

**U.S. Department of Labor**

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**Issue Date: 17 March 2005**

**CASE NO.: 2005-SOX-23**

**IN THE MATTER OF**

**DAVID E. CARTER,  
Complainant**

**v.**

**CHAMPION BUS, INC.,  
Respondent**

**ORDER DISMISSING COMPLAINT**

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes Oxley Act of 2002, 18 U.S.C. § 1514A (herein SOX or the Act). The Act prohibits discriminatory actions by publicly traded companies against their employees who provided information to their employer, a federal agency or Congress that the employee reasonably believe constitute violations of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344(bank fraud) or 1348 (security fraud) or any rule or regulation of the Securities and Exchange Commission or any provision of federal law relating to fraud against shareholders.

On November 2, 2004, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent terminated him in violation of the Act. OSHA conducted an investigation into the complaint and on January 7, 2005 issued its report finding that Complainant was terminated on June 30, 2004 and that the complaint was untimely in that it was filed more than 90 days after the termination. On January 14, 2005, Complainant filed a timely appeal of that determination.

On February 28, 2005, Counsel for Respondent filed a Motion to Dismiss with a supporting memorandum stating that Complainant filed a complaint with OSHA on November 17, 2004, alleging that Respondent terminated him on June 30, 2004 in violation of the Act because of his action in reporting, objecting to and refusing to participate in illegal activity

regarding issuance of letters certifying compliance with Federal Motor Vehicle Safety Standards (FMVSS) 220, 207 and 210 (Altoona Testing) and weight limitations.

Respondent contends that Complainant filed his SOX complaint more than 90 days after the alleged discriminatory violation, and thus, it is untimely since 18 U.S.C. § 1514 A (b)(2)(d) of SOX and 29 C.F.R. § 1980.103 require a complaint to be filed within 90 days of the alleged violation (Complainant's termination) or by September 28, 2004. Accordingly, Respondent argues that the complaint must be dismissed. *See e.g. Flood v. Cendant Corp.*, 2004-SOX-16 (ALJ Feb. 23, 2004)(dismissing SOX complaint filed 95 days after alleged violation as untimely); *Foss v. Celestica, Inc.*, 2004-SOX-4 (ALJ Jan. 8, 2004)(dismissing SOX complaint filed at least 95 days after complainant's termination as untimely); *Walker v. Aramark Corp.*, 2003-SOX-22 (ALJ Aug. 26, 2003) dismissing SOX complaint filed at least 105 days after complaint's termination as untimely).

Respondent contends that even OSHA's records which indicate an earlier complaint filing of November 2, 2004 also show Claimant's complaint to be untimely as not occurring within 90 days of Claimant's termination. Further, if the time period is expanded under the concept of equitable tolling and Complainant is granted an additional 16 days from August 25, 2004 to September 9, 2004, wherein Complainant's complaint was before EEOC, the complaint is still untimely as it was not filed by October 13, 2004. However, Respondent argues that equitable tolling does not apply since Complainant's complaint before OSHA did not make any allegations under the "identical statutory scheme" of SOX. (*See Moldauer v. Canandaigua Wine Co.*, 2003-SOX-26 (ALJ Nov.14, 2003)).

Complainant responds that Respondent terminated him on June 30, 2004, but that he appealed and had numerous telephone conversations between June 30, 2004 and December 16, 2004 concerning his termination with Andrew Imanse, president of Thor Bus, which owned Respondent and Thor Bus Vice President of Human Resources, Dean Bruick which led him to believe the matter could be settled by either a severance package or reinstatement. Settlement discussions ceased on December 16, 2004, when Mr. Imanse by letter, advised Complainant that he would not receive additional compensation. Complainant contends that the 90 day filing period should not commence until at least December 16, 2004 when Respondent concluded a review of his termination and decided to neither rehire him, nor offer additional compensation. Thus, his initial complaint which he says was filed on November, 17, 2004, as well as his subsequent formal complaint of February 26, 2005 filed with this office consisting of 16 numbered paragraphs were timely.

In the present case the statute of limitation runs when Complainant was made aware of the decision to terminate him (June 30, 2004) and not when talks about severance compensation concluded (*Halpern v. XL Capital. Ltd.*, 2004-SOX-54 [ALJ, June 14, 2004]) nor when the consequences of the act became most painful. (*See also Delaware State College v. Ricks*, 449 U. S. 250, 258 (1980). Discrete acts of discrimination such as termination constitute separate actions starting the time clock for filing charges. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

Complainant had 90 days from June 30, 2004 in which to file his SOX complaint. Whether he filed his complaint on November 2, 2004 or November 17, 2004, either complaint is untimely. Further there are no mitigating circumstances warranting tolling of time limitations. Accordingly the instant complaint is dismissed.

**A**

**CLEMENT J. KENNINGTON  
ADMINISTRATIVE LAW JUDGE**

**NOTICE OF APPEAL RIGHTS:** This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board (“Board”), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed by person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).