CONCLUSION

For the foregoing reasons, we affirm the ALJ's finding that Jones' Section 806 complaint was untimely filed and that she failed to satisfy the criteria for equitable tolling. She also failed to establish any other grounds for finding equitable relief. Accordingly, we **AFFIRM** the ALJ's Decision and Order Dismissing the Complaint and **DENY** Jones' Petition for Review.

**SO ORDERED.**

**JOANNE ROYCE**
**Administrative Appeals Judge**

**PAUL M. IGASAKI**
**Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**
**Administrative Appeals Judge**