In the Matter of:

CHELSEA ELIZABETH GREENE, **ARB CASE NO. 09-109**

COMPLAINANT, **ALJ CASE NO. 2009-SOX-044**

v. **DATE: March 9, 2011**

OMNI VISIONS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Chelsea Elizabeth Greene, *pro se*, Southern Pines, North Carolina

For the Respondent:
Paula D. Walker, *Waller Lansden Dortch & Davis, LLP*, Nashville, Tennessee

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

FINAL DECISION AND ORDER

The Complainant, Chelsea Elizabeth Greene, filed a complaint alleging that the Respondent, Omni Visions, Inc., retaliated against her in violation of the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act (SOX),[1] and its implementing

[1] 18 U.S.C.A. § 1514(A)(Thomson/West Supp. 2010). SOX's section 806 prohibits certain covered employers from discharging, demoting, suspending, threatening, harassing, or

regulations when it terminated her employment.[2] A Department of Labor Administrative Law Judge (ALJ) issued an Order of Dismissal (O. D.) finding that Greene failed to show cause why the complaint should not be dismissed because she failed to timely file her complaint within ninety days of the date on which Omni Visions terminated her employment. Upon review, we conclude that Greene failed to timely file her complaint or to demonstrate any basis on which to toll the limitations period. Accordingly, we affirm the ALJ's D. & O., and we dismiss Greene's complaint.

BACKGROUND

Omni Visions, Inc. is a private multi-state child placement agency offering services in therapeutic foster care, adoption, mental retardation support, and independent living. It hired Greene as a Regional Director in Asheville, North Carolina beginning on or around April 1, 2006, and terminated her employment on June 6, 2006.[3]

Greene filed a complaint in Federal District Court under the False Claims Act on January 5, 2007, 213 days after Omni terminated her employment. She alleged that Omni knowingly fabricated records and made or caused to be made false statements to obtain reimbursement from the United States Government and the North Carolina Medicaid Program on false and fraudulent claims and to obtain federal grants. She also alleged that Omni Visions terminated her employment when she informed Omni of her concerns and attempted to correct the improper practices.[4] The U.S. Department of Justice declined to intervene in the case.[5] On October 16, 2007, Greene filed a Notice of Voluntary Dismissal with the court.[6]

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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. 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] 29 C.F.R. Part 1980 (2010).

[3] D & O. at 6.

[4] *Id.* at 6. *See also* Greene's complaint in *United States, ex. Rel. Chelsea Greene, v. Omni Visions, Inc.*, Civil Action No. 1:07cv9 (W.D N.C. Jan. 5, 2007).

[5] D. & O. at 2 n.2.

[6] *Id.*

Greene filed her SOX complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on March 26, 2009, 517 days after she voluntarily dismissed her district court case and 1024 days after Omni terminated her employment. OSHA dismissed her complaint, finding that Omni is not a covered company for SOX purposes because it neither has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), nor is it required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)). OSHA also concluded that Greene did not timely file her complaint because she did not file it within 90 days of the date on which Omni terminated her employment.[7]

Greene requested a hearing before a United States Department of Labor Administrative Law Judge.[8] By order dated June 1, 2009, the ALJ ordered the parties to show cause why the case should not be dismissed for late filing.[9] On June 19, 2009, the ALJ issued an Order of Dismissal finding that Greene failed to file her complaint within the 90-day limitations period and failed to establish grounds for equitably tolling the limitations period.[10] In particular, the ALJ rejected Greene's arguments that the limitations period should be tolled because her attorney did not advise her to file a SOX claim, her False Claims Act complaint was the precise complaint filed in the wrong forum, the issues involved in her complaint are of a very serious nature, and Omni's President might have some remorse regarding his actions.[11]

Greene filed a timely petition requesting the Administrative Review Board to review the O. D.[12] The Board issued a Notice of Appeal and Order Establishing Briefing Schedule, and both parties filed briefs.

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7 Final Investigative Report (Apr. 7, 2009).

8 *See* 29 C.F.R. § 1980.106(a).

9 D. & O. at 2.

10 Omni Vision filed a Motion for Summary Decision with the ALJ dated June 22, 2009, in which it requested the ALJ to dismiss Greene's complaint because Omni does not fall within the class of companies SOX covers. In support of the motion, Omni attached an affidavit from James Henry, its Chief Executive Officer, in which he stated under oath that Omni neither has any class of securities registered under Section 12 of the Securities Exchange Act of 1934, nor is it required to file any reports under Section 15(d) of the Securities Exchange Act of 1934. The ALJ received the Motion on June 22, 2009, and thus he did not rule on it because he had previously issued the O.D.

11 *Id.* at 4-6.

12 *See* 29 C.F.R. § 1980.110(a).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under SOX.[13] In SOX cases, we review the ALJ's factual determinations under the substantial evidence standard.[14] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[15] However, the Board exercises de novo review with respect to the ALJ's legal conclusions.[16]

DISCUSSION

An employee alleging a SOX retaliation violation must file his or her complaint within 90 days after the alleged violation occurred.[17] "This limitations period begins to run from the time that the complainant knows or reasonably should know that the challenged act has occurred."[18] Greene concedes that Omni terminated her employment on June 6, 2006, and that she filed her SOX complaint with OSHA on March 26, 2009, 1024 days later.[19] Thus, Greene failed to meet the SOX's 90-day limitations period.

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[13] 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); 29 C.F.R. § 1980.110(a).

[14] 20 C.F.R. § 1980.110(c).

[15] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 7 (ARB June 29, 2006).

[16] *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 7 (ARB July 29, 2005).

[17] 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.").

[18] *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 692 (11th Cir. 1982). *See also Ross v. Florida Power & Light Co.*, ARB No. 98-044, ALJ No. 1996-ERA-036, slip op. at 4 (ARB Mar. 31, 1999)(statute of limitations begins to run "on the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person with a reasonably prudent regard for his rights").

[19] Complainant's Initial Brief at 1.

But SOX's limitations period is not jurisdictional and therefore is subject to equitable modification.[20] In determining whether the Board should toll a statute of limitations, the Board has been guided by the discussion of equitable modification of statutory time limits in *School Dist. of Allentown v. Marshall*.[21] In that case, which arose under the whistleblower provisions of the Toxic Substances Control Act,[22] 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."[23]

Greene's inability to satisfy one of these elements is not necessarily fatal to her claim.[24] But courts "'have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.'"[25] Furthermore, while we would consider an absence of prejudice to the other party in determining whether we should toll the limitations period once the party requesting modification identifies a factor that might justify such modification, "[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures."[26]

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[20] *Ubinger v. CAE Int'l*, ARB No. 07-083, ALJ No. 2007-SOX-036, slip op. at 5 (ARB Aug. 27, 2008).

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

[22] 15 U.S.C.A. § 2622 (West 2004).

[23] *Allentown*, 657 F.2d at 20 (internal quotations omitted).

[24] *Williamson v. Washington Savannah River Co.*, ARB No. 07-071, ALJ No. 2006-ERA-030, slip op. at 3 (ARB June 28, 2007). *Accord Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-030, slip op. at 7 (ARB Mar. 32, 2010)(An additional basis recognized as giving rise to equitable estoppel, . . . is "where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights." (citations omitted)).

[25] *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).

[26] *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984).

Greene bears the burden of justifying the application of equitable modification principles.[27] Initially Greene argues that she was first misled by her attorney when he told her that a SOX complaint was not an option while she was litigating her False Claims Act case and subsequently by Omni, when it did not disclose to her that it was an "employee stock ownership plan corporation." Neither assertion justifies the application of equitable tolling.

Greene freely chose her attorney and ultimately clients must bear the consequences of the acts and omissions of their attorneys.[28] As the Supreme Court held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all fact, notice of which can be charged upon the attorney."[29]

Thus, to the extent that Greene's attorney gave her incorrect advice or did not fully explain her legal alternatives, Greene, by choosing the attorney, may not now escape the consequences of her choice. Furthermore, even if she did not know that Omni was an "employee stock ownership plan corporation," she has not explained how this fact precluded her from timely filing a SOX complaint or why Omni had a legal obligation to so inform her, assuming that Omni did not so inform her.[30]

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[27] *Accord Wilson*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

[28] *Pioneer Investment Services Co., v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396 (1993); *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-026, slip op. at 6 (ARB Dec. 30, 2005); *Malpass v. General Elec. Co.*, Nos. 1985-ERA-038, -039 (Sec'y Mar. 1, 1994).

[29] *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).

[30] *Cf. Moldauer*, ARB No. 04-022, slip op. at 5 (employer's silence on the existence of the SOX whistleblower provisions insufficient to establish that it actively misled the complainant regarding his cause of action, especially given that the complainant was represented by counsel when he entered into the severance agreement with the employer). We note that appended to documents Greene submitted to the ALJ is a copy of the Fourth Amendment to the Omni Visions, Inc. Employee Stock Ownership Plan. Greene has not indicated when she received this document.

Greene also appears to argue that the fact that she filed a False Claims Act case was an extraordinary event that prevented her from filing her SOX complaint and/or that in filing the False Claims Act case she filed the precise claim in the wrong forum. But Greene cites no support for the assertion that she was precluded from filing the SOX complaint with the Department of Labor while pursuing the False Claims Act case in federal district court. Furthermore, even if the Board were to hold that filing the False Claims Act case constituted such an extraordinary event, not only had the filing period for the SOX complaint already expired by the time Greene filed the False Claims Act case, Greene waited 517 days after she dismissed her False Claims Act case to file her SOX complaint. Thus there is no construction of the tolling provision under which Greene's complaint could be considered timely.[31]

We also agree with the ALJ that even if Greene had filed the False Claims Act within 90 days of the termination of her employment, it does not constitute the precise statutory claim in the wrong forum. As the ALJ described the Third Cause of Action in her False Claims Act complaint, upon which Greene attempted to rely as the SOX complaint:

> Referenced allegations 1 through 37 set forth jurisdictional matters under the False Claims Act; the Defendant's alleged Medicare and Medicaid health service, record keeping, and billing practices; the Defendant's alleged improprieties in the area of foster care placement, supervision, and billing practices; and alleged misuse of state grant monies related to increasing the state foster parent pool. In her "Prayer for Relief" in the complaint, the Complainant sought "an amount in excess of $10,000 for Defendant's retaliatory actions against the Plaintiff-Relator under the 'whistle blower' provisions of the False Claims Act 31 U.S.C. § 3730(h)."

Nowhere in the False Claims Act complaint did Greene articulate conduct she reasonably believed constituted a violation of any of the enumerated laws contained in the SOX or request relief under the SOX. Accordingly, we affirm the ALJ's finding that Greene "has failed to establish that the complaint filed in Federal District Court on January 5, 2007, constituted a SOX complaint filed in the wrong forum."[32]

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[31] *Schafermeyer v. Blue Grass Army Depot,* ARB No. 07-082, ALJ No. 2007-CAA-001, slip op. at 10 (ARB Sept. 30, 2008)(complaint in wrong forum must be timely filed under applicable whistleblower statute); *Hillis v. Knochel Bros., Inc.,* ARB Nos. 04-081, -148, ALJ No. 2002-STA-050, slip op. at 8-9 (ARB Mar. 31, 2006)(where tolling applied, limitations period began running anew once impediment to filing was lifted).

[32] O. D. slip op. at 6. *Cf. Butler v. Anadarko Petroleum Corp,* ARB No. 09-047, ALJ No. 2009-SOX-001, slip op. at 5 (ARB Feb. 17, 2011)(limitations period tolled where

Finally Greene argues that her complaint should not be dismissed as untimely because of the serious nature of her concerns with Omni's business conduct, and Omni was not prejudiced by the late filing. But as the ALJ noted, the ARB has previously rejected the argument that the severity of the alleged violation provides a basis for tolling the limitations period because such tolling would result in the 90-day limitations period having no legal effect.[33] Further, as stated above, the lack of prejudice to the other party is not a basis alone for tolling the limitations period, although the Board may take a lack of prejudice into consideration if the party requesting tolling otherwise establishes a proper basis for such tolling.[34]

CONCLUSION

For the reasons explained above, we agree with the ALJ that Greene has failed to show cause why her SOX complaint should not be dismissed because she failed to timely file it, and she has demonstrated no basis for tolling the applicable limitations period. Accordingly, Greene's SOX complaint is **DISMISSED.**[35]

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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complainant filed SOX complaint in federal district court, even though the district court complaint did not necessarily establish a prima facie case of whistleblower retaliation).

[33] D. & O. at 6, citing *Ubinger v. CAE Int'l,* ARB No. 07-083, ALJ No. 2007-SOX-036 (ARB Aug. 27, 2008).

[34] *Romero v. The Coca Cola Co.,* ARB No. 10-095, ALJ No. 2010-SOX-021, slip op. at 6 (ARB Sept. 30, 2010).

[35] Omni has moved the Board to award it $1000 in attorney's fees pursuant to 29 C.F.R. § 1980.110(e), which provides that the Board may award such fees if the Board determines that a complaint was frivolous or that the complainant brought it in bad faith. While we agree that there is some merit to Omni's position given that Greene filed her complaint 3 years after the period for such filing had expired, with no recognized basis for doing so, given Greene's pro se status, we are not prepared to find that the complaint was totally baseless or brought in bad faith. Accordingly, Omni's motion for attorney's fees is **DENIED.**