



In the Matter of:

LAURA BUTLER,

ARB CASE NO. 09-047

COMPLAINANT,

ALJ CASE NO. 2009-SOX-001

v.

DATE: February 17, 2011

ANADARKO PETROLEUM CORP.,

RESPONDENT.

Appearances:

For the Complainant:

Laura J. Butler, pro se, Houston, Texas

For the Respondent:

Holly H. Williamson, Esq., *Hunton & Williams LLP*, Houston, Texas

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

FINAL DECISION AND ORDER OF REMAND

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 (West Supp. 2010); 29 C.F.R. Part 1980 (2009). Laura Butler filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Anadarko Petroleum (Anadarko) violated the SOX by terminating her employment in retaliation for engaging in protected activity. On December 30, 2008, a Labor Department Administrative Law Judge (ALJ) recommended dismissal of the complaint as untimely filed. We reverse and remand.

BACKGROUND

Laura Butler began providing land-related services for Anadarko Petroleum in 2003. Anadarko terminated her employment on May 22, 2006. Shortly after Anadarko fired her, Butler contacted OSHA for guidance. Pet. for Rev. at 2; Br. at 2, 3.¹ Butler initially followed OSHA's instructions by going to the OSHA website to fill out a form on the internet. The form she found allegedly related to "physical injury encountered on the job" rather than the "circumstances" associated with her dismissal. Pet. for Rev. at 2. Consequently, Butler did not file the form with OSHA. On June 26, 2006, Butler appeared in person at the Federal Bureau of Investigation (FBI) with typed testimony of the events of her case. Butler Resp. to Show Cause at 2. The following day, she sent a copy of her testimony to the Internal Revenue Service's Tax Fraud Department. *Id.*; Br. at 3. Thereafter, on July 31, 2006, Butler filed a complaint in the Southern District of Texas, alleging in part that Anadarko terminated her employment in violation of SOX's whistleblower provisions. *See* Anadarko Reply Br. Ex. 8, at 12.

On December 15, 2006, Butler submitted the material she filed with the district court and the FBI to OSHA. Br. at 3. OSHA concluded that the filing deadlines should be tolled because Butler timely filed the claim in the wrong forum. OSHA Findings at 2 (Sept. 3, 2008). Thereafter, OSHA considered Butler's SOX complaint and concluded that Anadarko had no knowledge of her protected activity and thus did not terminate her in retaliation for it. OSHA Findings at 4. Butler objected to OSHA's findings and requested a hearing with the Office of Administrative Law Judges.

On November 12, 2008, the ALJ assigned to the case issued a sua sponte order asking Butler to show cause why her OSHA complaint was timely filed. Butler responded that the filing deadline should be equitably tolled because she filed the precise statutory claim in the wrong forum. On December 30, 2008, the ALJ concluded that Butler failed to demonstrate that the filing deadline should be equitably modified. Specifically, the ALJ concluded that the FBI letter and July 31 district court complaint did not contain valid SOX complaints filed in the wrong forum. Butler appealed the ALJ's R. D. & O. 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

¹ The facts surrounding the conversation with OSHA were not part of the record below.

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.”

DISCUSSION

An employee alleging retaliation under SOX must file a complaint within ninety (90) days of the date on which the alleged violation occurred.² 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 14 (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).

Because Butler was fired in May 2006, the OSHA complaint she filed on December 15, 2006 was untimely on its face. Similar to other whistleblower statutes, 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. Equitable tolling and equitable estoppel are different and distinct concepts in equity. *Hyman v. KD Resources*, 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).

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.”).

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 (West 2004), 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). Butler 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).

Butler argues that her filing deadline should be equitably tolled because she filed the precise statutory claim in the wrong jurisdiction. Considering this claim, the ALJ held that the communication to the FBI did not qualify as a SOX complaint. R. D. & O. at 2. The ALJ noted that the only mention of something SOX related in the FBI communication was the statement that Butler’s attorney sent a letter to the CEO offering to mediate the discrimination claim and giving notice of a potential SOX whistleblower complaint. R. D. & O. at 2; Butler Resp. to Show Cause, Ex. 1 (Testimony), at 2.

On appeal, Butler claims that the ALJ erred and that her letter delivered on June 26, 2006, to the FBI constitutes a precise statutory claim filed in the wrong forum. We disagree. The communication itself does not contain a whistleblower complaint, but rather a timeline of the events surrounding Butler’s grievance. For example, instead of concluding with a request for reinstatement and damages, Butler concludes that “I am forwarding this to you, the FBI, because I believe this is a violation against the IRS, the SEC and the stockholders of Anadarko Corporation.” Testimony at 5. We agree with the ALJ and Anadarko that the FBI communication does not contain a valid SOX complaint to equitably toll Butler’s filing requirement.

On July 31, 2006, Butler filed a complaint in the Southern District of Texas alleging in part that Anadarko terminated her employment in violation of SOX’s whistleblower provisions.³ The ALJ held that the district court count alleging a Section 806 complaint was not specific enough to be considered “the precise claim in the wrong forum” for purposes of tolling the statute. R. D. & O. at 2-3. We disagree with the ALJ’s ruling. Essentially, the ALJ’s ruling focused on whether Butler’s federal court complaint sufficiently stated a prima facie SOX claim rather than whether it alleged enough to meet the time limitations bar in the SOX statute. The SOX regulations contemplate that OSHA may interview a complainant to supplement the complaint and then determine whether a prima facie claim exists. See 29 C.F.R. § 1980.104(b). Logically, then, a SOX complainant may satisfy the time limitation bar by filing an initial,

³ See Anadarko Reply Br. Ex. 8, at 12. The SOX claim was eventually removed from the federal complaint.

written complaint that may fall short of a prima facie case but clearly identifies that it is a SOX claim. Therefore to the extent the ALJ's R. D. & O. may be interpreted as defining "precise" to require that the complaint filed in the wrong forum must establish a "prima face case," we reject it as being overly narrow and inconsistent with equitable tolling principles. When the claim is filed in the wrong forum, it should be measured against the same standards under which an OSHA complaint is measured for timeliness. Additionally, the wrongly filed claim must be the same claim as the OSHA complaint ultimately filed. If the ALJ was addressing the sufficiency of the allegations, the ALJ should have considered the facts contained in the record OSHA forwarded, given that OSHA supplements the facts in the original complaint and forwards the complaint and the Secretary's findings to the Office of Administrative Law Judges. 29 C.F.R. § 1980.104(b), 105(b). The only issue the ALJ addressed in this case was the time limitations issue.

With these principles in mind, we find that Butler's federal court complaint (1) is the precise statutory claim (i.e., the same claim) filed with OSHA on December 15, 2006, and (2) it satisfied the initial filing requirements required of other SOX complainants who file with OSHA within the time limitations. It is easy to determine that it is the precise statutory claim (the same claim) because the federal complaint specifically referenced a March 9, 2006 letter allegedly containing SOX disclosures and sent to James T. Hackett, which was the same letter OSHA reviewed to find that Butler engaged in protected activity. See Federal Complaint ¶¶10 and 45; Secretary's Findings, p. 2. The federal complaint also included enough information for timeliness purposes. In addition to the referenced March 9, 2006 letter, Count 5 in the federal complaint is titled "Retaliation in Violation of the Sarbanes-Oxley Act." The Count contains several averments alleging that Butler reported potential SOX violations to the Anadarko CEO and that Butler was terminated in retaliation for reporting these potential violations. Butler further claimed damages for the retaliation. See Anadarko Reply Br. Ex. 8, at 12. We conclude the SOX claim filed in district court comports with the requirements of 29 C.F.R. § 1980.103(b) for purposes of tolling the statute's filing requirement.

In her briefs to the Board, Butler admitted to contacting the DOL and OSHA in late May just after her termination and was told by OSHA to file a form on a website.

Shortly after Respondent terminated Complainant's employment, Complainant contacted the offices of the Department of Labor and was advised to Contact the offices of OSHA. The offices of OSHA instructed Complainant to fill out a form for the complaint. The form of the complaint on the internet as of May, 2006, was inadequate as it did not lend itself to complaints for fraud and SEC violations.^[4]

Receiving the appellate material Butler submitted to the Board, Anadarko raises the issue that Butler is precluded from equitable tolling because OSHA directed her to the proper forum, but she declined that guidance. Contrary to Anadarko's argument, if Butler's admissions are true, we see such admissions as demonstrating that she attempted to do what OSHA suggested.

⁴ Br. at 2, 3. It does not appear that Butler informed Anadarko or the ALJ of this fact below.

We do not believe that the facts Butler alleged regarding her communication with OSHA alter her entitlement to equitable tolling, given that the internet form she allegedly found was limited to on-the-job physical injuries. Nevertheless, these facts were not presented or litigated below and, therefore, the import of the May communication to OSHA is not properly before us for appellate review. While Butler was entitled below to make the argument of equitable tolling, Anadarko too was entitled to a full statement of the facts to present counter arguments. The parties are not foreclosed from engaging in discovery as to the revelations Butler made on appeal, that she spoke with OSHA shortly after her job was terminated. We hold that the ALJ erred in not consider the July 31 district court complaint a valid SOX complaint for purposes of tolling. Because the ALJ did not have the benefit of all the facts, we limit our holding to the ALJ's consideration of the July 31 complaint. We make no additional findings on Butler's equitable tolling of the filing deadlines and remand for further proceedings. On remand and consistent with this Order, the parties may further adjudicate equity issues based on newly discovered evidence not addressed in this Order.

CONCLUSION

Butler argues below and on appeal that SOX's filing requirement should be equitably modified because she filed a precise statutory claim in the wrong forum. We find the ALJ erred in finding the July 31st district court complaint insufficient for purposes of tolling and thus **REVERSE** and **REMAND** Butler's claim to the ALJ for further proceedings consistent with this order.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge