

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 21 June 2005**

Case No. 2005-SOX-36

In the Matter of:  
BOGDAN RADU,  
Complainant,

v.

LEAR CORPORATION,  
Respondent.

BEFORE: THOMAS F. PHALEN, JR.  
Administrative Law Judge

**DECISION AN ORDER – GRANTING MOTION TO DISMISS**

This proceeding 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 (“SOX” or “Act”). The Act prohibits discriminatory actions by publicly traded companies against their employees who provide information to their employer, a federal agency, or Congress that the employee reasonably believes constitute violations of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission or any provisions of federal law relating to fraud against shareholders.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Procedural History

Complainant filed a multi-part complaint on October 5, 2005, in the Third Judicial Circuit for the State of Michigan, alleging retaliation in violation of the Act. (Cl. Br. at 5, 8). The SOX portion of the complaint was removed to the United States District Court for the Eastern District of Michigan, while the three state law claims remained in state court. (Cl. OSHA Comp. at 3-4).

On December, 17, 2004, Complainant filed a formal request asking the Occupational Safety and Health Administration (“OSHA”) to investigate his allegations. (Cl. OSHA Comp. at 4). On February 7, 2005, OSHA dismissed the complaint as untimely, finding that Complainant was terminated on July 7, 2004, and did not make his administrative complaint until December, 2004, which exceeded the 90-day statute of limitations. 29 C.F.R. §1980.103(d). On February

17, 2005, Complainant submitted his request for a formal hearing before the Office of Administrative Law Judges.

Respondent submitted a motion for summary decision and supporting brief on May 17, 2005. Complainant filed a response on May 24, 2005. Respondent filed a reply to Complainant's response on May 31, 2005. This matter is set for hearing on July 26, 2005, in Detroit, Michigan.

### Background

Before the undersigned is Respondent's motion to dismiss Claimant's administrative complaint. For purposes of responding to this motion, I shall accept Complainant's factual allegations as being true.

Bogdan Radu ("Complainant") was a senior engineer for Lear Corporation ("Respondent"). (Cl. Reply Br. at 2). At a July 6, 2004 meeting with his supervisor and a human resources director, Complainant was presented a letter terminating his employment with Respondent. (Cl. Reply Br. at 2). The letter stated that termination was effective on that same day. (Cl. Reply Br. at 2). Complainant, however, was subsequently given additional documents stating that his termination was effective July 7, 2004. (Cl. Reply Br. at 3).

Complainant, represented by counsel, filed a complaint in Michigan state court on October 5, 2004. (Cl. Reply Br. at 5). He also filed a complaint with OSHA on December 17, 2004. (Cl. Reply Br. at 5). The state claim raised the precise statutory claim at issue in the subsequent administrative complaint. (Cl. Reply Br. at 8).

## **DISCUSSION AND APPLICABLE LAW**

### Timeliness

The Act establishes the statute of limitations for a whistleblower's complaint under SOX:

An action under paragraph (1) [i.e., filing a complaint alleging discrimination] shall be commenced not later than 90 days after the date on which the violation occurs.

18 U.S.C. §1514A(b)(2)(D). Likewise, the applicable regulations add:

*Time for filing.* Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed, by any person on the employee's behalf, a complaint alleging such discrimination....

29 C.F.R. 1980.103 (d). Furthermore, the Department of Labor's commentary on §1980.103 states:

[T]he alleged violation ... is considered to be when the discriminatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision.

*Lawrence v. AT&T Labs and AT&T Corp.*, 2004-SOX-65, 4 (Sept. 9, 2004) (citing 69 Fed. Reg. No. 163, p. 52106 (August 24, 2004))<sup>1</sup> (internal citations omitted).

The Office of Administrative Law Judges computes time as established by the rules of practice and procedure for administrative hearings, which states in pertinent part:

*Generally.* In computing any period of time under these rules or in an order issued hereunder the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday or legal holiday observed by the Federal Government in which case the time period includes the next business day....

29 C.F.R. §18.4 (a).

The complainant in *Lawrence* received a letter from her employer on August 8, 2003, notifying that her employment would be officially terminated on October 6, 2003 unless she was placed in another position with the respondent. *Lawrence*, 2004-SOX-65 at 2. Also, while Ms. Lawrence's employment was extended by a few additional weeks, her counsel confirmed by letter dated December 19, 2003, that her official termination would be effective December 31, 2003. *Id.* at 5. Ms. Lawrence filed her complaint with OSHA on March 29, 2004. *Id.* at 3. Judge Kaplan found that Ms. Lawrence knew from the August 8, 2003 letter that her employment would be terminated. *Id.* at 6. Despite the possibility of other employment with the respondent, Judge Kaplan concluded that since Mrs. Lawrence's clock began to run on August 8<sup>th</sup>, her claim was time barred. *Id.*

In the instant case, Complainant's arguments are very similar to those made by Ms. Lawrence. While Complainant admits that he received a letter on July 6, 2004 from Respondent stating his termination was effective that day, he contends that due to alleged conversations on the 7<sup>th</sup>, and subsequent employer correspondence advising that his effective termination date would be July 7, 2004, that the commencement dated for initiating the running of the statute of limitations is July 7<sup>th</sup>, and not July 6<sup>th</sup>. (Cl. Br. at 5-7). As a result, under 29 C.F.R. §18.4 (a), the 90-day limitations period would begin running on July 8, 2004, and would expire on October 5, 2004. Based on this argument, Complainant's October 5, 2004 filing with the Michigan state court would be timely under the Act, as the filing fell on the 90<sup>th</sup> day.

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<sup>1</sup> Administrative Law Judge Kaplan notes that §1980.103 of the final regulations and the Department's associated commentary are identical to that section of the interim regulations and the associated commentary.

Complainant does not contest receipt of the July 6<sup>th</sup> termination letter, but instead argues that he held out hope that his employment would continue, and thus, had a reasonable belief that he was employed through July 7<sup>th</sup>. (Cl. Br. at 6). Adopting Judge Kaplan's reasoning in *Lawrence*, however, I find that when Respondent met with Complainant on July 6, 2004 and presented a letter informing Complainant that he was terminated, this act affectively communicated Respondent's decision to terminate Mr. Radu. *See also Carter v. Champion Bus, Inc.*, 2005-SOX-23, 2 (Mar. 17, 2005) (citing *Halpern v. XL Capital Ltd.*, 2004-SOX-54 (June 14, 2004), and *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980)(running of the limitations period commences when a complainant is made aware of the decision to terminate, and not when talks about severance are concluded). Accordingly, under 29 C.F.R. §18.4 (a), Complainant's 90-day period under the SOX statute of limitations commenced on July 7, 2004, and not July 8, 2005, and ultimately expired Monday, October 4, 2004. Therefore, even if Complainant's filing with a state court satisfied the filing requirements under the Act, I conclude, based on the facts as presented by Complainant, the Act, and the associated regulations, that this complaint is barred by the SOX statute of limitations. 18 U.S.C. §1514A(b)(2)(D).

### Tolling of the Statute of Limitations

As the undersigned has determined that the instant complaint is barred by the statute of limitations, it is not necessary to address Complainant's tolling arguments. For the purpose of completeness, however, the undersigned will briefly address Complainant's arguments.

Complainant asserts that his filing with the Michigan state court tolls the 90-day statute of limitations, (Cl. Br. at 8), and looks for support to the Administrative Review Board's decision in *Turgeay v. Nordam Group*, ARB 04-005 (Nov. 22, 2004). According to *Turgeau*, one situation where equitable tolling may be applicable is when "the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum." *Id.* at 3 (quoting *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 20 (3rd Cir. 1981)). Based on the facts of *Turgeau*, however, the statute of limitations was not ultimately tolled because the plaintiff failed to raise the precise statutory claim in Oklahoma state court as he subsequently filed with OSHA. *Id.* at 4.

Complainant next contends that the facts of this case warrant an exception to the rule that equitable tolling is generally not applicable in instances where a complainant is represented by an attorney. Access to counsel is considered to be "constructive knowledge of the forum and filing requirements that are involved with initiating a lawsuit." (Cl. Br. at 9)(citing *Turgeau*, ARB 04-005 at 4). He argues that due to the complexity of SOX, and the recency of OSHA's guidelines for filing a SOX claim, even though he was represented by counsel, the statute of limitations should be tolled. (Cl. Br. at 9-11). In support, Complainant states that "the Sarbanes-Oxley Act itself is sixty-pages long and is a rather complex piece of legislation that attorneys have spent countless hours attempting to decipher." (Cl. Br. at 9). Specifically, Complainant explains that both the Act and OSHA's regulation permissively state that a person "may" file for whistleblower relief with the Secretary of Labor within 90 days, and not that they "shall" file with OSHA within 90 days to preserve their rights. (Cl. Br. at 10).

Turning to the instant facts, I first note that unlike *Turgeon*, Complainant alleges that one of the counts in his Michigan state claim was a SOX retaliation claim. (Cl. Br. at 9). Assuming without deciding that the Complainant's allegation is accurate, and his state complaint included the "precise statutory claim" that he later filed with OSHA, I still conclude that equitable tolling is not applicable in this instance based on the fact that Complainant was represented by counsel prior to August 19, 2004. (Cl. Br. at 4).

I am further unconvinced by Complainant's argument that the statutory language of the Act and accompanying regulations was too complex for counsel to understand. The permissive language of the Act is clearly intended to provide a forum for persons with a cause of action against their employers, as opposed to mandating that they bring a claim. Complainant would have the undersigned believe that the Act's permissive language, ("may"), allows injured parties to elect to follow its requirements in order to bring a claim, or, alternatively, allows them to bring a claim by some unspecified means that is not listed in either the Act or the regulations, and to then commence the 90-day statute of limitations period upon the unsuccessful invocation of the alternative means. Complainant has provided no precedent to support such a contention, and I am unable to find any basis in the Act or the regulations for doing so.

In conclusion, I have determined that this claim is barred by the statute of limitations, and that even if it was not, the statute of limitations cannot be tolled because Complainant had constructive knowledge of the requirements under the Act and the applicable regulations. Furthermore, there is no basis for inferring a principle of equitable tolling in the present case, since a filing in federal court in a SOX proceeding must first be preceded by the administrative filing of a complaint with OSHA before proceeding with a court action under SOX. Here, however, no such filing was made prior to the state court action.

### **ORDER**

IT IS ORDERED that Respondent's motion for summary decision is GRANTED and the complaint is dismissed. IT IS FURTHER ORDERED that the hearing scheduled for July 26, 2005 is cancelled.

**A**

THOMAS F. PHALEN, JR.  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:**

To appeal you must file a petition for review (Petition) within ten business days of the date of the administrative law judge's decision with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. Your Petition must specifically identify the findings, conclusions or orders you object to. You waive any objections you do not raise specifically.

At the time you file the Petition with the Board you must serve it on all parties, and the Chief Administrative Law Judge; 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.

If you do not file a timely Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110. Even if you do file a Petition, this decision of the administrative law judge becomes the final order of the Secretary of Labor unless the Board issues an order within 30 days after you file your Petition notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).