In the Matter of:

WINCHESTER LEWIS, **ARB CASE NO. 10-106**

COMPLAINANT, **ALJ CASE NO. 2010-SOX-027**

v. **DATE: January 27, 2012**

WALT DISNEY WORLD,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Winchester Lewis, *pro se*, Davenport, Florida

For the Respondent:
Mary Ruth Houston, Esq., *Shutts & Bowen LLP*, Orlando, Florida

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

FINAL DECISION AND ORDER

This case arises under 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.[1] Winchester Lewis complained to the Department of Labor's

[1] 18 U.S.C.A § 1514A (Thomson/Reuters 2011) (the "Act" or "SOX"), and its implementing regulations found at 29 C.F.R. Part 1980 (2011). The Act and its

Occupational Safety and Health Administration (OSHA) that Walt Disney World (Disney) lied to a government agency in 1978 about using asbestos-containing materials, which, he alleged, was a fraud against shareholders. After an investigation, OSHA dismissed the complaint. Lewis requested a hearing.[2] A Department of Labor Administrative Law Judge (ALJ) granted summary decision. Lewis appealed to the Administrative Review Board (Board). We affirm the ALJ's order dismissing Lewis's complaint.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX.[3] The Board reviews an ALJ's grant of summary decision de novo.[4] Under 29 C.F.R. § 18.40(d) (2011), 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." "The burden is on the moving party 'to demonstrate the absence of any material factual issue genuinely in dispute.'"[5] We view the record on the whole in the light most favorable to the nonmoving party, and then determine whether there are any genuine issues of material fact and whether the movant

---

implementing regulations have been amended since Lewis filed his complaints. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010); 76 Fed. Reg. 68084-97 (Nov. 3, 2011). The amendments expanding the limitations period from 90 to 180 days do not affect the outcome of this case. Lewis's complaints were time-barred under the SOX when filed in 2008. The amended SOX limitations period does not revive Lewis's complaints on which the previous statute of limitations had run. *See Berman v. Blount Parrish & Co., Inc.*, 525 F.3d 1057 (11th Cir. 2008)(amended limitations period does not revive SOX securities claims on which the previous statute of limitations had run).

[2] Disney's April 22, 2010 Motion for Final Summary Decision, Exhibits E, I, J.

[3] 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).

[4] *Reamer v. Ford Motor Co.*, ARB No. 09-053, ALJ No. 2009-SOX-003, slip op. at 3 (ARB July 21, 2011).

[5] *See e.g., American Intern. Grp., Inc. v. London Am. Intern. Corp. Ltd.*, 664 F.2d 348, 351 (2d Cir. 1981) (quoting *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975)).

established that it was entitled to judgment as a matter of law.[6] Mindful of our duty to remain neutral, we relax somewhat the procedural requirements where a pro se party is involved.

DISCUSSION

An employee alleging retaliation under the SOX must file a complaint "within 90 days after an alleged violation of the Act occurs."[7] Section 806 states that no company "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee."[8] An "adverse action" under the SOX refers to any unfavorable employment action that is more than trivial, either as a single event or in combination with other deliberate employer actions.[9] To be timely, Lewis's SOX complaint must have been filed within 90 days of an alleged adverse action. We affirm the dismissal of this matter on two grounds.

The first basis for affirming dismissal is Lewis's failure to identify the adverse action that forms the basis of his claim. Proving an adverse action is an essential element of a SOX whistleblower claim.[10] There is a vague reference to the fact that Lewis "stopped working" sometime in 2007. It is unclear whether he resigned or whether he was discharged or even constructively discharged. Lacking any clarification by either party, understandably, the ALJ inferred that Lewis asserted "forced resignation, or constructive discharge" occurring sometime in 2007.[11] Nevertheless, it was Lewis's

---

[6] *Smale v. Torchmark Corp.,* ARB No. 09-012, ALJ No. 2008-SOX-057, slip op. at 5-6 (ARB Nov. 20, 2009).

[7] 29 C.F.R. § 1980.103(d) (2008); *see* 18 U.S.C.A. § 1514A(b)(2)(D) (Thomson/West Supp. 2008).

[8] 18 U.S.C.A. § 1514A(a).

[9] *See Menendez v. Halliburton*, ARB No. 09-002, -003; ALJ No. 2007-SOX-005, slip op. at 17 (ARB Sept. 13, 2011)**.**

[10] 49 U.S.C.A. § 42121; *see* 18 U.S.C.A. § 1514A(b)(2)(C); *Inman v. Fannie Mae*, ARB No. 08-060, ALJ No. 2007-SOX-047, slip op. at 5 (ARB June 28, 2011); *Sylvester v. Parexel Int'l LLC,* ARB No. 07-123. ALJ Nos. 2007-SOX-039, -42; slip op. at 9 (May 25, 2011).

[11] ALJ's Decision and Order Granting Respondent's Motion for Summary Decision at 7, 8. Since the administrative record does not reveal when the "forced resignation, or constructive discharge" occurred, the ALJ used December 31, 2007, as its date where "the parties agree that [Lewis] stopped working for Disney in 2007." *Id.* at 7. It is troubling to this Board that the ALJ was left to guess as to the status of Lewis's employment during 2007. Disney filed the motion to dismiss but conspicuously avoided discussing with any particularity what its employment records showed as to Lewis's 2007 employment status. Of

burden to assert and ultimately prove the adverse action Disney took. The dismissal of this claim must be affirmed on summary decision where there is no genuine issue regarding what adverse action Disney took against Lewis - an essential element of his claim.

The second basis for affirming dismissal is the failure to file a timely claim. Again, given Lewis's failure to point to a particular adverse action, the ALJ understandably inferred that Lewis's work stoppage in 2007 was a forced resignation or constructive discharge that occurred no later than December 31, 2007. It is undisputed that, on April 11, 2008, Lewis filed a complaint with OSHA under Section 11(c) of the Occupational Safety and Health Act.[12] That initial complaint was not part of the record; so we do not understand how the ALJ was able to determine that it had no allegations of a SOX violation. OSHA determined that Lewis's supplementation to the 11(c) complaint on July 15, 2008, was the first time that Lewis asserted a SOX complaint. The ALJ relied on July 15, 2008, as the operative date for determining timeliness. Regardless, Lewis did not complain to OSHA about any adverse action by Disney occurring on or after January 1, 2008. Again, operating under the 90-day limitations period, both the April 11, 2008 Section 11(c) complaint and the July 15, 2008 SOX complaint were untimely filed under the SOX. Accordingly, because Lewis's SOX complaint is untimely filed, we affirm the ALJ's order dismissing it.

CONCLUSION

The ALJ's order of dismissal in his Decision and Order Granting Respondent's Motion for Summary Decision is **AFFIRMED**.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

---

course, even in a pro se case, we recognize that Disney could simply rely on Lewis's allegations so long as Disney did not mislead the ALJ.

[12] Occupational Safety and Health Act of 1970, (Pub. L. No. 91-596, Dec. 29, 1970 with amendments through Jan. 1, 2004).