



In the Matter of:

GUY DeFAZIO,

ARB CASE NO. 11-063

COMPLAINANT,

ALJ CASE NO. 2011-SOX-035

v.

DATE: October 23, 2012

**SHERATON STEAMBOAT
RESORTS & VILLAS,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Guy DeFazio, pro se, Steamboat Springs, Colorado

For the Respondent:

Patrick J. Miller, Esq., Sherman & Howard, L.L.C., Denver, Colorado

Before: Paul M. Igasaki, Chief 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 Guy DeFazio filed complaints in August 2010 with the Labor Department’s Occupational Safety and Health Administration (OSHA). DeFazio alleged that the Respondent discharged him on January 21, 2010, in retaliation for reporting a mold problem and later threatened to sue him. OSHA investigated and dismissed these complaints: one as untimely filed under the SOX; one as untimely filed under Section 11(c) of the Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 660(c), and one apparently on the merits under the OSH Act. Respondent’s Appendix Exhibits E-H; Administrative Law Judge’s Order Dismissing Complaint as Untimely (Order of Dismissal) (July 5, 2011). DeFazio requested a hearing. Prior to a hearing, a Labor Department Administrative Law Judge (ALJ) dismissed the complaint because it was untimely filed under the SOX and because he determined that DeFazio was not entitled to any equitable relief from the bar of the statute of limitations. DeFazio appealed to the Administrative Review Board (ARB). We affirm.

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). The Board reviews the ALJ’s findings of fact under the substantial evidence standard. 29 C.F.R. § 1980.110(b). The Board reviews questions of law de novo. *See Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 4 (ARB Mar. 14, 2008).

DISCUSSION

We determine whether the ALJ properly dismissed DeFazio’s complaint as untimely under the SOX whistleblower statute.² When the Respondent allegedly violated the SOX by discharging DeFazio on January 21, 2010, a complaint of retaliatory discharge must have been filed “within 90 days after an alleged violation of the Act

¹ 18 U.S.C.A. § 1514A (Thomson/Reuters 2012) (the Act or SOX), and its implementing regulations found at 29 C.F.R. Part 1980 (2011).

² The ALJ stated that the Office of Administrative Law Judges (OALJ) “has no jurisdiction to review whistleblower complaints filed under the OSH Act” and thus, DeFazio’s request for review under the OSH Act “must therefore fail.” Order of Dismissal at 9. Neither the OALJ nor the ARB have authority to review the Secretary’s decision for alleged violations of Section 11(c) of the OSH Act, 29 U.S.C. § 660(c). *See* 29 U.S.C.A. §§ 659, 660 (Thomson/West 2008). We rule only on whether DeFazio filed a timely complaint to the extent that he attempts to assert a SOX claim.

occurs” to be timely.³ Section 806 states that no company “may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment.”⁴ The ALJ found that to be timely, DeFazio must have filed a complaint within 90 days after his January 21, 2010 discharge or no later than April 21, 2010. But as the ALJ noted, DeFazio did not file anything before April 21, 2010. Order of Dismissal at 6, 9. By his own admission, DeFazio filed nothing, anywhere, before June 2010. Complainant’s Brief at 6, 7; Complainant’s Appendix Exhibits 9, 10. Because the ALJ’s conclusion that DeFazio failed to file a timely complaint is supported by substantial evidence and is consistent with applicable law, we affirm it.

We are not persuaded by DeFazio’s argument that he is entitled to equitable relief from the bar of the limitations period. When deciding whether to relax the limitations period in a particular case, the Board is guided by the principles of equitable tolling applied in *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981) in which the United States Court of Appeals for the Third Circuit recognized 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.”⁵

³ 29 C.F.R. § 1980.103(d) (2008); *see* 18 U.S.C.A. § 1514A (b)(2)(D) (Thomson/West Supp. 2008). The SOX and its implementing regulations were amended in July 2010. *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 expanded the time in which to file a complaint from 90 to 180 days from the alleged SOX violation. The pre-amendment 90-day limitations period had run on DeFazio’s claim before the July 2010 amendment. Consequently, we cannot apply an amendment to revive DeFazio’s complaint on which the previous statute of limitations had run. *See Berman v. Blount Parrish & Co.*, 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).

⁴ 18 U.S.C.A. § 1514A(a).

⁵ *Wakileh v. Western Ky. Univ.*, ARB No. 04-013, ALJ No. 2003-LCA-023, slip op. at 4 (ARB Oct. 20, 2004) (citing *Marshall*, 657 F.2d at 18); *see also Udofot v. NASA/Goddard Space Ctr.*, ARB No. 10-027, ALJ No. 2009-CAA-007 (ARB Dec. 20, 2011). The Board has recognized a fourth situation in which equitable tolling may be warranted where, rather than actively misleading a complainant, the employer’s acts or omissions have lulled the complainant into foregoing prompt action to vindicate his rights. *Hyman v. KD Res.*, ARB No. 09-076, ALJ No 2009-SOX-020, slip op. at 7 (ARB Mar. 21, 2010). The record falls short of the kind of evidence needed to support an equitable tolling claim of being “lulled” into foregoing prompt action, especially where DeFazio was represented by legal counsel during the limitations period. *See* discussion *infra* pp. 3-4.

DeFazio asserts that his former attorney mishandled his case and that an attorney representing the Respondent manipulated DeFazio's rights by proposing to provide a response to DeFazio's counsel's March 11, 2010 demand letter by April 21, 2010, the date on which the running of the 90-day limitations period would end.⁶ Complainant's Brief at 5, 14. But the record supports the ALJ's finding that there is "simply no evidence that DeFazio was actively misled by Sheraton or its counsel with regard to filing a SOX cause of action" or that the settlement discussions prevented DeFazio from filing a complaint. Order of Dismissal at 8. Critically, DeFazio's counsel's March 11, 2010 letter, written weeks before the deadline, specifically references a potential SOX complaint. Complainant's Appendix Exhibit 2. The fact that DeFazio was represented by counsel during the limitations period supports the ALJ's determination that "there is no evidence that DeFazio was in some extraordinary way prevented from asserting his rights." Order of Dismissal at 8. Lastly, we agree with the ALJ that there is no evidence that DeFazio "raised a SOX claim in any forum during the statute of limitations period." *Id.* For these reasons, we affirm the ALJ's conclusion that there is an insufficient basis to justify equitable tolling in this case.

CONCLUSION

The ALJ properly determined that, (1) DeFazio failed to file a timely SOX complaint, and (2) DeFazio is not entitled to equitable relief. Accordingly, the ALJ's Order Dismissing Complaint as Untimely is **AFFIRMED**.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

⁶ DeFazio asserts that there is a conflict of interest and ethics issues involving the law firm representing the Respondent. He also argues that his former attorney mishandled the case. Complainant's Brief at 3, 5, 6, 11-17, 21. The Respondent argues that the conflict of interest allegations are frivolous. Respondent's Brief at 13. Because we reach our decision on procedural grounds, we decline to address this issue.