



In the Matter of:

MICHAEL BROOKS,

ARB CASE NO. 2017-0033

COMPLAINANT,

ALJ CASE NO. 2016-SOX-00037

v.

DATE: MAR 25 2019

AGATE RESOURCES, LLC,

RESPONDENT.

Appearances:

*For the Complainant:*

Michael Brooks; *pro se*; Coburg, Oregon; and Marianne Dugan, Esq.;  
Eugene, Oregon

*For the Respondent:*

Carolyn D. Walker, Esq.; Reilley D. Keating, Esq.; and Brianne L.  
Bridegum, Esq.; *Stoel Rives LLP*; Portland, Oregon

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A.  
Haynes and Daniel T. Gresh, *Administrative Appeals Judges*

## FINAL DECISION AND ORDER

**PER CURIAM.** The Complainant, Michael Brooks, filed a retaliation complaint under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2010) (SOX) and its implementing regulations, 29 C.F.R. Part 1980 (2018). Complainant alleged that his former employer, Agate Resources, LLC, violated the SOX whistleblower protection provisions by discharging him on September 27, 2013, because he

engaged in protected activity and by engaging in post-termination threats against him and his son.

Complainant filed his initial complaint of unlawful retaliation with the United States Department of Labor's Occupational Safety and Health Administration on April 4, 2016. On March 6, 2017, the ALJ granted Respondent's motion for summary decision, holding that Complainant failed to file a timely complaint and that equitable tolling of the untimely complaint did not apply. Complainant filed a petition requesting that the Administrative Review Board (ARB or the Board) review the ALJ's order. We affirm.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the Board his authority to act on appeal from ALJ decisions arising under the SOX and issue final agency decisions in those matters.<sup>1</sup> The ARB reviews an ALJ's grant of summary decision de novo under the same standard the ALJ applies. Summary decision is permitted where "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." 29 C.F.R. § 18.72(a) (2018). On summary decision, we review the record on the whole in the light most favorable to the non-moving party. *Micallef v. Harrah's Ricon Casino & Resort*, ARB No. 2016-0095, ALJ No. 2015-SOX-00025, slip op. at 3 (ARB July 5, 2018).

### **CONCLUSION**

The ALJ's decision is in accordance with law. For the reasons stated by the ALJ, there is no genuine issue of material fact that Brooks's complaint was untimely and that equitable tolling does not apply. Accordingly, we adopt the ALJ's well-reasoned Order Granting Summary Decision on Reconsideration and attach a copy hereto.

**SO ORDERED.**

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<sup>1</sup> Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 FR 69378-01 (Nov. 16, 2012).

**U.S. Department of Labor**

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**Issue Date: 06 March 2017**

CASE NO. 2016-SOX-00037

*In the Matter of*

**MICHAEL BROOKS,**  
Complainant,

v.

**AGATE RESOURCES, LLC,**  
Respondent.

Appearances: Marianne Dugan  
for Complainant

Carolyn D. Walker  
Reilley D. Keating  
Brienne L. Bridegum  
for Respondent

Before: Steven B. Berlin  
Administrative Law Judge

**ORDER GRANTING SUMMARY DECISION  
ON RECONSIDERATION**

This case arises under the whistleblower protection provisions of the Affordable Care Act<sup>1</sup> and the Sarbanes-Oxley Act.<sup>2</sup> Complainant alleges that Respondent retaliated against him for his protected activity when it terminated the employment on September 27, 2013. Complainant filed a whistleblower retaliation complaint with the Occupational Safety & Health Administration by telephone on April 4, 2016.<sup>3</sup> Nine days later, on April 13, 2016, OSHA issued "Secretary's Findings," dismissing the complaint as untimely filed. Complainant objected and requested a hearing before an administrative law judge. Until recently Complainant has been self-represented before the administrative law judge.

<sup>1</sup> 28 U.S.C. § 208c, and its implementing regulations at 29 C.F.R. Part 1984.

<sup>2</sup> 18 U.S.C. § 1514A, and its implementing regulations at 29 C.F.R. Part 1980.

<sup>3</sup> See "Secretary's Findings," issued April 13, 2016, where OSHA's Acting Assistant Regional Administrator finds that Complainant filed his complaint on April 4, 2016. No party disputes that this is the date of filing with OSHA.

On August 23, 2016, Respondent filed a “motion to dismiss,” which I construed as for summary decision. Respondent argued that Complainant’s claims were time-barred because he filed his administrative complaint with OSHA after the 180-day filing deadline applicable to the whistleblower protection provisions of both the Affordable Care Act and the Sarbanes-Oxley Act.

I issued an order to show cause directed to Complainant. I explained motions for summary decision in general and what Complainant needed to do to oppose the motion. I advised him of his right to retain counsel and that it could well be to his advantage to do so.

Continuing to represent himself, Complainant filed an opposition with supporting documentation.

On October 26, 2016, I denied summary decision. Viewing the evidence in the light most favorable to Complainant as the non-moving party, I found a genuine issue as to whether equitable tolling rescued Complainant’s otherwise late-filed OSHA complaint. There was no dispute that both statutes (ACA and SOX) require a complaining person to file a complaint with OSHA and that the filing occur within 180 days after the complainant learned of the alleged retaliatory act that violated the statute. There was no dispute that Complainant filed his OSHA complaint long after the 180 days had run.

The issue as to equitable tolling arose because – viewing the evidence in the light most favorable to him – Complainant had shown that he had timely filed his whistleblower complaint but with the wrong agencies. There was evidence that, within the 180-day filing period, he had made at least one call to the Department of Labor’s Wage & Hour Division in which he complained about a whistleblower violation, at least two calls to the Oregon Bureau of Labor and Industries about a whistleblower claim, and at least one call to the U.S. Department of Justice. Although it was possible that, on a full record after a hearing, I might find that Complainant was not entitled to equitable tolling, I could not make that determination on summary decision.

On November 8, 2016, Respondent moved for reconsideration. Relying on an exhibit that Complainant submitted in his opposition to summary decision, Respondent asserted that Complainant had the assistance of counsel to advise him about his rights related to the termination from employment. The exhibit documented that Complainant had the assistance of counsel no later than October 3, 2013, more than two years before he filed his OSHA complaint. Respondent argued that, as a matter of law, equitable tolling was unavailable to Complainant after that date because: “[O]nce a claimant retains counsel, tolling ceases because she has gained the means of knowledge of her rights and can be charged with constructive knowledge of the law’s requirements,” citing *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010) (affirming dismissal of Sarbanes-Oxley retaliation claim as untimely filed with OSHA).<sup>4</sup>

On November 10, 2016, I issued a Second Order to Show Cause directed to Complainant. I explained Respondent’s motion for reconsideration, and I required Complainant to file an

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<sup>4</sup> Ninth Circuit law is controlling in this Oregon-based case.

opposition on or before November 30, 2016, or risk having the motion granted and his case dismissed. Complainant moved for additional time to find counsel, and I allowed him an extension.

On December 23, 2016, Complainant – now represented by counsel – filed a timely opposition. He argues that: (1) although he retained counsel in 2013, the representation did not concern the present whistleblower claims; and (2) that it was only after the Supreme Court’s 2014 decision in *Lawson v. FMR LLC*, 134 S.Ct. 1158 (2014) that the protections of Sarbanes-Oxley were extended to the Affordable Care Act. In addition, Complainant raised a new argument in a reply brief: that a complaint he filed with the Oregon Bureau of Labor and Industries met the regulatory requirement that whistleblower complaints under the ACA and SOX be filed with OSHA. This is not an argument for equitable tolling; it is an argument that Complainant does not need equitable tolling because he filed a timely complaint with Oregon state agency.<sup>5</sup>

Reviewing the record on the motion, I discovered that Complainant had filed related claims in the U.S. District Court for the District of Oregon. On February 1, 2017, I notified the parties that I would take official notice of twelve documents on file in those cases. *See* 29 C.F.R. § 18.84.<sup>6</sup> I gave the parties an opportunity to submit evidence and argument to refute the materials being noticed. *Id.* Both parties filed responses. Although Complainant contends that the federal court filings are irrelevant, neither party disputes that all of the documents involved are appropriate for official notice. Accordingly, the twelve documents are admitted to the record as ALJ Exhibits 1-12.<sup>7</sup>

<sup>5</sup> Complainant raised this third argument (for the first time) in a surreply. I granted his motion to file the surreply and allowed Respondent a response, which Respondent filed.

<sup>6</sup> The regulation on official notice provides: “On motion of a party or on the judge’s own, official notice may be taken of any adjudicative fact or other matter subject to judicial notice. The parties must be given an adequate opportunity to show the contrary of the matter noticed.”

<sup>7</sup> The twelve documents are:

ALJ Exhibit No.	District Oregon Case Name	District Oregon Case No.	Document Title	Date Filed
1	<i>Brooks v. State of Oregon; Agate Resources</i>	6:14-cv-01412 TC	Complaint	Sept. 2, 2014
2			Plaintiff’s Notice of Voluntary Dismissal	Nov. 18, 2014
3			Judgment	Nov. 24, 2014
4	<i>U.S. ex rel. Brooks v. Trillium Community Health Plan and Agate Resources, Inc.</i>	6:14-cv-01424 AA	Complaint	Sept. 3, 2014
5			Pro Bono Appointment Response Form	July 7, 2015
6			First Amended Complaint	Oct. 19, 2015

I will grant summary decision on reconsideration.

Facts<sup>8</sup>

On September 16, 2013, Respondent placed Complainant on administrative leave pending an investigation into “serious allegations” about his behavior toward Analytics Group Supervisor Amanda Cobb.<sup>9</sup> Respondent required Complainant to write a statement about his “relationship” with Ms. Cobb. He stated that he liked her but had no non-work-related relationship with her and did not intend to.<sup>10</sup> When Human Resources Director Nanette Woods asked if he had any “feelings” for Cobb, Complainant expressed concern that Ms. Cobb had made “sexually suggestive remarks” and had a “nearly bipolar relationship with [Complainant].”<sup>11</sup> He reported that, in the week before Respondent put him on administrative leave, Cobb “kept calling [him] ‘honey’ and ‘sweetheart’ in the office.”<sup>12</sup>

On September 27, 2013, Woods called Complainant and informed him that he was terminated because of sexual harassment.

Six days later, on October 3, 2013, attorney Michael Arnold faxed and emailed a letter to Respondent’s Director of Human Resources. C.Opp.Br., Exh. 3. Mr. Arnold wrote:

7			Defendants’ Corporate Disclosure Statement	Dec. 14, 2015
8			Opinion and Order	Apr. 29, 2016
9			Notice of Substitution of Counsel	Oct. 28, 2016
10			Second Amended Complaint	Oct. 28, 2016
11	<i>Brooks v. Agate Resources</i>	6:15-cv-00983 TC	Complaint for Employment Discrimination	June 4, 2015
12			Notice of Representation	Sept. 29, 2015

<sup>8</sup> On summary decision, I view the facts in the light most favorable to the non-moving party, here Complainant. I draw all reasonable inferences in his favor. Accordingly, the facts recited in the text above are for purposes of this motion only.

<sup>9</sup> Letter from Complainant, filed May 10, 2016, at 9.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

Our office represents Mr. Brooks regarding his termination from employment. I am writing to request that you preserve all electronic and written records that pertain to Mr. Brooks, including but not limited to complaints he made regarding sexual harassment by another.

*Id.*

Continuing in the letter, attorney Arnold warns Respondent that its failure to preserve these documents “may constitute spoliation of evidence which may subject [Agate] to legal claims for damages and/or evidentiary and monetary sanctions.” *Id.* Mr. Arnold requests a copy of Complainant’s personnel file. *Id.* At some point, Respondent provided Mr. Arnold with documents from Complainant’s personnel file. C.Opp.Br. at 9 (asserting that other copies of the same documents showed different dates, indicating that they had been altered).

In his opposition to Respondent’s initial motion for summary decision, Complainant stated that he hired the Arnold firm to appeal an Oregon state agency’s denial of unemployment compensation. C.Opp.Br. at 15. In a declaration filed with his surreply on the current motion, Complainant states that he hired Mr. Arnold and his firm – not to “handle any sort of employment discrimination, retaliation, or whistleblower claim against Agate Resources” – but to “defend [himself] against false allegations of workplace sexual harassment at Agate, and attempts to obtain coverage for medical treatment for illnesses and injuries that stemmed [from] work at Agate.” He states that the Arnold firm “never told [him] they would represent [him] on an employment discrimination, retaliation, or whistleblower claim.” C.Decl., filed Dec. 23, 2016.

Mr. Arnold’s fee statement for part of the month of December 2013 appears to concern an unemployment compensation hearing,<sup>13</sup> but Complainant did not submit the fee statements from the beginning of the representation (in or around September or October 2013).<sup>14</sup> The fee statement thus does not establish whether Mr. Arnold discussed with or advised Complainant about potential termination-related claims he might assert against Agate, such as for sex harassment, wrongful termination, or whistleblower retaliation.

But Complainant offers an inconsistent record on the scope of Mr. Arnold’s representation. A fair reading of the Mr. Arnold’s letter quoted above is that Mr. Arnold was threatening – or at least suggesting as possible – a complaint against Agate, asserting that it was Complainant who was sexually harassed at Agate and that the termination was wrongful. After all, Mr. Arnold demands that Agate preserve records of Complainant’s complaining that *he* is being sexually harassed; Arnold says nothing explicit about records of complaints that others made *against* Complainant. In addition, Mr. Arnold holds himself out to Agate as representing Complainant

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<sup>13</sup> Oregon officials denied Complainant’s claim for unemployment compensation because they found that he was terminated for sex harassment, which is “cause” within the meaning of the Oregon workers’ compensation statute.

<sup>14</sup> Complainant alleges in a federal court complaint that he hired an attorney immediately after Agate put him on administrative leave on September 16, 2013. Assuming that Complainant did not have an attorney other than Mr. Arnold, he must have hired Mr. Arnold before the termination. If Complainant was referring to another attorney whom he hired at that time, it would potentially weaken his position on this motion, but there is no evidence of a second attorney in September 2013.

“regarding his termination from employment.” Mr. Arnold did not write that the representation was on Complainant’s unemployment insurance or workers’ compensation claim. Instead, he wrote broadly that he represented Complainant “regarding his termination from employment.”

There’s more. In other litigation, Complainant makes statements that in September 2013, he had email exchanges with “his attorney” about his whistleblowing activity, emails that he alleges Agate likely hacked. In another case, Complainant represented to a federal court that he hired an attorney who wrote a “spoliation letter” on October 3, 2013 (apparently Mr. Arnold and the letter quoted above) for the precise reason that Complainant was a “whistleblower” concerned about Sarbanes-Oxley violations at Agate. I discuss all this below; it suggests – inconsistent with Complainant’s current contentions – that Complainant hired Mr. Arnold (if not some other lawyer) in September or October 2013 for reasons that include whistleblowing claims, such as claims under the Sarbanes-Oxley Act.

Meanwhile, Complainant states that, on the day before the termination, September 26, 2013, he called the Equal Employment Opportunity Commission regarding “harassment and possible termination for being a whistleblower and for on-the-job injuries that his employer refused to cover [and] violations of FMLA.”<sup>15</sup>

EEOC accepts and processes complaints alleging retaliation for (1) filing charges of violations of the statutes it enforces or (2) opposing practices made unlawful under those statutes. The statutes within EEOC’s responsibility are Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, Title V of the Americans with Disabilities Act, section 501 of the Rehabilitation Act of 1973, the Equal Pay Act, and Title II of the Genetic Information Nondiscrimination Act.<sup>16</sup> Whistleblower retaliation complaints under Sarbanes-Oxley or the Affordable Care Act are not among the EEOC’s responsibilities.

EEOC referred the matter to a local EEOC district office (apparently Seattle), and Complainant states that he spoke with the EEOC Seattle office the same day. Complainant states that, ultimately, EEOC deferred to an Oregon state agency (Oregon Bureau of Labor and Industries Civil Rights Division) to investigate Complainant’s charge. This is consistent with the EEOC’s practice under work-sharing agreements with state fair employment practice agencies, whereby EEOC and the state agencies each accept complaints as an agent for the other (“cross-filing”), and then one of the agencies (not both) investigates the complaint.<sup>17</sup> But again, this case processing is limited to complaints within EEOC’s jurisdiction and does not include whistleblower claims under the Sarbanes-Oxley Act or the Affordable Care Act.

Complainant asserts that, once Agate terminated the employment, “he telephoned and attempted to lodge [complaints] concerning FFLA, Whistleblower Retaliation, and other unlawful acts

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<sup>15</sup> It appears that Complainant anticipated that a termination was possible because he had been put on an administrative leave pending investigation.

<sup>16</sup> Of course, EEOC accepts complaints of employment discrimination based on race, sex, national origin, religion, disability, age, and certain other factors not relevant here. The discussion in the text above concerns EEOC’s responsibility on retaliation claims.

<sup>17</sup> See 42 U.S.C. § 2000e-5(e); [https://www.eeoc.gov/employees/feqa\\_wsa\\_2012.cfm](https://www.eeoc.gov/employees/feqa_wsa_2012.cfm).



directed at him with the EEOC, HHS-Civil Rights Division, and Oregon's Bureau of Labor and Industries."

Complainant does not contend (or offer any evidence) that he contacted the Occupational Safety & Health Administration at this time. But he came close. He states that, on October 2, 2013, he called the U.S. Department of Labor in Portland, Oregon, "to lodge a complaint for termination due to injuries sustained on the job, FMLA violations, and retaliation for whistleblowing." The phone number that he called is for the Department's Wage & Hour Division. Complainant does not state that DOL (or Wage & Hour) accepted a complaint; he states only that he was referred to the Oregon Bureau of Labor and Industries (BOLI). That is the same agency to which the EEOC deferred.

Oregon BOLI focuses on complaints of employment discrimination, wage and hour violations (including, for example, overtime, child labor, and various leave laws), and protection of whistleblowers reporting about safety and health violations or violations of certain federal or state laws. *See* 2015 ORS § 659A.885. This would include, for example, investigation of employment discrimination (sex, race, national origin, etc.) initially filed with BOLI or with EEOC, if EEOC defers to the state agency. It would include alleged retaliation for filing a state worker's compensation claim. It would include whistleblower complaints related to occupational health and safety, parallel to the employee protection ("whistleblower") provision of the Occupational Safety & Health Act of 1970, section 11(c). 29 U.S.C. § 660(c); *see* 29 C.F.R. §§ 1977.23, 1902.4(c)(2)(v). But BOLI's responsibilities do not include investigation or enforcement of the whistleblower protection provisions in the Affordable Care Act or the Sarbanes-Oxley Act; there is no cross-filing arrangement or work-sharing agreement between federal OSHA and state agencies to investigate such complaints.

Complainant states that, after the Department of Labor referred him to Oregon BOLI, he phoned BOLI the same day (October 2, 2013). Curiously, he says that he "was led to believe that he was talking with an HHS-Civil Rights Division [employee]." He states that he reported "'everything,' including whistleblowing activities going back to 2006, records of Medicare and Medicaid fraud kept, monies (payoffs) given to Oregon agency employees, etc." C.Opp.Br. Ex. at 5. Complainant does not state how Oregon BOLI (or HHS) responded. He does not state that anyone accepted a complaint.

Instead, he states that he was concerned that BOLI had "mised/misinformed him" so he called another phone number at the Department of Labor. This was another office at Wage & Hour Division. He said the phone call was 65 minutes long, but he does not say what either he or the Wage & Hour representative stated. He concludes: "That lodged a formal complaint," but he does not explain how, nor does he state what the complaint was about or that it was under the Affordable Care Act or the Sarbanes-Oxley Act.

Complainant states that, about two weeks later, on October 17, 2013, he "tried to lodge claims of unlawful termination under FMLA and whistleblower retaliation, medical redlining and ACA" with the Department of Health & Human Services (Seattle District Office).

The Office of Civil Rights at DHHS accepts complaints of discrimination based on race, color, national origin, disability, age, sex, or religion in programs or activities that HHS directly operates or to which HHS provides federal financial assistance. That would include, for example, complaints of race or sex discrimination in the provision of Medicare or Medicaid benefits, but it does not include whistleblower protection under the Affordable Care Act or the Sarbanes-Oxley Act. DHHS referred Complainant to the EEOC, which again referred him to Oregon BOLI.

Complainant contacted Oregon BOLI (again) and spoke with intake clerk Monica Mosely. She asked him to write up his complaint. *See* C.Opp.Br. Exh. 1.

Complainant has submitted for the record a copy of his written BOLI complaint. *Id.* He invokes the Americans with Disabilities Act, asserting that he was disabled because he had difficulty walking, needed eye surgery, and was depressed after learning that he had a growth in a lung. He states that the eye injury was at the workplace, but he did not file a workers' compensation claim because Respondent had threatened him. He states that he observed and reported violations of HIPAA, Medicare and Medicaid fraud, kickbacks and bribes, and accounting irregularities. He says he had reported these to the Oregon attorney general, the Centers for Medicare and Medicaid Services, and the U.S. Department of Health & Human Services. More crucially, he states that he reported these to a "private attorney." He adds a statement that he believes Agate began hacking his private email account in September 2013, and that this included opening "emails from my private attorney."

Complainant states that, rather than accommodate his various medical conditions, Agate demanded that he postpone treatment and work 60 to 80 hour weeks, "often working all night long, doing special reports, software builds, etc." C.Opp.Br. Exh. 1 at 2. He complained to management that this violated the Americans with Disabilities Act and the federal Family and Medical Leave Act.

Complainant recites in his BOLI complaint: being put on an administrative leave without explanation on September 16, 2013; believing that it was at that time that Agate hacked his personal emails; being notified on September 27, 2013, that the employment was terminated because, according to Respondent, he had sexually harassed Amanda Cobb; and that actually it was Ms. Cobb who had sexually harassed him with sexual remarks and "actions," including "a very odd 'love letter' in early September 2013" that Complainant had grieved to Agate senior management. It is not until the end of the complaint that Complainant for the first time alleges whistleblower retaliation. As he wrote:

I believe Agate sought to terminate me, to rid themselves of a seriously ill employee. In their search for an excuse to do this, they illegally hacked into my private email account, discovered that I was a whistleblower, and invented the charge of "sexual harassment" to get rid of me and discredit my whistleblowing claims.

C.Opp.Br. Exh. 1 at 3.

Complainant states that he sent his written complaint to intake clerk Mosely at Oregon BOLI in December 2013. He admits that, having received the complaint, Mosely told him that BOLI does not take whistleblower retaliation complaints. He states that Mosely “eliminated the whistleblower retaliation claims on page 3 [*i.e.*, those quoted above] and told the Complainant that BOLI did not deal with whistleblower retaliation charges.” C.Opp.Br. Exh. 1.

Complainant writes of this phone call: The intake clerk “flat out refused to accept Complainant’s complaint [of retaliation].” C.Opp.Br. at 20. Complainant told the intake clerk that the U.S. Department of Labor said that BOLI did take whistleblower claims, apparently referring to the phone conversations he’d had with Wage & Hour Division on October 2, 2013. As discussed above, BOLI does take wage and hour complaints, including whistleblower complaints related to protected activity concerning wage and hour violations. It also accepts whistleblower complaints concerning occupational safety and health (akin to OSHA section 11(c) complaints). But it does not process whistleblower complaints under the Sarbanes-Oxley Act or the Affordable Care Act.

When Complainant asked to speak with a supervisor, Mosely transferred the call to a person whom Complainant believes was named Cylvia Hayes. This person supported Mosley’s opinion and told Complainant to proceed as Mosley had advised him.<sup>18</sup> C.Opp.Br. Note 1.

Complainant states that he phoned the U.S. Department of Justice on December 31, 2013, and again on January 16, 2014. The phone number he gives is for the Department’s information line on the Americans with Disabilities Act. He states that he “sought assistance for whistleblower retaliation and inexplicable actions by Oregon State officials.” He does not suggest that DOJ accepted a complaint.

Complainant states that, on February 13, 2014, he called the Oregon Secretary of State’s office, which “oversees business and consumer affairs.” He says he spoke to an aide of the Secretary and that Oregon Secretary of State Kate Brown personally “was listening in the conversation and talking with the aide.”<sup>19</sup> He said he reported whistleblower retaliation and requested assistance in pursuing whistleblower retaliation claims. He does not state what response he received.

Curiously, despite all these averments that he raised whistleblower complaints with these agencies, Complainant states in his initial opposition that it did not become “clear” to him until May 21, 2014, that the termination was “primarily” for whistleblowing. Complainant states that he is an expert on cyber intrusions and that, after investigating, he concluded that Agate had hacked his private emails (written on his private computer) beginning in July 2013 and with “multiple accesses in September 2013.” C.Opp.Br. at 13, 17. According to Complainant, his investigation disclosed hacked emails “from his attorney,” that made him suspicious around September [2013], and even as late as March 6, 2013 [probably 2014]. But it was not until May

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<sup>18</sup> Complainant now thinks the supposed supervisor was then-Governor John Kitzhaber’s “girlfriend,” who “was not supposed to be an Oregon employee at all” and in fact was “a paid lobbyist/advisor for [Respondent] Agate.” But, as Complainant did not know this at the time, he was under the impression that a supervisor had confirmed that BOLI did not accept whistleblower complaints of the kind he was trying to file.

<sup>19</sup> Kate Brown is currently the Governor of Oregon.

20, 2014, that he had “ample evidence that Agate knew that the Complainant was a whistleblower and retaliated against him for that.” *Id.* at 2. Complainant states that “a flurry of phone calls, emails, and correspondence with various federal agencies” followed. *Id.*

Complainant states that he called OSHA on April 21, 2014, but the phone number he gives for the call is for the Inspector General’s Office at the U.S. Department of Health & Human Services. He also gives another number, which is a general switchboard at the Department of Labor and allows for transfer to other offices. Complainant states that he was dissatisfied because “no action was taken.”

A week later, he again called the phone number for the Inspector General’s Office at DHHS. He reported that he had brought up “medical redlining” at a staff meeting [apparently while working for Respondent] and that he “suspected whistleblower retaliation, but proving that would depend upon the EEOC taking over BOLI’s botched investigation [or his getting information about possible hacking of his email account.]” Complainant also recalls telling “the Oregon State Plan OSHA Office about this in January or February 2014” or maybe in October or early November 2013. C.Opp.Br. at 7.

As intake clerk Mosely had accepted Complainant’s BOLI complaint (after striking the whistleblower allegation), BOLI assigned investigator Jeremy Wolff to the case. On March 3, 2014, Complainant and Wolff discussed the complaint on the phone. Wolff commented that the complaint raised five statutory claims, including discrimination, harassment, and termination on account of Complainant’s disability, an FMLA claim, and “a kind of whistleblowing retaliation claim.”

Three days later, on March 6, 2014, Complainant met with Wolff in person. Complainant states that he brought Wolff documentation showing that Respondent was selling health records, engaged in “double billing,” used “fake provider identifiers,” engaged in “medical redlining,” “falsified government reports,” and paid “bribes” “to the Governor and other state officials,” involving “tens of millions of dollars.” C.Opp.Br. at 8.

According to Complainant, this is when he first learned of the Sarbanes-Oxley Act. He states that Wolff told him that the Supreme Court had decided the *Lawson* case two days earlier and that this extended Sarbanes-Oxley protection “to cases like mine involving the Affordable Care Act (ACA).” C.Decl. ISO Opp. to Recon at ¶ 17. Complainant states that Wolff told him that, because of *Lawson*, Complainant’s claim was now covered under Sarbanes-Oxley. As Complainant writes in his declaration, Wolff told him that:

He was going to redraft the whistleblower portion of [the] complaint to include [Sarbanes-Oxley] and file a Sarbanes-Oxley complaint under section 806 of that law and submit it prior to March 21, 2014. He specifically told me that BOLI had contracts with the US DOL and that BOLI therefore could and would do this.

*Id.* Complainant states that Wolff also told him he would redraft the complaint to include whistleblower retaliation under the Affordable Care Act “as well as several state whistleblower

statutes.” *Id.* But it appears that Wolff never did any of this, nor could he have initiated a BOLI investigation under the Affordable Care Act or the Sarbanes-Oxley Act.

Complainant last communicated with Wolff on May 21, 2014. Wolff left Oregon BOLI at that time. According to Complainant, his complaint to BOLI “had been stripped of the whistleblower retaliation charges” (something Moseley had notified him about) and “NOTHING had been done with his case.” C.Opp.Br. at 10 (emphasis in original). On August 24, 2014, Complainant learned from BOLI that Wolff had left “some time ago,” and no one had been assigned to the case after May 21, 2014.

On September 2, 2014, Complainant sued the State of Oregon and Respondent Agate Resources in U.S. District Court.<sup>20</sup> See ALJ Ex. 1. Complainant sought \$13,200,000 in damages for violation of his civil rights under 42 U.S.C. § 1983 and certain other statutes.<sup>21</sup> *Id.* Although Complainant was self-represented when he filed the complaint, attorney Michael D. Vergamini was representing him when Complainant voluntarily dismissed his case on November 18, 2014. ALJ Ex. 2.

In his civil complaint, Complainant alleges that he is a whistleblower who reported on multiple occasions, beginning in 2007, violations of HIPAA (involving Medicare and Medicaid records) to agencies such as the Centers for Medicare and Medicaid Services and the Oregon Attorney General as well as the Chief Medical Officer or IT Manager at Agate. He alleged that – “for law enforcement” – he had investigated apparent fraud at Agate. See ALJ Ex. 1 at 2-3 (“The Plaintiff is a whistleblower . . .”). He alleged that he observed “payments to elected officials, physicians, hospital administrators, Oregon agency personnel” that were “likely unlawful,” and that he had reported this to “federal authorities and private attorneys.” He alleged that he saw Agate sharing methods to defraud Medicare and Medicaid through shell corporations for moving and hiding money. He alleges that he informed Oregon officials of “thousands of additional violations.” He alleges that he was terminated from employment.

In particular, Complainant represents to the federal court as follows:

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<sup>20</sup> *Brooks v. State of Oregon and Agate Resources*, Case No. 6:14-cv-01412-TC (D. Ore.).

<sup>21</sup> Complainant alleges violations of the Americans with Disabilities Act and the Family and Medical Leave Act in connection with Agate’s failure to accommodate an eye injury, a broken foot, and a mass in his right lung. He alleges that the eye injury was work-related and that Agate threatened him when he sought to file a workers’ compensation claim. He alleges that Agate’s stated reason for the termination was that he had sexually harassed Ms. Cobb. He alleges that he was denied unemployment insurance benefits, as it was determined that he had been terminated for cause. But, he alleges, this decision relied on fabricated documents. He alleges that the state administrative law judge engaged in judicial misconduct and “certainly collusion” by Agate, which he alleges was “a felony.” (Complainant asserts that the chair of the Unemployment Appeals Board was married to a nurse practitioner “whose livelihood depends in large part upon Agate’s contracts with her place of business.”) Complainant states that he appealed the denial of unemployment compensation to the Oregon Court of Appeals, which also “engaged in judicial misconduct” that Complainant attributes to the court’s desire to cover up unlawful activity of Oregon officials and agencies as well as that of the State’s contractors. Complainant, who states that he is an amateur radio operator and “skilled engineer at intrusion detection with several patents” (and “invented the algorithms used in the OTDR”) detected that his cell phone was being hacked, he suspects by the State of Oregon.

Immediately after being placed on Administrative Leave, the Plaintiff [*i.e.*, Complainant Brooks] had hired a private attorney to help him pursue an unlawful termination claim against Agate, with the State of Oregon. A spoliation letter was filed by that attorney on October 3, [2013]<sup>22</sup> . . . .

ALJ Ex. 1 at 7. Complainant apparently is referring to attorney Arnold who wrote the litigation hold letter to Agate on October 3, 2013. This is completely inconsistent with Complainant's current contention that he only hired Mr. Arnold to represent him on a claim for unemployment compensation or workers' compensation.

He alleges that, after receiving the litigation hold letter from his attorney, Agate's Human Resources Director "ordered the destruction of [Complainant's work] computer the next day, October 4, 2013." Complainant then states:

This is especially important because [Complainant] had filed a concern that Sarbanes-Oxley violations were taking place at Agate and he suspected that they were taking place statewide at all OHP contractors and had records for this in files on his computer. Federal statutes make this violation punishable by a \$20 million fine and 20 years in prison.

ALJ Ex. 1 at 7. This is a direct representation to a federal district court that Mr. Arnold's letter – in which he said he was representing Complainant regarding his termination from employment – was a letter intended to preserve, among other things, records related to Sarbanes-Oxley violations. It is inconsistent with Complainant's contention that Mr. Arnold's involvement was limited to unemployment compensation or workers' compensation.

Given Complainant's statement to the federal court about Sarbanes-Oxley violations and his statement to the court that he hired the attorney to pursue an unlawful termination claim against Agate, it is difficult to infer anything other than that Complainant was discussing pursuing as a plaintiff a wrongful termination action against Agate that would include Sarbanes-Oxley violations.

In any event, when the defense filed a motion to dismiss the federal case, Complainant voluntarily dismissed the case without prejudice. He says he did this because BOLI agreed to add his Sarbanes-Oxley and Affordable Care Act whistleblower allegations to his BOLI complaint. He states that BOLI did this, but that it ultimately dismissed his complaint.

Complainant filed another action in the district court on September 3, 2014, the day after he filed the first case.<sup>23</sup> This is a *qui tam* action against Agate Resources, Oregon Healthcare Plan, and the State of Oregon under the Federal False Claims Act and other provisions.<sup>24</sup> ALJ Ex. 4. Identifying the parties in the complaint, he describes himself as follows:

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<sup>22</sup> Complainant actually wrote "2014" in the federal complaint. But, as he filed the federal complaint on September 2, 2014, he could not be referring to a prior event that occurred on October 3, 2014 – that date was still in the future.

<sup>23</sup> *U.S. ex rel. Brooks v. Agate Resources, et al.*, Case No. 6:14-cv-01424 (D. Ore.).

<sup>24</sup> The United States declined to intervene on May 22, 2015.

Relator, Michael T. Brooks, was the Data Warehouse Administrator at Agate Resources . . . from November 7, 2005 until September 27, 2013, when he was unlawfully terminated when Agate hacked his email account and discovered he was a whistleblower. (See companion federal lawsuit.)

ALJ Ex. 4 at 2. Thus, Complainant describes the case he filed in the District of Oregon on the preceding day concerns him as a person who was unlawfully terminated on account of whistleblowing. As before, he alleges that:

Agate knew, due to hacking his computer, [Complainant] revealed that he was a whistleblower and that Agate had been hacking into his computer since at least the middle of August, 2013. They had discovered that [Complainant] was reporting fraud, kickbacks, bribes, and other unlawful activities to private attorneys and to the Oregon Attorney General's Office.

ALJ Ex. 4 at 6. Complainant seeks, on behalf of the United States, damages in excess of \$2.1 billion. The complaint is verified, with Complainant stating that he "swears that everything in this complaint is true." *Id.* at 8.

The district court appointed Jesse T. London as *pro bono* counsel for Complainant, which Mr. London accepted on July 6, 2015. ALJ Ex. 5. Now represented, Complainant filed an amended complaint on October 18, 2015. ALJ Ex. 6. He raises similar allegations about the sale of private medical information for employer use and adds allegations of fraud through "duplicative billing and other improper claims resulting in overpayment by the government that intention, not mistake, is the likely cause."<sup>25</sup> *Id.* at 6. Complainant then alleges:

Mr. Brooks went to one of Defendants' senior officers with his concerns and was rebuffed. Within a very short time, Mr. Brooks was terminated under a false pretense. Shortly after his pretextual firing, Mr. Brooks contacted state enforcement authorities to alert them to Defendants' misconduct . . . . Having gained nothing from his efforts, he decided to seek legal redress.

ALJ Ex. 6 at 2.

The court granted with leave to amend a defense motion to dismiss on April 29, 2016. The court expressly repeated Complainant's allegation that he "became very concerned with respect to potential claims fraud, improper disclosure of [personally identifiable and private health information], and discrimination against poor patients.' [He] was rebuffed when he expressed his concerns to one of defendants' senior officers. Shortly thereafter, defendants terminated [him], allegedly under false pretenses." ALJ Ex. 6 at 3.

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<sup>25</sup> Elsewhere in the amended complaint, Complainant alleges more specifically that this involved Medicaid payments. See ALJ Ex. 6 at 3-4, 9-11.

Two additional attorneys appeared on Complainant's behalf on October 28, 2016, and Complainant filed a second amended complaint on that day. ALJ Ex. 9, 10. The second amended complaint repeats the prior allegations about Complainant's reporting his concerns about unlawful conduct to "one of Defendants' high-level managers" and then "within a very short time," being "terminated under a false pretense." ALJ Ex. 10 at 5. Defendants moved to dismiss the second amended complaint. The motion remains pending.

On June 4, 2015, Complainant filed a third complaint in the district court against Agate.<sup>26</sup> ALJ Ex. 11. He alleged violations of the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Rehabilitation Act of 1973, the Whistleblower Protection Act (5 U.S.C. § 23 – affecting federal employees), the Family and Medical Leave Act, and whistleblower retaliation under the Nineteenth Century civil rights acts as well as the Civil Rights Act of 1964 (42 U.S.C. §§ 1981-2000h). ALJ Ex. 11 at 1-2. But he also expressly alleged violation of the whistleblower protection provisions of the Affordable Care Act and the Sarbanes-Oxley Act. He alleges that Agate violated these statutes through harassment, retaliation, failure to accommodate disability, and the termination of employment.<sup>27</sup> *Id.* at 3. He seeks over \$6 million in damages.

On September 29, 2015, attorney Michael Vergamini appeared on behalf of Complainant. The matter is pending before the district court.

Complainant filed the present complaint with the Occupational Safety & Health Administration on April 4, 2016. This was 920 days after Agate terminated the employment.<sup>28</sup> It was also 188 days after attorney Vergamini appeared to represent Complainant in the most recent of the three federal cases (the one Complainant filed on June 4, 2015).

Complainant filed the OSHA complaint in a phone call. The OSHA employee taking the call noted Complainant as stating that he had told Respondent's management about the company's fraudulent Medicare and Medicaid practices and that Respondent had terminated the employment, allegedly in retaliation.

On the present motion, Complainant explains why he did not file a complaint with OSHA until April 4, 2016. He states that what motivated him to file the OSHA complaint was a series of post-termination threats, some against him and some against family members. Complainant states the threats against him started in May 2014. Complainant also states that his son, who is incarcerated, was also threatened and then assaulted, starting more recently, in March 2016.

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<sup>26</sup> *Brooks v. Agate Resources*, Case No. 6:15-cv-983-TC (D. Ore.).

<sup>27</sup> Complainant alleged that either the EEOC or Oregon BOLI issued a right to sue letter on April 23, 2015, and that he had filed a charge of age discrimination with the EEOC, but that 60 days had not elapsed since that filing (making the ADEA complaint premature). On July 2, 2015, Complainant filed ten separate motions to compel discovery. The district court denied the motions on August 4, 2015.

<sup>28</sup> What appears to be a copy of the OSHA employee's reduction to writing of Complainant's phone complaint is attached to Respondent's motion. The form shows a filing date of April 4, 2016, but the employee who completed form did not sign or date it in the portion provided for her to certify the filing of the complaint. But, in the "Secretary's Findings," issued April 13, 2016, OSHA's Acting Assistant Regional Administrator finds that Complainant filed his complaint on April 4, 2016. No party disputes that this is the date of filing with OSHA, and I accept that it is the date Complainant filed with OSHA.



In particular, Complainant alleges that, starting in May 2014, he received telephone calls threatening his life. Caller ID was blocked on the calls. He reported the calls to the Federal Bureau of Investigation on May 27, 2014. He states – vaguely – that he “took precaution” but regarded the calls as bullying. He states that the calls continued and included “particularly graphic” calls on May 3 and 5, 2014.

But Complainant states that it was the threats to his incarcerated son that prompted him to file the OSHA complaint. He states – again vaguely – that these threats “alluded to the Complainant’s actions against Agate and Oregon officials.” Complainant reports his son as telling him that the threats extended, not only to Complainant’s son, but also to his wife and daughter. Complainant met with his son on March 21, 2016, and at his son’s urging, “logged formal complaints” with the local police, Oregon state police, and the FBI. Three days later, on March 24, 2016, “three unidentified males” “beat up” Complainant’s son, “specifically citing [Complainant’s] whistleblowing.”

As Complainant wrote: “THAT prompted the telephone call to OSHA in late March [2016 – actually April 4, 2016] . . . and the opening of this case.” C.Opp.Br. at 3 (emphasis in original). Complainant concluded that his son’s assailants’ motivation “very clearly” was court filings that Complainant had made on March 8, 2016 against Agate and against “personnel working for the state of Oregon.” Complainant describes this as a “state case” on which attorney Michael Vergamini is representing him. This apparently is another case aside from those described above.

Although Complainant states that the threatening calls to his son are what prompted him to file an OSHA complaint, he does not state that he included any allegations of threats against himself or his son or other family members when he called OSHA and made the complaint. The OSHA employee who reduced the complaint to writing recites Complainant’s allegations but includes no reference to any such allegation.<sup>29</sup>

### Discussion

*Standard on summary decision.* On summary decision, I must determine if, based on pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. § 18.40(d); Fed. R. Civ. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must

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<sup>29</sup> Under both statutes, the administrative complaint need not be filed in any particular form; for example, they may be filed by telephone. For oral complaints, the OSHA employee must reduce the complaint to writing. *See* 29 C.F.R. §§ 1980.103(b) (SOX); 1984.103(b) (ACA).

Here, the OSHA employee recorded in a “Case Activity Worksheet” as the “allegation summary” the following, which I quote in full: “Complainant contends that he reported concerns to company management about fraudulent practices related to Medicare and Medicaid. Complainant further contends that Respondent terminated his employment on September 27, 2013 in retaliation for raising these concerns, in violation of both Section 1558 of the Affordable Care Act (ACA), 29 U.S.C. 281c and the Sarbanes-Oxley Act (SOX), 18 U.S.C.A. §1514A.” There is no mention of threats.

draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed. R. Civ. P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 29 C.F.R. § 18.40(c). A genuine issue exists when, based on the evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

#### I. Equitable Tolling Does Not Rescue Complainant’s Late-Filed Complaint.

*Filing deadlines and tolling.* The whistleblower protection provision in the Affordable Care Act requires employees who believe they have a claim to follow the procedures codified at 15 U.S.C. § 2087(b). Those procedures require that an administrative complaint be filed with the Secretary of Labor within 180 days after the retaliatory act occurs.<sup>30</sup> *See* 29 U.S.C. § 218c(b)(1).

The Sarbanes-Oxley whistleblower protection provision generally follows the procedures established in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b). *See* 18 U.S.C. § 1514A(c)(2)(A). But Sarbanes-Oxley expressly requires that “An action . . . be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.” *Id.*, § 1514(c)(2)(D).<sup>31</sup> AIR 21 provides that the action is initiated by filing a complaint with the Secretary of Labor. 49 U.S.C.A. § 42121(b)(1).

The Secretary of Labor’s regulations implementing both statutes specify that administrative complaints must be filed with OSHA. The regulations both provide: “The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee.” 29 C.F.R. §§ 1980.103(c) (SOX); 1984.103(c) (ACA).<sup>32</sup>

The regulations for both statutes contain the same language to allow for equitable tolling:

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<sup>30</sup> As the statute provides: “A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 180 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination and identifying the person responsible for such act.” 15 U.S.C. § 2087(b)(1). Similarly, the applicable regulation provides: “*Time for filing.* Within 180 days after an alleged violation of section 18C of the FLSA occurs, any employee who believes that he or she has been retaliated against in violation of that section may file, or have filed by any person on the employee’s behalf, a complaint alleging such retaliation.” 29 C.F.R. § 1984.103(d).

<sup>31</sup> The applicable regulation provides: “*Time for filing.* Within 180 days after an alleged violation of the Act occurs or after the date on which the employee became aware of the alleged violation of the Act, any employee who believes that he or she has been retaliated against in violation of the Act may file, or have filed on the employee’s behalf, a complaint alleging such retaliation.” 29 C.F.R. § 1980.103(d).

<sup>32</sup> Both regulations add that: “Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address: <http://www.osha.gov>.”

The time for filing a complaint may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint equitably tolled if a complainant mistakenly files a complaint with another agency instead of OSHA within 180 days after becoming aware of the alleged violation.

29 C.F.R. §§ 1980.103(d), 1984.103(d).

Equitable tolling focuses, not on the defendant's wrongful conduct, but on "whether the plaintiff's delay was excusable." *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir. 2010).<sup>33</sup> "Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital information bearing on the existence of his claim." *Id.*, quoting *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000). Generally, equitable tolling finds application in three situations: when respondents "actively misled Complainant . . . , Complainant was prevented from asserting his rights in some extraordinary way, or . . . Complainant raised the claim in the wrong forum." *Rosenfeld v. Cox Enterprises*, ARB Case No. 16-026 (May 24, 2016) (Sarbanes-Oxley), 2016 WL 3135584, slip op. at 2. In an unpublished decision, the Ninth Circuit affirmed the ARB's adoption of this three-prong analysis, which the court observed had been "articulated in cases such as *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981)." *Herchak v. U.S. Dep't of Labor*, 125 Fed. Appx. 102, 106 (9th Cir. 2005) (unpub.).

Agate asserts, and Complainant does not dispute, that under controlling Ninth Circuit authority, an argument for equitable tolling ceases when the party retains counsel, for the party

Is charged with constructive knowledge of the law's requirements once she retained counsel. "[O]nce a claimant retains counsel, tolling ceases because she has gained the means of knowledge of her rights and can be charged with constructive knowledge of the law's requirements." *Leorna v. U.S. Dep't of State*, 105 F.3d 548, 551 (9th Cir. 1997) (internal quotation marks and citation omitted).

*Coppinger-Martin v. Solis*, 627 F.3d at 750 (Sarbanes-Oxley whistleblower). In *Coppinger-Martin*,

Shortly after her termination, Coppinger–Martin hired an attorney, and her attorney contacted Nordstrom's general counsel on May 22, 2006, to discuss her severance agreement and possible claims against Nordstrom. Thus, even if equitable tolling could be properly applied, it would have ceased by May 22, 2006, at the latest.

*Id.* Once the party is represented by counsel, counsel's negligence in meeting deadlines is not a basis for equitable tolling. *See Miranda v. Castro*, 292 F.3d 1063, 1067 n. 4 (9th Cir. 2002) (collecting cases) (attorney's miscalculation of deadline and his negligence in general does not constitute extraordinary circumstances sufficient to warrant equitable tolling).

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<sup>33</sup> The Ninth Circuit is controlling in this Oregon-based case.

In the present case, unless Complainant can demonstrate that his filing with the Oregon Bureau of Labor and Industries satisfied the requirement to file an administrative complaint with OSHA, there is no dispute that he late-filed the complaint. He filed the complaint with OSHA on April 4, 2016; Agate informed Complainant of the termination 920 days earlier, on September 27, 2013. This far exceeds the 180-day filing requirement applicable to both statutes. I will address below and reject Complainant's argument that his filing with Oregon BOLI met the filing requirements applicable to the present claims. The viability of Complainant's claims thus turns on whether the filing requirement was equitably tolled such as to make timely Complainant's April 4, 2016 OSHA filing. I conclude that, as a matter of law, Complainant cannot rescue his stale claims through equitable tolling. *See Coppinger-Martin v. Solis*, 627 F.3d at 750.

*Mr. Arnold's representation.* There is no dispute that an attorney (Mr. Arnold) was representing Complainant no later than October 2013. It appears that Complainant's assertion that the representation was limited and did not extend to claims related to his whistleblowing activities is a sham. *See, e.g., Yeager v. Bowlin*, 693 F.3d 1076, 1079-80 (9th Cir. 2012); *Van Asdale v. Int'l Game Technology*, 557 F.3d 989, 998-99 (9th Cir. 2009). As the Ninth Circuit stated:

The Supreme Court has explained that “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.” Some form of the sham affidavit rule is necessary to maintain this principle. This is because, as we have explained, “if a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.”

*Van Asdale*, 557 F.3d at 998. Thus,

“The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony” . . . . But the sham affidavit rule “should be applied with caution” because it is in tension with the principle that the court is not to make credibility determinations when granting or denying summary judgment.

*Yeager*, 693 F.3d at 1080.

I thus place no reliance on the fact that Mr. Arnold's letter states that he is representing Complainant on the termination or that the only examples of documents he specifies for preservation would relate to an assertion that it was Complainant who was being sexually harassed at Agate. These suggest that Mr. Arnold was representing Complainant on some form of affirmative claim for wrongful termination, not simply a claim for unemployment compensation. But the Arnold letter goes to the credibility of Complainant's characterization of Mr. Arnold's representation; it is not an assertion that Complainant made inconsistent with the statement in his current declaration. I treat in the same manner Complainant's statements to

BOLI that he reported by email Medicare and Medicaid fraud and accounting irregularities to his “private attorney” and that Agate hacked those emails in September 2013.

Of much greater concern is Complainant’s inconsistent statements made to the United States District Court. In his civil complaint filed on September 2, 2014, Complainant states that “immediately after being placed on Administrative Leave,” he hired “a private attorney to help him pursue an unlawful termination claim against Agate, with the State of Oregon.” Complainant stated to the district court that the anti-spoliation letter this attorney wrote to Agate on October 3, 2013, was “especially important because [Complainant] had filed a concern that Sarbanes-Oxley violations were taking place at Agate . . . .”

This is almost certainly a reference to Mr. Arnold, who we know wrote the October 3, 2013 anti-spoliation letter to Agate. It supports a conclusion that Complainant’s assertion now that Mr. Arnold was not involved in pursuing an unlawful termination claim against Agate is a sham. And if Complainant was not referring to Mr. Arnold, it means that he had some other lawyer at that time who was representing him in the pursuit of a wrongful termination claim against Agate. In that event, his assertion about the limits of Mr. Arnold’s representation might not be a sham, but it does not help him: It means that he was represented by counsel for wrongful termination purposes whether counsel was Mr. Arnold or some other lawyer. The reference to his private attorney hired to “pursue an unlawful termination claim” is enough to foreclose equitable tolling; the additional reference to Sarbanes-Oxley violations only makes more certain the same result: no equitable tolling. The result is that Complainant was not entitled to equitable tolling at any time; at the time of the termination, Complainant had constructive knowledge from Mr. Arnold or another attorney how to initiate the present claims timely and failed to do so.

*Mr. Vergamini’s representation.* The civil action filed on September 2, 2014, also defeats Complainant’s equitable tolling argument in a second and independent way. As discussed above, Complainant alleged in the district court that he was attempting to raise wrongful termination claims, including claims related to Sarbanes-Oxley. Consistent with this, Complainant only dismissed this district court action when defendant State of Oregon (BOLI) agreed to amend his BOLI complaint to add a Sarbanes-Oxley whistleblower complaint. That was plainly a purpose of the litigation. But, crucially, it was an attorney, Michael D. Vergamini, who signed the voluntary dismissal papers on behalf of Complainant on November 18, 2014. Even if Mr. Vergamini first began his representation of Complainant on that date, November 18, 2014, it was 503 days before Complainant filed the OSHA complaint on April 4, 2016. Complainant was charged with knowledge of how to proceed on his claims and did not do so for 503 days, making them untimely.

*Mr. London’s representation.* In the *qui tam* action Complainant filed in the district court on the day after he filed the civil case discussed above, he alleged that he was “unlawfully terminated when Agate hacked his email account and discovered he was a whistleblower.” Mr. London appeared as *pro bono* counsel for Complainant on July 6, 2015. Mr. London was aware of the complaint and its allegation; he knew Complainant contention that Agate had terminated the employment in retaliation for whistleblowing. Again, under *Coppinger-Martin v. Solis*, 627 F.3d at 750, Complainant is charged with constructive knowledge of his rights under the whistleblower statutes and of how he must proceed to pursue the whistleblower claims. This was

273 days before he filed an OSHA complaint. Even had he been entitled to equitable tolling before this time, the tolling ceased at this point, making his OSHA filing untimely.

*Mr. Vergamini's second representation.* In the next district court case, Complainant filed a complaint on June 4, 2015. This complaint expressly and unequivocally pleads whistleblower retaliation claims under the Affordable Care Act and the Sarbanes-Oxley Act. Mr. Vergamini appeared on Complainant's behalf on September 29, 2015. That was 188 days before Complainant filed his OSHA complaint. It is beyond question that Mr. Vergamini's representation extended to the very whistleblower claims that Complainant has asserted here. Under *Coppinger-Martin v. Solis*, 627 F.3d at 750, Complainant is charged with knowledge that those claims had to be filed initially with OSHA, not with a federal district court. Even if Complainant was entitled to equitable tolling throughout the entire period before September 29, 2015, the tolling ceased on that day, leaving Complainant's OSHA filing untimely.<sup>34</sup>

For all of these reasons, Complainant failed to file a timely complaint with OSHA on either of his whistleblower claims.<sup>35</sup>

## II. Complainant's Filing with BOLI Did Not Satisfy the Statutory or Regulatory Filing Requirement under Either Statute.

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<sup>34</sup> Ultimately, Complainant explains the timing of his OSHA filing, and it has nothing to do with anything that would support equitable tolling. What triggered the filing on April 4, 2016, were threats to Complainant's son and his son's family in March 2016, together with an assault on his son in prison. Complainant concluded that the motivation for the attack was filings Complainant had made in a state court action against Agate and the State of Oregon. It was not that Complainant finally learned that the place he had to file the complaint was the federal OSHA office. That history is not a basis for equitable tolling.

<sup>35</sup> Complainant's arguments based on *Lawson v. FMR LLC*, 134 S.Ct. 1158 (2014) are frivolous. Complainant argues that, until the Supreme Court announced that decision, the protections of the Sarbanes-Oxley Act were not extended to the Affordable Care Act, and thus he did not have a claim under that Act until that time.

Complainant misconstrues *Lawson*. There, the Court resolved a conflict between the Administrative Review Board (*Spinner v. David Landau & Assoc., LLC*, No. 10-111 etc., ALJ No. 2010-SOX-029 (May 31, 2012)) and the First Circuit's decision in *Lawson* below. Rejecting the First Circuit's view, the Court agreed with the Administrative Review Board and held that the Sarbanes-Oxley whistleblower provision protected employees of contractors of publically traded companies. *Lawson* is of no assistance to Complainant and did nothing to make statutory protection available to him that was not available before *Lawson* was decided.

First, the Supreme Court announced *Lawson* on March 4, 2014. That is 762 days before Complainant filed his OSHA complaint. Even were there some merit to Complainant's argument about the extension of the Affordable Care Act, notice on March 4, 2014 would render untimely Complainant's OSHA filing 762 days later.

Second, the Court never mentions the Affordable Care Act in *Lawson*. Complainant offers no explanation for his argument that *Lawson* extended coverage under the Affordable Care Act.

Third, the First Circuit opinion in *Lawson* was never controlling in any case Complainant would bring. Complainant lives and worked for Agate in Oregon. Had it issued any relevant decisions, the Ninth Circuit would be controlling, not the First Circuit. As the Ninth Circuit had not ruled on the issue *Lawson* decides, the Administrative Review Board decision would be controlling on an Oregon-based case. The Board held that Sarbanes-Oxley protects employees of contractors of publically traded companies. For a person living and working in Oregon, *Lawson* made no change in controlling law; it confirmed in a final way that the Board's view – already applicable to Complainant – was correct.

As discussed above, both the Affordable Care Act and Sarbanes-Oxley Act require that a person initiate a claim by filing a complaint with the Secretary of Labor. The regulations further particularize that the complaint must be filed with the Occupational Safety & Health Administration. Unlike EEOC charges of discrimination and section 11(c) retaliation cases under the Occupational Safety & Health Act, there is no work-sharing or cross-filing agreement between the U.S. Department of Labor (or OSHA) and state agencies on the processing of whistleblower complaints under either of the statutes involved in the present case.

For the first time in this litigation, Complainant argued in his reply brief that his BOLI complaint satisfied the filing requirements under the federal statutes here. He cites nothing in the statutes, nothing expressly stated in any regulation (federal or state), and nothing in Oregon law (statutory, regulatory, or case decisions) to suggest that the Affordable Care Act and the Sarbanes-Oxley Act filing requirements may be met with a filing in a state agency.

Rather, Complainant argues that following links in at least one website leads to a site that gives the Oregon State Plan as a place where whistleblower complaints may be filed. Complainant neglects the relevant Department of Labor website: "Whistleblower Protection Programs: File a Complaint." That site states:

File a **discrimination** complaint if your employer has retaliated against you for exercising your rights as an employee. If you have been punished or retaliated against for exercising your rights under the OSH Act, you must file a complaint with OSHA **within 30 days of the alleged reprisal**. In states with approved state plans, employees may file a complaint under the OSH Act (Section 11(c)) with both the State and Federal OSHA.

If you are filing a complaint under any other whistleblower statute enforced by OSHA, the time limit for filing varies by statute. They also must be filed directly with Federal OSHA. Refer to the Summary of OSHA Whistleblower Statutes to determine the time limit that applies to your complaint.

[https://www.whistleblowers.gov/complaint\\_page.html](https://www.whistleblowers.gov/complaint_page.html). This is entirely consistent with the relevant federal and state statutes and regulations discussed above. Filing with a state plan satisfies the requirements only for whistleblower claims under the Occupational Safety & Health

Act; for all other whistleblower claims, the complaint "must be filed directly with Federal OSHA."<sup>36</sup>

### Conclusion and Order

Complainant failed to file a timely complaint with the Occupational Safety & Health Administration on either of his whistleblower claims. As a matter of law, any application of equitable tolling ceased beyond the limitations period, rendering the April 4, 2016 filing untimely. Accordingly,

Complainant's complaint is DENIED and DISMISSED in its entirety.

SO ORDERED.



Digitally signed by STEVEN BERLIN  
DN: CN=STEVEN BERLIN, OU=ADMIN  
LAW JUDGE, O=US DOL Office of  
Administrative Law Judges, L=San  
Francisco, S=CA, C=US  
Location: San Francisco CA

STEVEN B. BERLIN  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS (SARBANES-OXLEY ACT):** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service

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<sup>36</sup> If Complainant's filing with Oregon BOLI was sufficient, his claim is foreclosed. Complainant states that, when he dismissed his federal action against Oregon BOLI, the agency agreed to add these whistleblower claims to this state agency complaint. He states that BOLI complied but subsequently dismissed his claims. To the extent that is correct, Complainant's present whistleblower claims were already adjudicated and are subject to dismissal as *res judicata*.



(eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).

**NOTICE OF APPEAL RIGHTS (AFFORDABLE CARE ACT):** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

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Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1984.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1984.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-N, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the

Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1984.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

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Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1984.109(e) and 1984.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1984.110(b).