In the Matter of:

JONATHAN JAY, **ARB CASE NO. 08-089**

COMPLAINANT, **ALJ CASE NO. 2007-WPC-002**

v. **DATE: April 10, 2009**

ALCON LABORATORIES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Jonathan Jay, *pro se,* Arlington, Texas

For the Respondent:
Jerry G. Bradford, Esq., *Alcon Laboratories, Inc.*, Ft. Worth, Texas

FINAL DECISION AND ORDER

This case arises under the Federal Water Pollution Control Act (WPCA)[1] and its implementing regulations.[2] Jonathan Jay filed a complaint with the United States

[1] 33 U.S.C.A. § 1367 (West 2009).

[2] 29 C.F.R. Part 24 (2006). The Department of Labor has amended these regulations since Jay filed his complaint. 72 Fed. Reg. 44,956 (Aug. 10, 2007). We have applied the regulations in effect when Jay filed his complaint, and in any event, as explained more fully at note 10, *infra,* even if the amended regulations were applied to this case, they would not change the outcome.

Department of Labor alleging that his former employer, Alcon Laboratories, Inc., violated the WPCA by terminating his employment. After a hearing, a Labor Department Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) dismissing Jay's complaint because it was not filed within the WPCA's limitations period.[3] Jay appealed. We concur and deny the complaint.

BACKGROUND

Alcon is a company that develops ophthalmic products and medical devices. Alcon hired Jay on April 23, 2001, as an Associate Scientist. His tasks included providing analytical support for evaluations of raw materials and product development.[4] Alcon claims that Jay's performance deteriorated after he was hired. In March 2005, Alcon placed Jay placed on a Performance Improvement Plan (PIP) designed to improve his performance.[5]

Thereafter, according to Jay, a co-worker sent an e-mail to him and others describing a procedure suggesting that they "pour heavy metal waste down the drain." Jay told the co-worker that he was not comfortable with this procedure and that it would violate company policy.[6]

On July 7, 2005, Jay attended a meeting with Brian Clark, his supervisor, and Vickie Stamp, Alcon's Human Resources Representative. Jay claims that the "main topic of that meeting being that I would not follow another Alcon employee's instructions to dispose of heavy metal wasted by pouring it down the drain."[7]

Alcon discharged Jay on December 13, 2005. According to Jay, Stamp told him that he was terminated because of a "skill set mismatch."[8] Jay had another conversation with Stamp on January 9, 2006. This time, Jay testified, Stamp told him that his firing "was due to failing a performance improvement plan."[9]

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3 *Jay v. Alcon Labs., Inc.*, 2007-WPC-002 (ALJ May 1, 2008).

4 D. & O. at 2.

5 ALJ Exhibit (ALJX) 6.

6 ALJX 1 (Complaint) at 5.

7 *Id.* at 6-7.

8 Hearing Transcript (Tr.) at 11.

9 *Id.*

JURISDICTION AND STANDARD OF REVIEW

The WPCA's employee protection provision authorizes the Secretary of Labor to hear complaints of alleged discrimination because of protected activity and, upon finding a violation, to order abatement and other remedies.[10] The Secretary has delegated authority to the Administrative Review Board (ARB or the Board) to review an ALJ's initial, recommended decision.[11]

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision.[12]

DISCUSSION

A. The ALJ Properly Denied Jay's Motion to Amend the Complaint

Jay contacted the Labor Department's Occupational Safety and Health Administration (OSHA) on February 2, 2006, to initiate a WPCA complaint.[13] He filed a written complaint with OSHA on February 8, 2006. Although the written complaint does not specify which statute Jay believes that Alcon violated by discharging him from employment, OSHA interpreted the complaint as alleging that Alcon violated the WPCA. OSHA investigated the complaint and concluded that Jay had not filed it within the WPCA's limitations period. Jay objected and requested a hearing before an ALJ.

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[10] 33 U.S.C.A. § 1367(b).

[11] 29 C.F.R. § 24.8. *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

[12] *See* 5 U.S.C.A. § 557(b) (West 2000); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Masek v. The Cadle Co.*, ARB No. 97-069, ALJ No. 1995-WPC-001, slip op. at 9 (ARB Apr. 28, 2000). New regulations provide for substantial evidence review of the ALJ's factual findings in a WPCA case. *See* 29 C.F.R. § 24.110(b) (2007). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). Even if the Board applied a substantial evidence review to the ALJ's findings in this case, such review would not change the outcome of our decision, because applying the less restrictive de novo review standard, we agree with the ALJ's recommendation to deny Jay's complaint.

[13] ALJX 2.

Prior to the hearing, the ALJ ordered the parties to submit prehearing statements containing "[a] brief statement of each issue and the parties' position with regard thereto, including the citation of all relevant statutes, regulations, and case law."[14] Jay submitted a prehearing statement asserting that his discharge claim arose under the Sarbanes-Oxley Act of 2002 (SOX),[15] as well as the WPCA.[16] The SOX prohibits discrimination against certain employees who engage in specific types of protected activity and permits those employees to file complaints up to 90 days following an adverse employment action.[17] As discussed more fully below, the WPCA permits only a 30-day filing period.[18]

The ALJ interpreted Jay's assertion in his prehearing statement as an attempt to amend his original complaint to include a SOX claim. The relevant regulation states that an ALJ may allow appropriate amendments to a complaint when he or she determines that the "controversy on the merits will be facilitated," the public interest and the parties will not be prejudiced, and the amendment is "reasonably within the scope of the original complaint."[19] The ALJ found that Jay requested the amendment at a "very late" stage, and that a SOX claim did not reasonably relate to the scope of the original complaint, and that Jay "only raised the SOX argument because his complaint would be considered timely under that statute." He therefore denied Jay's request to amend his complaint.[20]

The Board reviews an ALJ's decision on a request to amend a complaint under the abuse of discretion standard.[21] Jay argues that "Sarbanes Oxley and the Water [Pollution] Control Act are both applicable to this case."[22] But Jay does not provide

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[14] ALJX 4.

[15] 18 U.S.C.A. § 1514A (West 2005).

[16] ALJX 5.

[17] 18 U.S.C.A. § 1514A(b)(2)(D).

[18] 33 U.S.C.A. § 1367(b).

[19] 29 C.F.R. § 18.5(e).

[20] D. & O. at 4.

[21] *See, e.g., Powers v. Tennessee Dept. of Env't & Conservation*, ARB Nos. 03-061, 03-125; ALJ Nos. 2003-CAA-008, -016, slip op. at 11 (ARB Aug. 16, 2005), and cases cited therein.

[22] Complaint's Brief at 9. Jay did not file his brief on or before June 26, 2008, as our briefing order required. We ordered Jay to show cause no later than September 2, 2008, why we should not dismiss his case for failing to prosecute it by not timely filing a brief. Jay did not respond to that order but did file briefs on August 25, 2008. Since Alcon did not request that we strike Jay's briefs, and no evidence exists that Jay acted in bad faith, we accepted his

authority or argument supporting this statement, nor does he inform us how the ALJ abused his discretion when he denied the amendment. Since we find nothing in the record or in the ALJ's rationale for denying the motion to conclude that the ALJ abused his discretion, Jay's motion to amend the complaint was properly denied.

B. Jay Did Not File His Complaint Within the WPCA's 30-Day Limitation Period.

As earlier noted, an employee alleging a violation of the WPCA's employee protection provision must file his complaint no later than 30 days after the alleged violation occurs.[23] In cases arising under environmental whistleblower statutes like WPCA, the limitation period for filing a complaint begins to run from the date the employee receives "final, definitive, and unequivocal notice" of an adverse employment decision.[24] The date that an employer communicates to the employee its intent to implement an adverse employment decision marks the occurrence of a violation, rather than the date the employee experiences the consequences.[25]

Jay testified that Alcon notified him of his discharge on December 13, 2005.[26] He did not file his complaint until February 8, 2006, which was more that thirty days after he was notified of his discharge. Therefore, his complaint was not timely filed.

C. Jay Has Not Shown That He is Entitled to Equitable Estoppel or Equitable Tolling.

Jay argued before the ALJ that "equitable estoppel or equitable tolling should be applied to his complaint in order to render it timely filed."[27] The ALJ concluded that Jay

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briefs. *See Ellison v. Washington Demilitarization Co.,* ARB No. 08-119, ALJ No. 2005-CAA-009 (ARB Mar. 16, 2009).

[23] 33 U.S.C.A. § 1367(b).

[24] *See, e.g., Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 14 (ARB Feb. 28, 2003).

[25] *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-053, slip op. at 36 (ARB Apr. 30, 2001). *See Chardon v. Fernandez,* 454 U.S. 6, 8 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become apparent); *Delaware State Coll. v. Ricks,* 449 U.S. 250, 258 (1980) (limitations period began to run when the tenure decision was made and communicated rather than on the date his employment terminated).

[26] Tr. at 11.

[27] D. & O. at 4.

had not demonstrated that he was entitled to either equitable estoppel or equitable tolling of the limitations period.[28] We concur.

Like the ALJ, in determining whether to toll a statute of limitations, we have been guided by the discussion of equitable modification of statutory time limits in *School Dist. of City of Allentown v. Marshall.*[29] In that case, which arose under the whistleblower provisions of the Toxic Substances Control Act,[30] the court articulated three principal situations in which equitable modification may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.[31]

Jay argued below, and now to us, that Alcon misled him as to why he was terminated. Jay testified that on December 13, 2005, Alcon terminated his employment because of a "skill set mismatch." He also testified that on January 9, 2006, Stamp gave him a different reason for his firing, namely, that he failed the performance improvement plan. Jay contends that the limitation period should begin to run on January 9, 2006, because it was not until then that he realized that, because of the differing explanations, something was "not right" and that his concerns about pouring out the heavy metal might have caused his termination. Therefore, since he filed his complaint on February 8, 2006, which was within 30 days of January 9, 2006, his complaint was timely filed.[32]

The ALJ rejected this argument. So do we. Unlike cases he cited in which the employer actively misleads the employee into believing that no adverse action had been taken, and thus the employee is not aware of when the limitations period begins, the ALJ here found that Alcon did not mislead Jay because the explanations it gave for Jay's termination are essentially synonymous. That is, failing the PIP logically equates to a "skill set mismatch."[33] Therefore, since Alcon did not mislead Jay into believing that it did not terminate him, but merely gave differing, though similar, explanations for doing so, we agree that Jay's argument that Alcon misled him fails. Furthermore, the record supports the ALJ's finding that Jay was not extraordinarily prevented from timely filing

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28 D. & O. at 6-7.

29 657 F.2d 16 (3d Cir. 1981). *See e.g., Hemingway v. Northeast Utils.*, ARB No. 00-074, ALJ Nos. 1999-ERA-014, -015, slip op. at 4 (ARB Aug. 31, 2000); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 2 (ARB Nov. 8, 1999).

30 15 U.S.C.A. § 2622 (West 2004).

31 *Allentown*, 657 F.2d at 20 (internal quotations omitted).

32 D. & O. at 7; Complainant's Brief at 7.

33 D. & O. at 5, 7.

his complaint or that he filed it in the wrong forum. For these reasons, Jay is not entitled to equitable tolling.

CONCLUSION

The ALJ did not abuse his discretion in denying Jay's request to amend the complaint to add a SOX claim. Jay's WPCA claim is **DISMISSED** because he did not file the complaint within the 30-day limitation period and because he is not entitled to equitable tolling.

SO ORDERED.

OLIVER M. TRANSUE
Administration Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge