



**In the Matter of:**

**MILES HYMAN,**

**ARB CASE NO. 09-076**

**COMPLAINANT,**

**ALJ CASE NO. 2009-SOX-020**

**v.**

**DATE: March 31, 2010**

**KD RESOURCES, et al.,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Miles Hyman, *pro se*, North York, Ontario, Canada**

***For the Respondents, KD Resources, LLC and Braesridge Energy, LLC:***

**Mark J. Oberti, Esq., *Seyfarth Shaw LLP*, Houston, Texas**

***For the Respondent, Platinum Energy Resources, Inc.:***

**Joanne M. Vorpahl, Esq., *Porter & Hedges, L.L.P.*, Houston, Texas**

**DECISION AND ORDER OF REMAND**

The Complainant, Miles Hyman, 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) (West Supp. 2009)(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.

Hyman alleged that his former employer, KD Resources Corporation, violated the SOX whistleblower protection provisions by discharging him on June 5, 2008, because he engaged in protected activity. Hyman filed his initial complaint of unlawful retaliation with the United States Department of Labor on November 11, 2008. The Department's Occupational Safety and Health Administration (OSHA) dismissed Hyman's claim as untimely filed. Hyman then filed his complaint with the Office of Administrative Law Judges (OALJ). In response, the presiding Administrative Law Judge (ALJ), sua sponte, issued an Order to Show Cause. Upon consideration of Hyman's response, the ALJ issued his Decision and Order (D. & O.) dated March 18, 2009, dismissing Hyman's complaint as untimely. Hyman filed a petition requesting the Administrative Review Board (ARB or the Board) to review the D. & O. For the following reasons, we remand this matter to OALJ for further proceedings consistent with this Decision and Order of Remand.

## BACKGROUND

On June 5, 2008, Complainant Myles Hyman was terminated from his employment with Respondent KD Resources, LLC. Hyman alleged that KD Resources, LLC is an affiliate of Respondent Platinum Resources Energy, LLC, and also of Respondent Braesridge Energy, LLC, which Hyman further alleges is a parent company of KD Resources.<sup>1</sup> (The Respondents are hereafter collectively referred to as "KD Resources."). On November 11, 2008, Hyman filed his SOX complaint with OSHA alleging that his termination was in retaliation for having provided information to his supervisors that a KD Resources employee, who controlled the company's accounting system, had a prior conviction for fraud and embezzlement, and that the company had entered into a swap agreement that was fraudulent. Before the ALJ, Hyman further alleged that he believed the conduct at issue was part of a scheme to commit mail fraud, wire fraud, and securities fraud "once KD Resources was rolled into Platinum Energy." (Hyman's submission of February 14, 2009 in response to Order to Show Cause). After an investigation, OSHA found that the complaint was untimely, having been filed approximately 160 days after Hyman's termination, and it dismissed the claim.

Hyman filed his objections to OSHA's ruling and requested a hearing before a Department of Labor ALJ. Noting Hyman's failure to file his initial complaint within the 90-day limitations period prescribed by 29 C.F.R. § 1980.103, the ALJ issued an Order to Show Cause,

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<sup>1</sup> In his complaint filed with OSHA, Hyman specifically alleged that he was "a former employee of KD Resources, which is an affiliate of Platinum Energy (a publicly traded company) and also an affiliate of Braesridge Energy, which is a parent company of KD Resources" and that he "often performed work directly for Platinum Energy, and KD Resources and its employees acted as agents for Platinum Resources."

sua sponte, directing Hyman to show cause as to why the complaint should not be dismissed because it was not timely filed.

In response to the Order to Show Cause, Hyman established through the documentary evidence he provided with his submission of February 14, 2009,<sup>2</sup> that he was led to believe that he would be returned to his former employment or alternatively given a one-year consulting contract, that he would be financially compensated for having been wrongfully terminated, and that KD Resources would address the SOX compliance issues that Hyman had raised.<sup>3</sup> Based on

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<sup>2</sup> With the documentation provided, Hyman also submitted a five-page explanation. As subsequently noted, his characterization of events as contained in the explanation, which was submitted pro se, is at variance with the documentary evidence, which consists primarily of email correspondence between the parties occurring during the period following Hyman's termination. Consequently, where such discrepancies occur, for purposes of this review, we will rely upon the information contained in the documentary evidence.

<sup>3</sup> The summation of the assurances that Hyman received following his termination is based upon three particularly relevant documents attached to his February 14, 2009 submission:

Claimant's Exhibit 29 (email from Hyman to KD representative dated October 15, 2008), wherein Hyman recounts that at his initial meeting following his discharge with the Respondents, on August 23, 2008, those in attendance agreed that he had been wrongfully discharged and that he "had to be properly compensated . . . to settle the matter," and where the parties further discussed the prospects of Hyman "getting [his] job back or in the alternative a one-year consulting contract to clear up the irregularities at KD." In this correspondence, Hyman further noted that he was assured "that the irregularities I complained about would be addressed and corrected, that an auditor would be called in, and that the current management staff of KD would be replaced."

Claimant's Exhibit 5 (correspondence from Hyman to Barry Kostiner, CEO of Platinum and part owner of KD Resources, dated September 5, 2008), wherein Hyman presents the proposed solution that had apparently been requested of him. By this document Hyman indicates that he is agreeable to the payment of \$138,000 constituting the "difference in pay that I would have earned for 2008 if I had not been wrongfully dismissed," "a one year consulting contract," and that he be given authority to resolve the SOX compliance issues.

Claimant's Exhibit 13 (email by Hyman to Kostiner, dated September 22, 2008), which is stated to comprise an overview of the events that had transpired and the agreement he understood to have been reached between the parties to satisfactorily resolve his termination and the SOX compliance issues. In the email Hyman states to Kostiner (the primary representative with whom he corresponded following the August meeting): "If you recall, based on my rendition [on August 23, 2008] of events that took place at KD and the few documents that I presented to support my story, the unanimous conclusion was that I was wrongfully dismissed and that I had to be made whole. To that end Ralph Ghermezian [a part owner in KD] asked me to send him a list of my damages, which I did [on September 5, 2008] along with the proposed solution that you and I talked about after the meeting and again on the phone on August 26th." More specifically, Hyman notes in this email that at the August 23rd meeting they discussed payment of \$75K to \$100K "and my job back or in the alternative the money and a one-year consulting contract", and that on August 26th when Hyman

this, Hyman argued that his failure to timely file his complaint should be excused on equitable estoppel grounds.

Relying upon the three bases for estoppel identified in *School District of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981),<sup>4</sup> the ALJ found that Hyman's submission lacked necessary evidence to support equitable tolling of the SOX 90-day filing period in several respects:

There is no evidence or argument submitted that Complainant was unable, despite due diligence, to obtain vital information bearing on the existence of his complaint. Likewise, there is no evidence submitted that any Respondents actively mislead [sic] Complainant respecting his SOX claim, that he was in some way prevented from asserting his rights, or that he raised the precise statutory claim in another forum. Complainant only asserts that at a meeting on August 23, 2008, Respondents promised to pay him a substantial severance and that in later emails the settlement offer and terms of his reemployment with the company were discussed.

D. & O. at 2. Accordingly, the ALJ dismissed Hyman's complaint as untimely filed.

Hyman timely appealed the ALJ's D. & O. to the Board. In support of his contention on appeal that the ALJ committed reversible error, Hyman raises several arguments, among the most pertinent being that the Respondents, either or all, through one or more agents, made certain representations upon which Hyman reasonably relied in foregoing the filing of his SOX complaint within the 90-day limitations period, and thus that the period for filing his complaint was equitably tolled.<sup>5</sup>

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revisited the subject of returning to work, Kostiner agreed that this "was a good idea" and indicated that he would get back to Hyman on the matter. Finally, Hyman recounts with specificity his understanding of the efforts KD Resources *et al.* had agreed to undertake to correct the alleged SOX violations.

<sup>4</sup> "[W]hen (1) the defendant has actively misled the plaintiff respecting the cause of action, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." *Allentown*, 657 F.2d at 20.

<sup>5</sup> Hyman also makes several arguments based on factual assertions for which there is no evidentiary support in the record or that are based upon exhibits submitted for the first time on appeal to the ARB. Because Hyman did not submit the evidence upon which these arguments are based in the first instance to the ALJ, we neither consider nor address these arguments on appeal. *See Halloum v. Intel Corp.*, ARB No. 04-068, ALJ No. 2003-SOX-007, slip op. at 8 n.1 (ARB Jan. 31, 2006).

The Respondents argue that the ALJ was correct in ruling that Hyman's complaint is barred by the SOX 90-day limitations period. The Respondents assert that there is no legitimate doubt that it terminated Hyman from his employment on June 5, 2008, and that equitable modification principles, as recognized by the ALJ, do not toll the running of the SOX limitations period for filing Hyman's complaint. The Respondents also argue that KD Resources and Braesridge Energy are not covered employers under SOX because neither is publicly traded, and maintain that Platinum Energy has no ownership or other interest in either of the other two companies. Thus, it is argued, the ALJ's D. & O. should be affirmed.

For the following reasons, the Board vacates the ALJ's D. & O. and remands this matter for further proceedings consistent with this Decision and Remand Order.<sup>6</sup>

### **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). Pursuant to the SOX and its implementing regulations, the ARB reviews the ALJ's factual determinations under the substantial evidence standard. *See* 29 C.F.R. § 1980.110(b).

We must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we "would justifiably have made a different choice had the matter been before us de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (citations omitted). The ARB reviews an ALJ's conclusions of law de novo. *Matthews v. Labarge, Inc.*, ARB No. 08-038, ALJ No. 2007-SOX-056, slip op. at 2 (ARB Nov. 26, 2008).

### **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 Hyman did not file his complaint until November 11, 2008, which was almost 160 days after KD Resources terminated his employment on June 5, 2008. However, in addressing the question of the timeliness of Hyman's complaint, the ALJ correctly recognized that the 90-day limitations period imposed by 18 U.S.C.A. § 1514A(b)(2)(D)<sup>7</sup> is not

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<sup>6</sup> Because the ALJ did not initially address the Respondents' challenge to Hyman's assertions of affiliation, agency and/or ownership by and between the three companies, giving rise to the issue of employer coverage under SOX, the ARB does not address this challenge on appeal, but leaves it for the ALJ to resolve upon remand of this case, should the Respondents again raise the issue.

<sup>7</sup> 18 U.S.C.A. § 1514A(b)(2)(D) provides: "An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs."

jurisdictional in the sense that noncompliance serves as an absolute bar to administrative action, and that the filing deadline is thus subject to equitable modification, i.e., tolling or estoppel. *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 11 (ARB Apr. 30, 2008); *Harvey v. Home Depot*, ARB Nos. 04-114, -115, ALJ Nos. 2004-SOX-020, -036, slip op. at 16 (ARB June 2, 2006). See *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982) (holding that the limitations period for a timely charge of discrimination under Title VII is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling).

Equitable tolling and equitable estoppel are different and distinct concepts in equity. “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). As the First Circuit further explained, while equitable tolling focuses upon a plaintiff’s excusable ignorance of the facts underlying his or her claim, “equitable estoppel occurs where an employee is aware of his [statutory] rights but does not make a timely filing due to his reasonable reliance on his employer’s misleading or confusing representations or conduct.” *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 752 (1st Cir. 1988).

The ALJ initially found that Hyman failed to invoke the standard for equitable tolling by finding that Hyman failed to establish that he was “unable, despite due diligence, to obtain vital information bearing on the existence of his complaint.” R. D. & O. at 2. On this point we do not disagree. See e.g., *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990) (equitable tolling arises where the employee “could not by the exercise of reasonable diligence have discovered essential information bearing on his claim”).

Where we find basis for reversible error is with respect to the ALJ’s determination that Hyman presented insufficient evidence in response to the Order to Show Cause to invoke equitable estoppel principles tolling the running of the SOX limitations period.<sup>8</sup> In reaching his conclusion that the evidence of record did not support tolling of the filing limitations period based on equitable estoppel grounds, the ALJ cited and exclusively relied on the three bases for estoppel identified in *School District of Allentown v. Marshall*, i.e., when:

- (1) the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
- (3) the plaintiff has

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<sup>8</sup> With regard to equitable estoppel, the ALJ determined that “there is no evidence submitted that any Respondents actively misled [sic] Complainant respecting his SOX claim, that he was in some way prevented from asserting his rights, or that he raised the precise statutory claim in another forum.” (D. & O. at 2).

raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

657 F.2d at 20. 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.<sup>9</sup> 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. 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, 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). *Accord Coke v. General Adjustment Bureau*, 640 F.2d 584, 589 (5th Cir. 1981) (en banc).

At first blush, the additional test recognized in *Bonham* and *Coke* might seem but a restatement of the first category recognized in *Allentown*. However, under this test it is immaterial whether the defendant engaged in intentional misconduct. “The rule does not hinge on intentional misconduct on the defendant’s part. Rather, the issue is whether the defendant’s conduct, innocent or not, reasonably induced the plaintiff not to file suit within the limitations period.” *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 865-66 (5th Cir. 1993).

Thus, for example, in *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 391 (2002), the Fifth Circuit (in which the instant case arises) held equitable tolling proper where the employer had mistakenly required its employees to sign claim release forms that later turned out to be invalid. In *Coke*, the Fifth Circuit *en banc* invoked equitable estoppel to toll the running of the limitations period where the employee, in reliance upon repeated assurances by his employer of its intention to reinstate him to his former position, failed to file an ADEA claim with the Secretary of Labor within the prescribed time period. Similarly, in *Bonham*, the Third Circuit held that the plaintiff provided sufficient evidence to defeat a summary judgment motion on equitable estoppel grounds where he established that his failure to file a timely complaint for wrongful discharge was attributable to his post-termination effort to amicably resolve his employment situation by seeking to secure alternative employment with the employer, at least for the period during which his effort was met with positive signals from the employer. 569 F.2d at 193. See also *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876 (5th Cir. 1991) (company’s misstatements as to the reason for termination and assurances of reinstatement which lulled employee into not approaching the EEOC in a timely manner held sufficient to invoke equitable estoppel notwithstanding lack of evidence that the employer engaged in conduct intentionally designed to prevent the employee from timely asserting his rights).

In response to the Order to Show Cause, Hyman asserted, as the basis for his failure to timely file his complaint, his reliance “on the promises made by [the Respondents’] representatives,” which he characterized as promises “to pay me a substantial severance to

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<sup>9</sup> “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.

compensate me for my retaliatory discharge, as well as to address and correct the issues I brought to their attention” and “which also included discussions about my reinstatement by the company.” Hyman’s submission of February 14, 2009, at pp. 1-2. The ALJ viewed the basis of Hyman’s assertion of equitable estoppel accordingly: “Complainant only asserts that at a meeting on August 23, 2008, Respondents promised to pay him a substantial severance and that in later emails the settlement offer and terms of his reemployment with the company were discussed.” D. & O. at 2.

It is true as a matter of law that Hyman bears the burden of justifying the application of equitable modification principles. *Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995). It is also true that the Board “construe[s] complaints and papers filed by pro se complainants ‘liberally in deference to their lack of training in the law’ and with a degree of adjudicative latitude.”<sup>10</sup> *Ubinger v. CAE Int’l*, ARB No. 07-083, ALJ No. 2007-SOX-036, slip op. at 6 (ARB Aug. 27, 2008) (quoting *Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-003, slip op. at 6 (ARB Apr. 25, 2003)). Consequently, and as previously noted, notwithstanding Hyman’s characterization of the basis for his failure to timely file his complaint, we glean from the evidentiary documents submitted by Hyman in response to the Order to Show Cause that one or more of the Respondents’ officials and/or agents (either or all) led Hyman to reasonably believe that he would be returned to his former employment or alternatively given a one-year consulting contract, that he would be financially compensated for having been wrongfully terminated (including payment of back salary), and that KD Resources would resolve the SOX compliance issues that Hyman had raised. This showing is, in our estimation, sufficient to establish a basis for applying equitable estoppel to toll the running of the SOX 90-day limitations pursuant to the test that has been recognized by the courts in addition to the three identified in *Allentown* and upon which the ALJ relied.

In reaching our conclusion, we distinguish the current situation from a party’s reliance upon settlement negotiations, which the Board has held does not toll the running of the statute of limitations. See *Beckman v. Alyeska Pipeline Servs. Co.*, ARB No. 97-057, ALJ No. 1995-TSC-016 (ARB Sept. 16, 1997) (settlement negotiations in the absence of any showing that the employer misled or otherwise prevented the employee from filing a complaint held insufficient to toll running of limitations period). Unlike the situation in *Beckman*, the showing in this case is to the effect that one party “lull[ed] another into a false security, and into a position he would not take only because of such conduct.” *Humble Oil v. The Fidelity & Casualty Co. of N.Y.*, 402 F.2d 893, 897-98 (4th Cir. 1968). No showing of actual fraud is required. “It is only necessary to show that the person estopped, by his statements or conduct, misled another to his prejudice.” *Id.* Accord *McAllister v. F.D.I.C.*, 87 F.3d 762, 767 (5th Cir. 1996); *Bonham*, 569 F.2d at 193. Therefore, we reverse the D. & O. and remand this case to the ALJ for further consideration consistent with this Decision and Remand Order.

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<sup>10</sup> We acknowledge the ALJ’s skepticism as to whether or not Hyman is pro se, but on the record before us there is nothing to indicate anything other than Hyman’s pro se status unrepresented by legal counsel.



In holding that Hyman's showing in response to the ALJ's Order to Show Cause met the minimal requirements necessary to invoke equitable estoppel as a basis for tolling the running of the period for filing his complaint, we limit our ruling to the context in which the timeliness of Hyman's complaint was raised and decided below, and leave open for further consideration the issue of the timeliness of Hyman's complaint upon remand and an appropriately more fully-developed evidentiary record.

The ALJ's disposition pursuant to the Order to Show Cause effectively constituted a disposition by way of summary decision pursuant to 29 C.F.R. § 18.41 (2009). As such we consider it to have been an inappropriate procedure for resolving the timeliness issue given the fact intensive nature of the considerations that must be resolved where equitable tolling or equitable estoppel is invoked. The courts have repeatedly held that whether equitable modification should be applied to toll the running of a statute of limitations is a fact intensive determination requiring close examination of the facts and equities. *See, e.g., Rivera v. Quarterman*, 505 F.3d 349, 354 (5th Cir. 2007); *Cantor v. Perelman*, 414 F.3d 430, 431 (3d Cir. 2005); *Hammer v. Cardio Med. Prods.*, 131 Fed. Appx. 829, 831-32 (3d Cir. 2005); *Halifax v. MRV Communications*, 54 Fed. Appx. 718, 2003 WL 151257 (2d Cir. 2003); *Whalen/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (*en banc*); *Alsaras v. Dominick's Fine Foods*, 248 F.3d 1156 (7th Cir. 2000); *Kale*, 861 F.2d at 752. For example, such determinations almost invariably involve the credibility of witnesses. Consequently, as the Tenth Circuit has noted, "the issue of equitable tolling and estoppel [cannot] be resolved on the basis of the affidavits" because of the difficulty of determining credibility therefrom" *Wilkerson v. Siegfried Ins.*, 621 F.2d 1042, 1044 (10th Cir. 1980).

## CONCLUSION

In response to the Order to Show Cause, Hyman provided sufficient evidence to invoke equitable estoppel as a defense to the summary disposition of his complaint for having failed to file his complaint within the SOX 90-day limitations period. Accordingly, the ALJ's D. & O. is **REVERSED** as not in accordance with applicable law. This case is **REMANDED** for further consideration consistent with this Decision and Remand Order.

**SO ORDERED.**

**E. COOPER BROWN**  
Deputy Chief Administrative Appeals Judge

**PAUL IGASAKI**  
Chief Administrative Appeals Judge

**Administrative Appeals Judge Wayne C. Beyer dissents and writes separately:**

I would affirm the ALJ's decision dismissing Hyman's complaint as untimely and therefore dissent.

In *Beckmann v. Alyeska Pipeline Serv. Co.*, ARB No. 97-057, ALJ No. 1995-TSC-016 (ARB Sept. 16, 1997), the ARB held that “employer participation in settlement discussions” does not toll the limitations period in a whistleblower case. I would apply that principle to the facts of this case.

The ALJ ordered Hyman to show cause why his case should not be dismissed on timeliness grounds. KD Resources discharged Hyman on June 5, 2008. His February 14, 2009 response to the show cause order discloses very little about what transpired between June 5, 2008, and approximately September 5, when the 90-day limitations period would have run.

Hyman relies heavily on what occurred at an August 23, 2008 meeting with company representatives, whom he names. He alleges that they promised to pay him an unspecified “substantial severance” after they learned that he was going to file complaints with unnamed “regulatory bodies.” But it does not appear that the meeting ripened into an agreement, because Hyman proceeds to say that “continued discussions” “took place” “about my reinstatement by the company.”

For example, in his February 14, 2009 submission, Hyman says that on August 26, 2008, he “spoke with Barry Kostiner [whom he identifies as CEO of Platinum Energy and part owner of KD] on the telephone regarding the settlement and my getting my job back. . . . At this point, I believed my termination was open to discussion, or at least that we were moving toward an amicable settlement of the matter.”

The last day for filing his SOX complaint was on or about September 5, 2008. On that day, Hyman reports that he “sent Barry Kostiner my proposed solution.”

On September 9, Hyman says Kostiner sent an email saying he had not read the proposal in detail but passed it along to the Ghermezians (part owners of KD). On September 22, 2008, Hyman sent Kostiner another email saying that things were taking too long and that he would now take the \$75,000 that he was offered at the August 23, 2008 meeting and that he would no longer seek reinstatement.

On October 15, 2008, Raphael Ghermezian (CEO of Triple Five Corporation as well as part owner of KD) sent Hyman an email in which he said he did not see why he should pay Hyman anything. Hyman saw this as a “complete about face” and forwarded the email to his lawyer, David Holmes, the next day.

In a footnote, the majority quotes portions of Hyman’s Exhibits 5, 13, and 29. The quoted language does not change my view that both before and after the running of the limitations period on or about September 5, 2008, no settlement agreement had been reached about severance or re-employment, and that Hyman was relying on hope but no promise that things would work out. I do not read any of Hyman’s submissions as satisfying an equitable estoppel test insofar as that test would permit Hyman’s forbearance in response to the Respondents’ representations.

Although I have reached my decision based upon the foregoing, I note that Hyman has made submissions to us that were not before the ALJ. While as an appellate body we consider new matters only in exceptional circumstances, Hyman makes an equitable argument and, “He who seeks equity must do equity.” I regard his failure to disclose documents to the ALJ that he has since disclosed to us as fatal to his claim.

Hyman is technically correct when he says he is now pro se. However, the attachments to his brief to the ARB establish that David Holmes of the Solomon Law Firm represented Hyman in post-termination negotiations in June 2008. Holmes sent a letter of representation to a KD attorney in which he requested modifications of a KD proposed settlement agreement. See Complainant’s Brief to ARB, Exhibit 1 (draft settlement agreement); Exhibit 2 (Letter of June 13, 2008, “We represent Miles Hyman.”).

KD’s attorney responded that “this is not a negotiation” and withdrew its settlement offer (“My client withdraws Mr. Hyman’s settlement package.”), Exhibit 3, to which Holmes replied on June 16 that “Mr. Hyman is studying his legal rights and options, and will proceed accordingly at the appropriate time.” Exhibit 4. As I have indicated above, Hyman still regarded Holmes as “my lawyer” through October 16, 2008, when the limitations period had run.

The ARB does not extend tolling principles to complainants who are represented by counsel. See, e.g., *Patino v. Birkin Manufacturing Co.*, ARB No. 09-054, ALJ No. 2005-AIR-023, slip op. at 4 (Nov. 24, 2009); *McCrimmons v. CES Env’tl. Servs.*, ARB No. 09-112, ALJ No. 2009-STA-035, slip op. at 6 (Aug. 31, 2009). Because the ALJ would be expected to apply precedent to the full record, the act of remand in my view would be a legal nullity.

**WAYNE C. BEYER**  
**Administrative Appeals Judge**