In the Matter of:

JOSE ROMERO,

COMPLAINANT,

v.

THE COCA COLA CO.,

RESPONDENT.

ARB CASE NO. 10-095

ALJ CASE NO. 2010-SOX-021

DATE: September 30, 2010

BEFORE: ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Complainant:
John. J. Spittler, Jr., Esq., *Spittler, Read & Associates, P.A.*, Miami, Florida

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

FINAL DECISION AND ORDER

The Complainant, Jose Romero, filed a complaint alleging that The Coca Cola Company (Coca Cola) retaliated against him in violation of the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX) and its implementing regulations.[1] A Department of Labor Administrative Law Judge (ALJ) dismissed

[1] 18 U.S.C.A. § 1514(A) (Thomson/West Supp. 2010); 29 C.F.R. Part 1980 (2009). Sarbanes-Oxley's Section 806 prohibits covered employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against employees who provide information to a covered employer, a federal agency or Congress regarding

Romero's complaint because Romero failed to timely file it. Romero petitioned the Administrative Review Board to review the ALJ's decision, but Romero failed to timely file his petition for review and failed to demonstrate that he was entitled to tolling of the limitations period. Thus, we must dismiss his complaint.

BACKGROUND

On September 27, 2007, Romero filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Coca Cola, retaliated against him in violation of the SOX's whistleblower protection provisions when it terminated his employment on June 30, 2007, because he engaged in protected activity.[2] OSHA concluded that Coca Cola informed Romero on June 5, 2007, of its decision to terminate his employment.[3] Complainants alleging employer retaliation in violation of SOX must file their complaints within 90 days of the date of the alleged violation (i.e., "when the discriminatory decision has been both made and communicated to the complainant").[4] Because Romero had failed to bring his complaint within the 90-day period from the date he was informed of Coca Cola's decision (June 5, 2007), OSHA dismissed his complaint as untimely.[5]

Romero filed a request for hearing with the Office of Administrative Law Judges on January 25, 2010.[6] The presiding ALJ issued an Order to Show Cause why the complaint should not be dismissed as untimely. After considering both parties' responses, the ALJ issued his Order Dismissing Complaint on April 7, 2010, finding no basis upon which to toll the limitations period and rejecting Romero's complaint as untimely.[7]

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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.

[2] Order Dismissing Complaint (Ord.) at 1.

[3] *Id.*

[4] 29 C.F.R. § 1980.103(d).

[5] Ord. at 1.

[6] *Id.*

[7] *Id.* at 7.

Included in the ALJ's Order was a "Notice of Appeal Rights," which stated in pertinent part: "To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a)."[8]

This notice summarizes the relevant regulation that provides in pertinent part:

> Any party desiring to seek review, including judicial review, of a decision of the administrative law judge . . . must file a written petition for review with the Administrative Review Board . . . , which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the administrative law judge will become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the Board . . . . To be effective, a petition must be filed within 10 business days of the date of the decision of the administrative law judge.[9]

Pursuant to this regulation, Romero's petition for review was to be filed no later than April 21, 2010. But he did not file his petition until April 29, 2010. Consequently, on May 11, 2010, the Board issued an Order to Show Cause compelling Romero to explain why the Board should not dismiss the petition as untimely. Romero responded to the Order on June 8, 2010. Coca Cola did not reply. The Board must now determine whether Romero has established grounds for tolling the limitations period for the filing of his petition. For the following reasons, we find that he has failed to do so and dismiss his petition as untimely.

DISCUSSION

The regulation establishing a ten-business-day limitations period for filing a petition for review with the Board is not jurisdictional and is therefore subject to equitable modification.[10] In determining whether to toll a statute of limitations in a particular case, the Board is guided by the principles of equitable modification of

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[8] Ord. at 8. The Notice of Appeal Rights also states that a petition "is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication," pursuant to 29 C.F.R. § 1980.110(a).

[9] 29 C.F.R. § 1980.110(a).

[10] *Accord Patino v. Birken Mfg.*, ARB No. 09-054, ALJ No. 2005-AIR-023, slip op. at 3 (ARB Nov. 24, 2009); *Stoneking v. Avbase Aviation*, ARB No. 03-101, ALJ No. 2002-AIR-007, slip op. at 3 (ARB July 29, 2003).

statutory time limits discussed in *School Dist. v. Marshall*.[11] In that case, 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) the plaintiff has in some extraordinary way been prevented from filing his action, or
> (3) the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.[12]

While the Board recognizes these grounds, it has determined that a petitioner's inability to satisfy one of these elements is not necessarily fatal to his tolling claim.[13] Nevertheless, the Board, like the courts, has "'generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.'"[14]

The Eleventh Circuit Court of Appeals, the court to which the Board's decision in this case would be appealed, has held, "Equitable tolling is an extraordinary remedy which is typically applied sparingly."[15] To be entitled to equitable tolling, a petitioner must act diligently, and the untimeliness of the filing must be the result of circumstances beyond his control.[16] Confirming equitable tolling's status as an extraordinary remedy, the Eleventh Circuit "has rejected most claims for equitable tolling."[17]

Romero bears the burden of justifying the application of equitable tolling principles.[18] In his response to the Board's Order to Show Cause, Romero contends that

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11 657 F.2d 16, 19-21 (3d Cir. 1981).

12 *Marshall*, 657 F.2d at 20 (internal quotations omitted).

13 *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 4 (ARB Aug. 31, 2005). *Cf. Allentown*, 657 F.2d at 20 ("We do not now decide whether these three categories are exclusive, but we agree that they are the principal situations where tolling is appropriate.").

14 *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).

15 *Steed v. Head*, 219 F.3d 1298, 1300 (2000).

16 *Drew v. Dep't of Corr.*, 297 F.3d 1278, 1286-87 (11th Cir.2002).

17 *Diaz v. Sec'y for the Dep't of Corr.*, 362 F.3d 698, 701 (11th Cir. 2004).

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

his counsel, John Spittler, received the ALJ's Order on the morning of Monday, April 19, 2010, twelve calendar days following its issuance. Romero asserts that the limitations period should be tolled because this purported "extraordinary delay" in receiving the Order prevented him from timely filing his petition.[19] He further contends that at all times he diligently pursued his legal rights. We disagree.

"Extraordinary circumstances" is a very high standard that is satisfied only in cases in which even the exercise of diligence would not have resulted in timely filing.[20] While the fact that the ALJ's Order was not delivered until the twelfth day after it was issued may have been unusual, we do not find it so abnormal as to qualify as an "extraordinary" circumstance that prevented Romero from timely filing his petition. Romero attached to both his petition for review and response to the Order to Show Cause the affidavit of Spittler's paralegal, Melissa Cameron. It states that on the morning of Monday, April 19, 2010, she received and brought the Order to Spittler's immediate attention.[21] Cameron avers that she contacted the assistant of Chief Administrative Law Judge Purcell regarding the delayed receipt of his Order.[22] But once the ALJ's assistant confirmed that any concerns about service should be addressed in the Petition for Review and that the ALJ could not assist Romero, Spittler did not contact the Board to obtain an enlargement of time to file the Petition. Instead he decided, without consulting with the Board, that Romero was entitled to tolling of the time for filing because it had taken more time than usual for the petition to reach him. Furthermore, having received the Order on April 19, Spittler waited to file the petition until April 29, 8 business days after his counsel received the Order and 6 business days after the closing of the statutory limitations period. Had Romero's counsel contacted the Board and explained the reasons for requiring an enlargement of time, it is likely that the Board would have granted the request, but he failed to ask for such an enlargement and thereby has failed to establish due diligence.[23]

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[19] Complainant's Response to Order to Show Cause at 1-2.

[20] *See, e.g., Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999)("complete psychiatric disability" during the entirety of the limitations period); *Alvarez-Machain v. United States*, 107 F.3d 696 (9th Cir. 1996) (incarceration in a foreign country for the entirety of the limitations period).

[21] Affidavit of Melissa Cameron at 1-2.

[22] *Id.* at 2.

[23] While Romero's attorney may ultimately be responsible for failing to timely file, the Board has consistently held that "attorney error does not constitute an extraordinary factor because '[u]ltimately, clients are accountable for the acts and omissions of their attorneys.'" *Sysko v. PPL Corp.*, ARB No. 06-138, ALJ No. 2006-ERA-023, slip op. at 5, quoting *Higgins v. Glen Raven Mills, Inc*., ARB No 05-143, ALJ No. 2005-SDW-007, slip op. at 9

"Extraordinary circumstances" does not extend to excusable neglect.[24] And in any event, there was no evidence of excusable neglect here. After receiving the petition for review, Romero had nearly three business days to request an enlargement of time to file a motion for enlargement or to file the petition itself, but he proffered no excuse for his failure to either move for an enlargement or submit the petition. Therefore even if excusable neglect was a basis for granting tolling, Romero has presented the Board with no grounds on which to excuse his counsel's failure to timely file either a motion for enlargement or the petition.

Finally, Romero contends that Coca Cola has not been prejudiced by his untimely filing. Although the Board will consider an absence of prejudice to the other party in determining whether it should toll the limitations period, an "'[absence of prejudice] alone is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures.'"[25] As we have found no grounds justifying equitable tolling of the limitations period, we need not decide whether Romero's untimely filing prejudiced Coca Cola.

CONCLUSION

We conclude that the Romero's delayed receipt of the ALJ's Order did not prevent the timely filing of his petition for review, and therefore is not an "extraordinary" circumstance which justifies equitable tolling. We also conclude that Romero did not exercise due diligence in preserving his right to petition the Board for review of the ALJ's Order. Accordingly, we **DISMISS** his petition for review.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

(ARB Sept. 29, 2006); *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-006, slip op. at 5-6 (ARB Aug. 27, 2002).

[24] *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

[25] *Roseberry v. City of Portsmouth*, ARB No., 06-046, ALJ No. 2005-WPC-004, slip op. at 4 (ARB Mar. 31, 2006), quoting *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 152 (1984).