In the Matter of:

BRIAN A. SMALE,

COMPLAINANT,

v.

TORCHMARK CORPORATION,

RESPONDENT.

ARB CASE NO. 09-012

ALJ CASE NO. 2008-SOX-057

DATE: November 20, 2009

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Brian A. Smale, *pro se*, Plano, Texas

For the Respondent:
Michael H. Collins, Esq., *Locke Lord Bissell & Liddell LLP*, Dallas, Texas

FINAL DECISION AND ORDER

The Complainant, Brian A. Smale, filed a retaliation complaint under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX) and its implementing regulations.[1] He alleged that his former employer, Torchmark

[1] 18 U.S.C.A. § 1514(A) (West Supp. 2008); 29 C.F.R. Part 1980 (2009). The 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),

Corporation, violated the SOX whistleblower protection provision by discharging him on February 2, 2007, because he engaged in protected activity. Torchmark avers that it terminated his employment because he failed to follow directions and to appropriately communicate with management, and because he submitted three improper Risk Observations. After finding that Smale had not timely filed his complaint within 90 days after the date of termination, a Labor Department Administrative Law Judge (ALJ) recommended that Smale's complaint be dismissed. We affirm.

BACKGROUND

Torchmark Corporation, a holding company, "specializes in life and supplemental health insurance for 'middle income' Americans marketed through multiple distribution channels including direct response, and exclusive and independent agencies."[2] Torchmark employed Smale as a Senior IT Auditor in the Internal Audit Department.[3] At a meeting on February 1, 2007, Smale submitted three Risk Observations to Torchmark pursuant to its prescribed form.[4] The three Risk Observations concerned the Health Insurance Portability and Accountability Act (HIPAA), the SOX, and the efficiency of audit time reporting methods.[5] Torchmark terminated Smale's employment the next day, on February 2, 2007.[6] Smale averred that Torchmark did not inform him of the reasons that it fired him and when he asked if he could be sent a letter explaining the reasons to him, he was told that he would not be sent an explanation.[7] Smale alleged that Torchmark disciplined other members of the audit department for various reasons but did not fire them.[8]

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 Respondent's Response to Complainant's Initial Brief at 3.

3 Comp. Br. at 4.

4 *Id.* at 4-5.

5 *Id.*

6 *Id.* at 4.

7 *Id.* at 5.

8 *Id.* at 12.

On the day that Torchmark terminated his employment, Smale wrote a letter to Torchmark's General Counsel and the Audit Committee Chairman regarding HIPAA violations at a Torchmark subsidiary.[9] Within a week of sending the letter, Phillip Jones, an attorney for Torchmark contacted Smale. Jones met with Smale on February 14, 2007, and according to Smale, Jones told him that Torchmark fired him because he filed the third Risk Observation regarding audit time reporting.[10] After some discussion in which Smale alleges that he suggested that Torchmark rehire him as a HIPAA Security Officer and Jones offered a monetary settlement, Smale says that he indicated that he would like to submit to mediation.[11] Smale states in his brief that "in response to discovery admissions during court ordered arbitration and Administrative Law Judge case, Respondent, without affidavits from Jones, stated they could not remember Smale offering to be re-hired as the HIPAA Security Officer and denied stating Smale's third Risk Observation was the reason for Torchmark's decision to terminate Smale's employment."[12]

On March 2, 2007, Smale and three attorneys representing Torchmark met in mediation proceedings in which no settlement was reached.[13] On May 3, 2007, Smale filed a discrimination suit in a Texas district court based on an EEOC right to sue letter from the Texas Workforce Commission.[14] Smale alleged that he was unable to obtain necessary documentation from Torchmark in this matter.[15] The lawsuit was eventually sent to arbitration.[16] In December of 2007 and January of 2008, the parties engaged in settlement discussions, which led to a draft settlement agreement that Smale alleges focused on release of claims Smale could have made specifically regarding the SOX.[17]

After the 90-day period for filing a SOX complaint following his termination had passed, on February 1, 2008, Torchmark submitted an affidavit to the American Arbitration Association stating that it had discharged Smale, in part, because he submitted the three improper Risk

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9 *Id.* at 5-6.

10 *Id.* at 6.

11 *Id.* at 6-7.

12 *Id.* at 7.

13 *Id.* at 7, 12.

14 *Id.*

15 *Id.*

16 Resp. Br. at 2.

17 Comp. Br. at 9.

Observations.[18] On February 26, 2008, the arbitrator granted Torchmark's motion for summary judgment prior to the hearing because the deadline for filing additional complaints had passed.[19]

Smale filed his SOX complaint on February 19, 2008, with the Department of Labor's Occupational Safety and Health Administration (OSHA).[20] After an investigation, OSHA found that the complaint was untimely and dismissed the claim.[21] Smale filed his objections to OSHA's ruling and requested a hearing before a United States Department of Labor Administrative Law Judge (ALJ).[22]

Smale's complaint was assigned to an ALJ for a hearing. The ALJ issued a briefing schedule order, and shortly thereafter, Smale filed an amended complaint with the OALJ, in which he alleged that Torchmark discharged him on February 2, 2007, in violation of the SOX; that he engaged in protected activity; and that he was entitled to monetary damages in the amount of $2,213,394.00. He also requested permission to file a response to Torchmark's anticipated motion for summary decision and to request equitable relief in the form of equitable tolling. On September 17, 2008, Torchmark filed its Answer to the Complainant's Amended Complaint, a motion for summary decision, and a brief in support of its motion for summary decision.

In its motion for summary decision, Torchmark argued that the statute of limitations barred Smale's claim and that consequently, the ALJ must dismiss it. The ALJ issued an Order to Show Cause ordering Smale to respond to Torchmark's motion for summary decision.

Smale responded to the Motion for Summary Decision on September 30, 2008. Relevant to the issue of timeliness, Smale asserted that equitable tolling applied to his case because Torchmark actively misled him respecting the cause of action. He explained that when he was first terminated, he asked and attempted to find out the reasons for his termination, but he was not provided with any. He then stated that Torchmark's attorney actively misled him a few weeks later when he told Smale that he was fired for submitting the third Risk Observation concerning internal audit time reporting. He stated that he did not know that he was fired in part for submitting the three improper Risk Observations, the second of which concerned a violation of the SOX, until February 1, 2008, when his former supervisor, Kathy A. McHaney, submitted an affidavit to that effect in arbitration. Smale argues that the McHaney affidavit was the first

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18 *Id.*; McHaney Affidavit, Resp. Ex. A to Torchmark's Motion for Summary Decision and Brief in Support Thereof.

19 *Id.* at 13.

20 Initial Brief for the Complainant at 2 (Nov. 28, 2008).

21 Secretary's Findings at 1; Comp. Br. at 14.

22 ALJ Notice of Hearing and Pre-Hearing Order at 1.

notice that he had that he had a cause of action under the SOX and that the affidavit shows that his protected activity under the SOX was a contributing factor in his termination.

On October 2, 2008, Torchmark sent a letter to the ALJ regarding Smale's equitable tolling argument, stating that its attorney did not mislead Smale as to the reasons for his termination. The letter also stated that Smale did not rely on anything its attorney said in any event, since he filed HIPAA and other claims even though its attorney allegedly told Smale that he was fired for filing a report on time reporting mechanisms. Smale responded to Torchmark's letter and stated that he was dissuaded from filing a SOX claim by Torchmark's attorney on February 14, 2007.

On October 6, 2008, the ALJ issued an Order on Motion for Summary Decision and Dismissal pursuant to 29 C.F.R. Part 18.40. The ALJ dismissed Smale's complaint because he found that the record presented no genuine issue of material fact that would allow for a finding that the Complainant filed his complaint within the established time period or that he was entitled to equitable relief. The ALJ reasoned that Smale knew that he had engaged in protected activity and that Torchmark terminated his employment. He noted that Smale failed to file his claim within the 90-day time period. The ALJ further found that Torchmark's assertion that Smale was fired for non-protected activity did "not constitute actively misleading him as to the cause of action and require a tolling of his time period."[23] Thus, the ALJ granted Torchmark's motion for summary decision.

Smale timely appealed the ALJ's order to the Administrative Review Board in his Petition for Review dated October 17, 2008, and the Board issued an order setting a briefing schedule for the parties. Both parties submitted briefs in response to the Board's briefing order.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX.[24] The Board reviews an ALJ's recommended grant of summary judgment de novo.[25] 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.[26] Thus, pursuant to 29 C.F.R. § 18.40(d) (2009), the ALJ may issue summary decision "if the

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[23] ALJ Order on Motion for Summary Decision and Dismissal at 3 (Oct. 6, 2008).

[24] Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

[25] *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) (citing *Nixon v. Stewart & Stevenson Servs., Inc.*, ARB No. 05-066, ALJ No. 2005-SOX-001, slip op. at 6 (ARB Sept. 28, 2007)).

[26] *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-026, slip op. at 3 (ARB Dec. 30, 2005)

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.[27] "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.'"[28] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[29] 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."[30]

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").[31] It is undisputed that Smale did not file his complaint until February 18, 2008, which was over one year after Torchmark terminated his employment on February 2, 2007. Accordingly, Smale's complaint is untimely. However, SOX's limitations period is not jurisdictional, and therefore it is subject to equitable modification.[32] But the Supreme Court has noted that equitable relief from limitations periods is "typically extended ... only sparingly."[33]

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[27] *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).

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

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

[30] 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).

[31] 29 C.F.R. § 1980.103 (d) (2009).

[32] *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).

[33] *Irwin v. Veterans Admin.,* 498 U.S. 89, 96 (1990).

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.*[34] In that case, which arose under the whistleblower provisions of the Toxic Substances Control Act,[35] 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."[36]

Although Smale's inability to satisfy one of these elements is not necessarily fatal to his claim, courts "'have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.'"[37] Furthermore, ignorance of the law is generally not a factor that can warrant equitable modification.[38]

Smale bears the burden of justifying the application of equitable modification principles.[39] He argues that we should toll the limitations period because Torchmark's attorney,

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[34] 657 F.2d 16, 19-21 (3d Cir. 1981).

[35] 15 U.S.C.A. § 2622 (West 2004).

[36] *Allentown*, 657 F.2d at 20 (internal quotations omitted). This case arises in the Fifth Circuit, in which the court has distinguished between equitable tolling and equitable estoppel as grounds for tolling limitations periods. *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878-79 (5th Cir. 1991). In *Rhodes*, the court wrote that equitable tolling "'focuses on the plaintiff's excusable ignorance of the employer's discriminatory act'" and equitable estoppel "'examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights.'" *Id.* at 878-79 (quoting *Felty v. Graves-Humphreys Co.*, 785 F.2d 516, 519 (4th Cir. 1986)), *but see Ramirez v. City of San Antonio*, 312 F.3d 178, 184 (5th Cir. 2002) (stating that equitable tolling applies only when an employer's affirmative acts mislead the employee), *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 391 (5th Cir. 2002) (stating that equitable estoppel does not hinge on misconduct of the defendant, but on "whether the defendant's conduct, innocent or not, reasonably induced the plaintiff not to file suit within the limitations period."). The *Rhodes* articulation appears to be the rule most consistently followed by the Fifth Circuit and in any event application of either interpretation would not change the outcome of this case as fully explained below.

[37] *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).

[38] *Flood v. Cendant Corp.*, ARB No. 04-069, ALJ No. 2004-SOX-016, slip op. at 4 (ARB Jan. 25, 2005).

[39] *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).

Phillip Jones, actively misled him as to why he was terminated.[40] Under an equitable estoppel analysis the Board has held that the party invoking the doctrine must show 1) the respondents wrongfully concealed their actions, 2) the complainant failed to discover the operative facts that are the basis of the cause of action within the limitations period; and 3) the complainant acted diligently until discovery of the facts.[41]

Here, Torchmark did not conceal any actions. Smale knew on February 2, 2007, that Torchmark had terminated his employment, and he knew that he had submitted risk observations the day prior to his termination that concerned the SOX. Assuming all facts in the light most favorable to Smale, he had 90 days from the day of his termination to file his SOX claim because this was when he received "final, definitive, and unequivocal notice" of an adverse employment action by Torchmark.[42] Rather than file within this time period, however, he waited over a year before submitting his complaint.

As explained by the Fifth Circuit, "a showing of deception as to motive supports equitable estoppel only if it conceals the very fact of discrimination; equitable estoppel is not warranted where an employee is aware of all of the facts constituting discriminatory treatment but lacks direct knowledge of the employer's subjective discriminatory purpose."[43] This precept is applicable here – Smale knew that he had engaged in protected activity with respect to the SOX and that he had been adversely affected in the terms of his employment when he was terminated; the only thing he did not know was whether there was discriminatory purpose. Therefore, application of equitable estoppel is not warranted. Even if Jones told Smale that he was fired due to audit reporting, that did not preclude the possibility that there were additional reasons for his firing, including the SOX Risk Observation. Furthermore, Smale's actions belie his assertion that he believed, after speaking with Jones, that Torchmark fired him only because he filed Risk Observation Report 3 on time auditing. As Torchmark has argued, this allegation is simply not consistent with the fact that Smale filed a HIPAA complaint (the subject of Risk Observation 1) in response to his termination, as well as complaints based on race discrimination and retaliation. Thus, Smale has failed to raise a question of material fact regarding the issue whether Torchmark either innocently or intentionally induced Smale not to file within the limitations period.

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[40] Comp. Pet. for Rev. at 3.

[41] *Overall v. Tenn. Valley Authority*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-053, slip op. at 39-40 (ARB Apr. 30, 2001) (citations omitted).

[42] *Thissen v. Tri-Boro Constr. Supplies, Inc.*, ARB No. 04-153, ALJ No. 2004-STA-035, slip op. at 5 (ARB Dec. 16, 2005).

[43] *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1216-17 (5th Cir. 1992). *Accord Coppinger-Martin v. Nordstrom, Inc.*, ARB No. 07-067, ALJ No. 2007-SOX-019, slip op. at 6 (ARB Sept. 25, 2009) (concealing the reason for an adverse employment action does not toll the statute of limitations governing a whistleblower claim, nor does it estop the employer from asserting timeliness as a defense).

Smale argues in his brief that he could not bring his claim until he knew that Torchmark terminated his employment in part due to his SOX-related Risk Observation because otherwise he would be risking a determination that his suit was frivolous and potentially an award against him for attorneys' fees. While a complainant's burden to establish the elements of his claim may be difficult, it is still the complainant's burden to do so. Smale's argument confuses notice with evidence. As the ALJ quoted from *Halpern*, "[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 pursuant to SOX."[44] To toll a limitations period until a complainant acquired evidence of motive "would abort the policy of the law of repose in statutes of limitations of diligence in the equitable principles permitting suspension of them."[45]

CONCLUSION

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

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

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[44] ALJ Order on Motion for Summary Decision and Dismissal at 2; *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 5 (Aug. 31, 2005) (citations omitted).

[45] *Hill v. U.S. Dep't of Labor*, 65 F.3d 1331, 1338 (6th Cir. 1995) (quoting *Pinney Dock & Transp. v. Penn Central Corp.*, 838 F.2d 1445, 1478 (6th Cir. 1988).