



In the Matter of:

JAMES KARL REID,

ARB CASE NO. 10-110

COMPLAINANT,

ALJ CASE NO. 2009-SOX-0027

v.

DATE: March 30, 2012

THE BOEING COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**John J. Tollefsen, Esq. and Frank S. Homsher, Esq.; Tollefsen Law PLLC,
Lynnwood, Washington**

For the Respondent:

**Jonathan P. Harmon, Esq. and Eric B. Martin, Esq.; McGuire Woods LLP,
Richmond, Virginia**

**Before: Lisa Wilson Edwards, Administrative Appeals Judge; Joanne Royce,
Administrative Appeals Judge, and Luis A. Corchado, 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 James Karl Reid complained to the Department of Labor's Occupational Safety and Health Administration (OSHA) that his employer, Boeing, had subjected him to several adverse employment actions and to a hostile work environment in retaliation for raising concerns about securities violations.² Following an investigation, OSHA found that Reid's complaint was untimely. OSHA also found that Reid was not entitled to relief from the 90-day filing period on the doctrine of equitable tolling. OSHA thus dismissed the complaint.³ Reid objected and requested a hearing.

A Department of Labor Administrative Law Judge (ALJ) denied Boeing's motion for summary decision on, *inter alia*, the tolling issue, and he held a formal hearing in June and August, 2009. In a Decision and Order, the ALJ found that Reid's complaint was untimely and not subject to equitable tolling, and Reid had not proven a hostile work environment or that he had engaged in activity that the SOX protects. Accordingly, the ALJ dismissed the complaint. Reid appealed to the Administrative Review Board (ARB or Board). We affirm the ALJ's order dismissing Reid'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.⁴ The Board reviews an ALJ's findings of fact under the substantial evidence standard and reviews an ALJ's conclusions of law *de novo*.⁵

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 implementing regulations have been amended since Reid filed his complaint in September, 2009. *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.

² Complaint (dated Sept. 29, 2008); Respondent's Exhibit 3.

³ Secretary's Findings (dated Jan. 2, 2009).

⁴ 29 C.F.R. § 1980.110(a); 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).

⁵ 29 C.F.R. § 1980.110(b). 5 U.S.C.A. § 557(b) (West 1996); *see Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 4 (ARB Mar. 14, 2008).

DISCUSSION

An employee alleging retaliation under the SOX must file a complaint “within 90 days after an alleged violation of the Act occurs.”⁶ Section 806 states that no company “may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee.”⁷ Reid’s SOX complaint must have been filed within 90 days of an alleged adverse action to be considered timely.

It is undisputed that Reid’s complaint is untimely.⁸ Reid’s complaint was filed on September 29, 2008, more than a year after September 20, 2007, when he experienced a stress-related breakdown on the job and left work, to which he did not return. Reid did not file his complaint within 90 days of any alleged adverse action occurring prior to September 2007. Consequently, we agree with the ALJ’s conclusion that those claims are untimely and not actionable. Substantial evidence also supports the ALJ’s findings that Reid’s August 27, 2008 e-mail exchange with Boeing personnel, the sole remaining alleged adverse action occurring inside the 90-day filing period, (1) was not adverse and (2) was not part of the hostile work environment or unlawful employment practice Reid claimed to have endured before September 2007.⁹ Therefore, the ALJ properly concluded that this alleged adverse action does not support the hostile work environment claim. In sum, Reid’s untimely complaint is subject to dismissal.¹⁰

⁶ 29 C.F.R. § 1980.103(d) (2008); *see* 18 U.S.C.A. § 1514A(b)(2)(D).

⁷ 18 U.S.C.A. § 1514A(a).

⁸ Complainant’s Brief at 24.

⁹ Decision and Order Dismissing Complaint (May 28, 2010) (D. & O) at 32-35; Respondent’s Exhibit 21. *See Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). With regard to the other alleged adverse action occurring inside the filing period, namely Aetna Insurance Company’s July 2008 decision upholding its January 2008 decision to discontinue Reid’s short-term disability benefits, the ALJ found no genuine issue of material fact that Boeing did not control Aetna’s decision. The ALJ accordingly granted summary decision in Boeing’s favor on this issue. Order Granting In Part and Denying In part Respondent’s Motion for Summary Decision and Denying Complainant’s Cross Motion for Summary Decision (May 27, 2009) at 11-13, marked Administrative Law Judge Exhibit 9.

¹⁰ Because we affirm the ALJ’s dismissal of the complaint on other grounds, we need not address his findings on protected activity. Nevertheless, we note that under current precedent, the ALJ may have erred in his analysis of Reid’s protected activity. In *Sylvester*, we made clear that the “definitive and specific” standard that the ARB had employed in prior cases and the ALJ noted in this case (D. & O. at 41), was inconsistent with Section 806’s statutory language. *Sylvester v. Parxel Int’l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -42, slip op. at 17 (ARB May 25, 2011). We stated that “[n]ot only is it inappropriate, but it also presents a potential conflict with the express statutory authority of § 1514A, which prohibits a publicly traded company from discharging or in any other manner discriminating

SOX's whistleblower protection provision's filing period is not jurisdictional and is therefore subject to "equitable modification."¹¹ In determining whether to relax the filing period in a particular case, the Board is guided by the principles of equitable tolling set forth in *School District of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981), and recognizes three situations in which tolling is proper:

- (1) When 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.¹²¹

Equitable tolling may be applied only in "exceptional circumstances," and Reid bears the burden of justifying its application.¹³ Reid argues that his medical condition was an extraordinary circumstance that prevented him from timely filing. The ALJ disagreed and found no basis for equitable tolling. We agree with the ALJ.

We are mindful of Reid's medical condition and the evidence he adduced to show that it prevented him from timely filing, including Dr. Steger's opinion that Reid's medical condition prevented him from filing before July 1, 2008. The Board has recognized that a medical condition that prevents a complainant from timely pursuing his legal rights has been held to be an "extraordinary" circumstance justifying equitable tolling.¹⁴ The ALJ, however, found the evidence insufficient to justify application of

against an employee for providing information regarding conduct that the employee 'reasonably believes' constitutes a SOX violation." *Id.* Given the emphasis in SOX on auditor independence (SOX §§ 201-209) and effective internal controls (SOX §§ 302 and 404), Reid may well have "reasonably believed" that his concerns regarding auditor independence and internal record-keeping constituted SOX violations.

¹¹ *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022; ALJ No. 2003-SOX-026, slip op at 4 (ARB Dec. 30, 2005).

¹² *Allentown*, 657 F.3d at 19, 20.

¹³ *Id.* at 20; *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Brockamp v. United States*, 67 F.3d 260, 263 (9th Cir. 1995), *rev'd on other grounds*, 519 U.S. 437 (1997).

¹⁴ *Prince v. Westinghouse Savannah River Co.*, ARB No. 10-079, ALJ No. 2006-ERA-001, slip op. at 4 (ARB Nov. 17, 2010)(citing *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999)).

equitable tolling principles. In particular, the ALJ noted that Dr. Steger, Reid's treating psychologist, admitted that he was not aware that Reid, (1) in March 2008 went on his Boeing-issued laptop; (2) in April 2008 contacted Aetna to appeal its denial of short-term disability benefits and hired an attorney, and (3) as of May 2008 was in contact with OSHA to give statements in former colleagues' complaints.¹⁵

The ALJ ultimately did not resolve the tolling issue by analyzing the effects of Reid's medical condition. Rather, the ALJ examined events leading up to the filing of Reid's complaint. The ALJ determined that the September 29, 2008 filing "was due, at least in part (if not entirely)," to a mistaken belief about the law. Reid and his wife, Belinda Born-Reid, testified that they believed that Reid did not have a SOX whistleblower claim unless and until Boeing fired him. Reid testified that when he learned on July 31, 2008 of the "ZZing" of his Boeing e-mail account, he came to believe that Boeing had fired him.¹⁶ The next day, Reid e-mailed Victoria Coleman at OSHA:

I am filing my own case, beginning yesterday when I realized that Boeing had ZZ-REID, Karl my name . . . which basically means I'm gone. . . . No vacation reminder that says i'm on [leave of absence] or whatever But I digress, can I call on all the testimonies that were used in Ms. Phelps['] Cases concerning Nick Tides and Matt Neumann and reference them to prove my workplace was a hostile work environment along with all the evidence I have? That was [sic] we meet the time window?

Complainant's Response to Motion for Summary Dismissal Cross Motion for Summary Decision, Exhibit G. The ALJ concluded that this evidence established that Reid's September 29, 2008 filing "was due *not* to recovery from his alleged mental incapacity, but instead [to] a misunderstanding about the law. Such justification is insufficient to equitably toll SOX's limitations period."¹⁷ The

¹⁵ D. & O. at 24, 25, 30-31.

¹⁶ Hearing Transcript (T.) at 1020-22 (Born-Reid); T. at 1466-69, 1588-89 (Reid); Respondent's Exhibit 21 at 11; Administrative Law Judge Exhibit 9 at 14 (ALJ found no genuine issue of material fact on the issue of whether Boeing had ever fired Reid, and granted summary decision in the Respondent's favor on this issue). On May 27, 2009, the ALJ dismissed Reid's claim that he was terminated on July 31, 2008. *See* Order Granting in Part and Denying in Part Respondent's Motion for Summary Decision and Denying Complainant's Cross Motion for Summary Decision (May 27, 2009). In the D. & O., the ALJ noted that that he had dismissed Reid's claim that he was terminated on July 31, 2008. Reid has not appealed the dismissal of his termination claim and thereby waives any appeal on that issue. D. & O. at 3.

¹⁷ D. & O. at 31 (emphasis added) (citation omitted).

ALJ's conclusion is in accordance with law and we affirm it.¹⁸ Accordingly, we affirm the ALJ's order of dismissal.

CONCLUSION

Equitable tolling of the 90-day limitations period does not apply. Accordingly, the ALJ's order dismissing the complaint is **AFFIRMED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

¹⁸ *Flood v. Cendant Corp.*, ARB No. 04-069; ALJ No. 2004-SOX-016, slip op. at 4 (ARB Jan. 25, 2005) (Ignorance of the law is generally not a factor warranting equitable modification.).