



Issue Date: 10 October 2007

Case No.: 2006-SOX-72

In the Matter of:

Susan M. Hinds,
Complainant

v.

Hillenbrand Industries, Inc.,
Batesville Services, Inc.,
Respondent

ORDER OF DISMISSAL

This proceeding arises under the employee protection provisions of the Sarbanes-Oxley Act of 2002 and the procedural regulations found at 29 C.F.R. Part 18. The U.S. Department of Labor issued the Secretary's Findings on a complaint filed by Susan M. Hinds, who requested a hearing on these findings.

On July 10, 2007, I issued an Order advising the parties that I would consider the timeliness of the Complainant's complaint as a preliminary matter, before addressing the merits of the Complainant's Complaint. On August 6, 2007, counsel for the Respondents filed a Notice of Motion and Certification of Service; Brief in Support of Respondents' Motion for Summary Decision; Respondents' Statement of Undisputed Material Facts; and Certification of Sharon P. Margello. On September 5, 2007, the Complainant filed her Motion in Response to Respondent Motion for Summary Decision. On September 24, 2007, Complainant, through counsel, filed her Brief in Support of Complainant's Motion in Opposition to Summary Judgment, and Designation of Evidence and Certification of Susan E. Sparks. On September 28, 2007, Respondents filed a Reply Brief in Further Support of Respondents' Motion for Summary Decision for Complainant's Failure to File Her Complaint Within the Limitations Period.

Background

The Complainant was employed as Director of Financial Planning and Analysis for approximately six months in 2005 by Batesville Services, Inc. (Batesville), which is owned by Hillenbrand Industries, Inc. (Hillenbrand). In that position, she reported to Mr. Douglas I. Kunkel, the Vice President and CFO at Batesville.

In May 2005, the Complainant filed an internal complaint alleging that she was the victim of a sexually hostile workplace.¹ An investigation was undertaken by Hillenbrand's general counsel, and conducted by an outside law firm; the conclusion was that there had been no illegal conduct. On July 19, 2005, the Complainant filed charges against Respondents with the EEOC, alleging gender discrimination under the Civil Rights Act and Equal Pay Act (Respondents' Exhibit I). In her narrative, she stated that she had been sexually harassed by her supervisor, Mr. Douglas Kunkel, and that she was subject to a hostile work environment.

On July 22, 2005, a meeting took place with the Complainant, Mr. Kunkel, and Ms. Laurel Rutledge, the director of human resources.² During this meeting, the Complainant gave a handwritten note to Mr. Kunkel and Ms. Rutledge stating that she was resigning, but that her resignation would not become effective until May 1, 2006; she then left the building. The Complainant states that during this meeting, she felt "threatened and intimidated," which resulted in a "constructive discharge notice," and her departure from the building, ill and emotionally distressed.³ The letter of resignation reads as follows:

I, Susan M. Hinds, am resigning from my position as Director of FP&A of Batesville Casket Company due to gender discrimination and questionable business practices. I reported these issues and concerns to senior management at both Batesville Casket Company and Hillenbrand Industries and have concluded that the appropriate corrective action was not taken to remedy the situation properly. This has left myself exposed to retaliation as reported and therefore have been given no options – resulting in essentially a constructive discharge. I have suffered emotional distress and health issues as a result. I fear for my safety, health, and well-being. My last day of employment is May 1, 2006. (Complainant's Exhibit I, Respondents' Exhibit C)

Later that same day, Mr. Kunkel sent the Complainant a letter by overnight mail, advising her that Batesville had accepted her resignation effective immediately on July 22, 2005 (Respondents' Exhibit Q). Mr. John Dickey, the Vice President of human resources, sent the Complainant a letter dated July 22, 2005, confirming that Batesville had accepted her resignation effective immediately (Respondents' Exhibit R). The Complainant acknowledged in her deposition that she received Mr. Dickey's letter and that she read it (Respondents' Exhibit P).

Ms. Mari Jo Moody, a human resources director, also sent the Complainant a letter on July 26, 2005, confirming the July 22, 2005 effective date of her resignation. Ms. Moody indicated that she had received a voicemail from the Complainant's husband inquiring about short term disability benefits, and informed her that she had sent a package of information about COBRA coverage and 401(k) rollover (Respondents' Exhibit S). The Complainant sent a letter to Mr. Patrick de Maynadier, Hillenbrand's General Counsel and Ethics Committee Chairman,

¹ According to the Complainant, she first made a complaint in February 2005.

² According to the Respondents, the purpose of this meeting was in part to discuss allegations by the Complainant's subordinate that she was subjecting him to sex discrimination. In her pleadings, the Complainant disputes this, but in her deposition, she acknowledged that the purpose of the meeting was to discuss complaints by the subordinate (Respondents' Exhibit P).

³ The Complainant also submitted a handwritten note indicating that she was ill.

dated July 28, 2005, acknowledging that she had received these letters (Respondents' Exhibit U). The Complainant began this letter as follows:

This letter is in response to a series of letters that I received from Batesville Casket Company, Inc., regarding my employment as I am out on a disability leave of absence. Specifically, I would like to address their unilateral decision and actions to terminate my employment under the guise of a voluntary resignation.

Mr. de Maynadier responded on August 5, 2005, confirming that Batesville had accepted her resignation on July 22, 2005 (Respondents' Exhibit V). On August 25, 2005, the Complainant filed another charge with the EEOC, stating that she had been retaliated against by Respondents for filing her earlier charge; she indicated that the date of the retaliatory action was July 22, 2005 (Respondents' Exhibit J).

On November 3, 2005, the Complainant filed the instant charges with the U.S. Department of Labor, alleging violations of the Sarbanes-Oxley Act.⁴

DISCUSSION

The purpose of summary judgment is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Green v. Ingalls Shipbuilding, Inc.*, 29 BRBS 81 (1995); *Harris v. Todd Shipyards Corp.*, 28 BRBS 254 (1994). An administrative law judge may grant a summary decision for either party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact, and that a party is entitled to judgment as a matter of law. 29 C.F.R. § 18.40(d). "When a motion for summary decision is made and supported as provided in this section [by affidavit], a party opposing the motion may not rest upon mere allegations or denials of such pleadings. Such response must set forth specific facts showing that there is a genuine issue of material fact for hearing." 29 C.F.R. § 18.40(c). The evidence and inferences are viewed in the light most favorable to the non-moving party. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999).

Under the Sarbanes Oxley Act, an employee alleging discharge or other discrimination must file a complaint with the Secretary of Labor within 90 days of the violation. 18 U.S.C. § 1514(A)(b)(2)(D). The regulations at 29 C.F.R. § 1980.103 provide that a complaint for discrimination must be filed within 90 days of "when the discriminatory decision has been both made and communicated to the Complainant." See, *Marc Halpern v. XL Capital, Ltd*, ARB Case No. 04-120 (Aug. 31, 2005). It is the date that the employer communicates to the employee its intent to implement an adverse employment decision that marks the occurrence of a violation, rather than the date the employee experiences the consequences. *Id.* at 3.

In this case, the statute of limitations began to run when the Complainant received the first letter from the Respondents advising her that her resignation had been accepted, and her employment was terminated as of July 22, 2005. The undisputed facts show that this occurred as early as July 23, 2005, but no later than July 28, 2005. The Complainant filed her complaint

⁴ The Complainant's letter was dated November 1, 2005; it is date stamped November 3, 2005.

with the Secretary of Labor on November 3, 2005, approximately 98 to 103 days after the alleged violation. Therefore, her complaint, by statute, is untimely.⁵

The Complainant argues that the limitations period should run from “on or about” August 7, 2005, when she received the letter from Mr. de Maynadier, and realized the consequences of what had happened. The Complainant argues that:

Denial of short term disability benefits made on August 7, 2005 on the basis Susan was no longer employed by Hillenbrand is the earliest milestone that the Court can consider as a date for determining a violation of the SOX Act as this is the first date where she was discriminated against with respect to her “compensation, terms, conditions, or privileges of employment.”

Complainant’s Brief at 3. However, the Respondents’ intent to terminate the Complainant’s employment was made and clearly communicated to her no later than July 28, 2005. Although this termination may have resulted in further consequences, such as the alleged denial of disability benefits, and disputes over compensation, the adverse action at issue here, the termination of employment, occurred no later than July 28, 2005.

The Complainant’s pleadings, as well as her letter to Mr. de Maynadier, reflect her dispute with Respondents about whether her termination was “voluntary” or forced. Based on the Complainant’s July 22, 2005 letter, the Respondents accepted her resignation, but making it effective immediately, rather than on the May 1, 2006 date specified by the Complainant. The Complainant apparently felt that she could rely on her chosen date of May 1, 2006, making her eligible for short term disability benefits, as well as the additional compensation provided with thirty days notice of termination. However, as noted above, the letters from Ms. Moody and Mr. de Maynadier made it clear that the Respondents’ intent was to terminate the Complainant effective July 22, 2005.⁶

Regardless of whether she “resigned” or was “unilaterally terminated,” there is no dispute that the Complainant’s employment with Batesville was terminated effective July 22, 2005. The Complainant was advised that her letter of resignation had been accepted by Mr. Kunkel’s letter, which was sent to her by overnight mail on July 22, 2005. The Complainant’s letter to Mr. de Maynadier is dated July 28, 2005, and reflects that the Complainant received the letters from Mr. Kunkel and Mr. Dickey confirming the termination date of July 22, 2005. Thus, the undisputed evidence establishes that the latest date on which the Complainant became aware of the Respondents’ decision to terminate her was July 28, 2005.

Indeed, the Complainant’s claim that she did not understand herself to be terminated until the August 8, 2005 letter from Mr. de Maynadier is not consistent with her own actions. Thus, in

⁵ In her letter appealing the Secretary’s findings, dated November 1, 2005, and received November 3, 2005, the Complainant stated that her appeal “slightly” exceeded 90 days.

⁶ The Complainant argues in her brief that Respondents ignored her notice of “constructive resignation” effective one year later, and “arbitrarily” applied a termination date of July 22, 2005. Complainant’s Brief at 2. Whether the Respondents’ decision was arbitrary or not, the fact remains that the Respondent decided to terminate the Complainant’s employment effective July 22, 2005.

her August 18, 2005 EEOC complaint, she alleged that the act of discrimination, that is, her discharge, took place on July 22, 2005 (Respondents' Exhibit J); when she appealed the Secretary's findings that her complaint was not timely filed, she stated that there were extenuating circumstances that caused her to "slightly" exceed the 90 day filing period.

The Complainant also argues that she has been the subject of "ongoing discrimination," and that the time period for filing her complaint should start on the date of the last alleged adverse action, which was the alleged blacklisting in connection with her job application at MainSource in October 2005. This allegation of blacklisting is the subject of a second complaint, 2007 SOX 49, which I dismissed by Order dated October 1, 2007, on the grounds that the Complainant's complaint in that matter was untimely filed. The Complainant's allegation that Respondents engaged in blacklisting after her termination does not extend the filing requirements in connection with her claim that she was wrongfully terminated. Nor has the Complainant cited to any authority in support of such a claim.⁷

Finally, for the first time, the Complainant alleges that Respondents' failure to pay her compensation to which she was entitled on August 19, 2005 was retaliation in violation of the Sarbanes Oxley Act, and thus her complaint was filed within the 90 day time requirement. Unfortunately for the Complainant, she did not make this claim in her filing with OSHA, and thus it is not part of the claim before me. Even if it were, it is an allegation of a discrete act of retaliation; it would not serve to "relate back," and bring the July 22, 2005 termination within the filing limits. Discrete acts of discrimination such as termination constitute separate actions, which start the time clock for filing charges. *National Railroad Passenger Co. v. Morgan*, 536 U.S. 101 (2002).

Despite the fact that her complaint was untimely under § 1514(A)(b)(2)(D), the Complainant argues that she should be allowed to proceed in this matter under the doctrine of equitable tolling.⁸ This doctrine does not depend on any wrongdoing by the respondent, but instead focuses on the complainant's inability, despite all due diligence, to obtain vital information bearing on the existence of her complaint. *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000). This doctrine extends the statute of limitations until the complainant can gather information needed to articulate a claim.

Generally, tolling the statute of limitations is proper under any of the following circumstances: (1) when the defendant has actively misled the plaintiff respecting the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from asserting her rights; or (3) where the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *School District of the City of Allentown*, 657 F.2d 16, 20 (3rd Cir. 1981), citing *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978); *Halpern, supra*, at 4. Courts have held that the restrictions on equitable tolling must be

⁷ Indeed, such a theory would render time limits for filing a complaint meaningless.

⁸ Although the Complainant has not specifically invoked the doctrine of equitable estoppel, I find that she would not be entitled to tolling of the limitations period under this doctrine, which allows for late filing if an employer has engaged in "affirmative misconduct" to mislead the complainant regarding an operative fact forming the basis for a cause of action, the duration of the filing period, or the necessity for filing. See *Halpern, supra*, at 5. There is no evidence, or even any allegation, that the Respondents misled the Complainant about the fact of her termination, the duration of the filing period, or the necessity for filing under the Sarbanes Oxley Act, or any other statute.

scrupulously observed, and it is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious claim. *Doyle v. Alabama Power Co.*, 1987 ERA 53 (Sec’y, Sept. 29, 1989).

With respect to the first basis for tolling the statute, the Complainant has not alleged, nor do the undisputed facts establish, that Respondents misled her in any way regarding her cause of action under the Sarbanes Oxley Act.⁹ In fact, there is no evidence that Respondents’ employees ever did or said anything to dissuade the Complainant from initiating legal action of any kind in connection with her termination. Indeed, the Complainant filed complaints with the EEOC before and after her termination.

To the extent that the Complainant is claiming that she was ignorant of the applicability of the Sarbanes Oxley Act to her situation, or the filing requirements thereunder, this is simply not an “extraordinary circumstance” that might justify applying the doctrine of equitable estoppel. A party invoking that doctrine must show that her ignorance was caused by circumstances beyond her control. *See, e.g., Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999)(plaintiff’s mental incapacity warranted equitable tolling); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998)(pro se inmate’s lack of knowledge “until it was too late” of one-year limitation period for filing habeas corpus petition insufficient to warrant equitable tolling); *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999), *cert. denied*, 531 U.S. 1164 (2001)(“ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing.”).

The exhibits submitted by the Respondents establish that the Complainant is a very well-educated individual. Thus, her resume reflects that she received a bachelor’s degree in accounting and business education, and a masters degree in business administration; she is a licensed certified public accountant. The Complainant was employed from 1985 until her termination by Respondents as an accountant, controller, and manager of corporate strategy and accounting and finance with several companies; in 2003 she established a business consulting firm. By her own account, the Complainant has “over twenty years of diversified financial, accounting, strategy, and business analysis expertise” (EX A).

The Complainant is also familiar with the legal process, having brought charges or lawsuits against several former employers for alleged violations of Title VII of the Civil Rights Act, and the Equal Pay Act.¹⁰

⁹ The Complainant has incorporated her arguments in 2007 SOX 49, that MainSource deliberately hid their decision to hire another person for the job she applied for, and misled her about her application. But she has not alleged, nor are there any factual allegations to support a claim that Respondents in **this matter** misled her about their intent to terminate her effective July 22, 2005.

¹⁰ The Complainant filed suit in federal court against her employer Tower Automotive Inc. in January 2001, alleging violations of Title VII and the ADA; the complaint reflects that she had filed numerous charges with the EEOC against this employer. The Complainant filed charges with the EEOC in July 2003 against her employer Toyota Motor Manufacturing NA, Inc., alleging violations of Title VII and the Equal Pay Act. She also filed a suit in federal court in November 2005 against numerous corporations and individuals under Title VII and the Equal Pay Act (Respondents Exhibits F, G, H)

Nor has the Complainant established that there were any extraordinary circumstances that may have prevented her from timely asserting her rights under the Sarbanes Oxley Act. She has not shown that she was physically or mentally handicapped within the 90 day period following her termination. As the Respondents have pointed out, the Complainant was able to file charges with the EEOC in August 2005, and to prepare and transmit information for the EEOC investigator in connection with two separate claims. She also engaged in litigation with other former employers during the summer of 2005. As reflected by the Complainant's deposition testimony, during this 90 day period, she monitored Internet Message Boards with discussions of Respondents, and the business press (Respondents' Exhibit Z).¹¹

The Complainant has alleged that she suffered from physical limitations during the limitations period, in the form of Meniere's disease.¹² However, the Complainant has not submitted any medical records, or any other documentation that would tend to establish that she in fact suffered from any disability that prevented her from understanding and acting upon her rights during the 90 day limitations period. Moreover, such a conclusion is flatly contradicted by her activity in connection with her EEOC complaints, which included preparing and filing her complaints, and providing documentation and information to the EEOC investigators. (See Respondents Exhibits X, Y). As the Respondents point out, and the Complainant does not dispute, the Complainant also made numerous telephone calls to employees of Respondents during the months of August and September 2005 (Respondents Exhibit Y).

With her Brief, the Complainant submitted a letter from Dr. Myles L. Pensak to Dr. Thomas Schrimpf, dated October 19, 2005, after his evaluation of the Complainant. He discussed her multi year history of "aural symptoms commensurate with that of endolymphatic hydrops." He indicated that her otologic/otoneurologic examination was unremarkable, and stated that they discussed methods to handle her Meniere's. In a letter to Dr. Schrimpf dated August 12, 2005, Dr. Arthur L. Hughes discussed his evaluation of the Complainant for paresthesias and a possibly abnormal MRI scan. He noted her history of Meniere's syndrome, and that for the preceding few months, the Complainant had noted some shortness of breath, as well as numbness and tingling, as well as bright specks in her vision. Otherwise, he described her health as good. Dr. Hughes stated that her brain MRI scan was normal; she had episodic paresthesias of the left arm of doubtful pathological significance, and Meniere's syndrome by history; he recommended reassurance. Dr. Schrimpf's office notes from July 2003 reflect that the Complainant was doing well with her Meniere's disease, although she suffered from some dizziness during the summer and fall of 2005. There is also a page with a paragraph, source unknown, characterizing Meniere's disease as "one of the most unbearable medical conditions

¹¹ Respondents state that the Complainant has refused to disclose whether she was represented by Ms. Susan Sparks, Esq. in connection with this matter during the 90 day limitations period. As Respondents point out, Ms. Sparks has represented the Complainant in a number of matters preceding this claim, and in a suit against Microsoft that was filed the same months as this claim. Respondents' Brief at 3. Ms. Sparks has represented the Complainant while this matter was before the Office of Administrative Law Judges. In her response filed on September 5, 2005, the Complainant stated that "Respondent mischaracterizes my relationship with my counsel and am [sic] invoking the attorney client privilege in response to the footnote one on page three of the Brief for the Motion to Dismiss." Complainant's response at 35. The reasonable inference is that the Complainant had access to counsel during the filing period, whether or not she chose to exercise it.

¹² The American Medical Association Encyclopedia of Medicine describes Meniere's disease as a disorder of the inner ear, characterized by recurrent vertigo, deafness, and tinnitus.

around” (Complainant’s Exhibit J).

While these records show that the Complainant has been diagnosed with and treated for Meniere’s disease, they do not establish, or even suggest, that this condition was so severe that it made the Complainant unable to prepare and file her SOX complaint at any time during the ninety day filing period. Indeed, the Complainant testified in her deposition that she has suffered from Meniere’s disease for ten years (Respondents’ Exhibit Z). Yet during that time she was able to work in executive positions for numerous organizations, and to form her own consulting business. The Complainant sat for the LSAT examination in December 2005, and is currently enrolled in law school. She herself stated that between July 22, 2005 and November 1, 2005, she was on “medical leave,” and under a “medical condition.” She acknowledged that she was not incapacitated, but rather “limited in capacity.” (Respondents’ Exhibit Z). The Complainant has offered no documentation, or even explanation, as to how this physical condition, which apparently has not presented an obstacle to engaging in other activities, prevented her from filing her complaint within the 90 day limitations period.¹³

Finally, limitations statutes can be tolled on grounds of equitable tolling when the complainant has raised the precise statutory claim that is in issue, but has mistakenly done so in the wrong forum. This appears to be the ground on which the Complainant relies most heavily, as she claims that she “mistakenly” filed her claim with the EEOC instead of with the Department of Labor. I have reviewed the complaints filed by the Complainant with the EEOC, copies of which were provided by counsel for the Respondents, and I find that the allegations in those complaints have nothing in common with the allegations made by the Complainant in the instant claim. Thus, the Complainant filed charges with the EEOC on July 19, 2005, before her termination, alleging that Respondents had violated her rights under Title VII of the Civil Rights Act, and the Equal Pay Act. The narrative portion of her complaint deals strictly with her allegations that she was sexually harassed by her supervisor, Mr. Kunkel, and that she was forced to work in a hostile work environment. There is not even a suggestion or implication that any employee of Respondents was engaged in any type of fraud that might affect shareholders (Respondents’ Exhibit I).

Similarly, on August 25, 2005, the Complainant filed charges against the Respondents with the EEOC, again alleging violations of Title VII of the Civil Rights Act, claiming that she had been retaliated against for filing her first complaint with the EEOC. Again, there is no claim that any employee of the Respondent had committed any kind of accounting fraud, or engaged in any fraudulent activity to the detriment of shareholders (Respondents’ Exhibit J).

The Complainant’s complaint in the instant case, filed with the Department of Labor, is dated November 1, 2005. It includes numerous allegations of financial fraud and misleading of shareholders. None of this information, or even any allegations alluding to such claims, was included in the previous EEOC complaints. In short, the substance of the complaints that the Complainant filed with the EEOC bear nothing in common with the complaint she filed with the Department of Labor, other than the Respondents.

¹³ Indeed, in her response, the Complainant takes umbrage at any suggestion that she was totally incapacitated, and states that she was not completely incapacitated at all times, but was trying to live as full a life as possible, including seeking alternate employment, and exploring law school options.

It has been found appropriate to toll the statute of limitations where a plaintiff has raised the precise statutory claim in issue, but has mistakenly done so in the wrong forum. But courts have held that the restrictions on equitable tolling must be scrupulously observed, and it is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious claim. *Doyle v. Alabama Power Co.*, 1987 ERA 43 (Sec’y, Sept. 29, 1989). It is abundantly clear that the claims the Complainant lodged with the EEOC are not the precise statutory claim in issue in this case; indeed, they are not even similar. Not only is the statute relied on by the Complainant in this matter different than the statutes she relied on in her EEOC claims, the underlying facts that purportedly support her claims are radically different. Thus, her claims in the EEOC charges revolve around her allegations of sexual harassment and gender discrimination, whereas her claims in the instant matter revolve around her allegations of financial impropriety and deception of shareholders.

The decision by the Administrative Review Board (Board) in *Carter v. Champion Bus, Inc.*, No. 05-076 (Sept. 29, 2006), is instructive. In that case, the complainant argued that the limitations period should be tolled because he filed his complaint with the EEOC within the 90 day period, and that this complaint shared a common nucleus of operative facts with his complaint filed under the Sarbanes Oxley Act, and was filed under an identical scheme in the wrong forum. The Board noted that the only wrongdoing that the complainant alleged in his EEOC complaint was violations of safety protocols. The Board stated:

To be considered the “precise complaint in the wrong forum,” the EEOC complaint must demonstrate that Carter engaged in SOX-protected activity prior to his discharge. His complaints to Champion management must have provided information regarding Champion’s conduct that Carter reasonably believed constituted mail, wire, radio, TV, bank, or securities fraud, or violated any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders.

Id. at 8. The Board cited its previous decision in *Harvey*, in which it found that “Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws such as the Fair Labor Standards Act or Family Medical Leave Act, standing alone, is not protected conduct under the SOX.” *Id.* at 8, citing to *Harvey v. Home Depot, U.S.A. Inc.*, ARB Nos. 04-114, 115 (ARB June 2, 2006).

The Board found that since the complainant’s EEOC complaint did not show that the employer retaliated against him because his complaints to the employer’s management provided information regarding the Employer’s conduct that the complainant reasonably believed was defrauding shareholders or violating security regulations, the complainant had not established, as a matter of law, that he filed the precise statutory complaint in the wrong forum.

As in the instant case, the complainant argued that he was advised by the EEOC that his complaint would be more appropriate under whistle blower protection laws. But the Board held that the reference by the EEOC to the “whistleblower protection laws” did not remedy the complainant’s failure to express his reasonable belief that his employer was defrauding

shareholders or violating security regulations.

I find that the Complainant did not “mistakenly” file the claim that is the subject of the instant case with the EEOC. Rather, after the conclusion of the EEOC proceedings in connection with her gender discrimination claims, she filed a new and factually distinct claim with the Department of Labor, alleging, not gender discrimination, but violations of the Sarbanes Oxley Act.¹⁴

Curiously, the Complainant appears to argue that the Respondents are to blame for the delay in filing her complaint with OSHA. Thus, she claims that the failure of the Respondents to respond to her EEOC charges within the time limits was the “proximate” and “direct” cause of the delay in filing her charges with OSHA. The Complainant relies on her claim that, in discussing the overdue response with an EEOC employee, she learned that the EEOC did not handle whistleblower complaints. The Complainant reasons that, had the Respondents filed a response in the EEOC matter, she would have learned sooner that the EEOC did not handle whistleblower complaints, and that she had filed in the wrong forum. However, even setting aside the fact, as Respondents argue, that the Complainant’s account of her conversation with the EEOC is completely unsubstantiated, the fact remains that the complaint filed with OSHA is completely different than the complaint filed with the EEOC. Thus, the Complainant did not merely turn around and file the same complaint with OSHA; she filed a new and separate complaint, with different factual allegations and different statutory grounds for relief.

For all of the foregoing reasons, I find that the Complainant failed to file a claim of discrimination under the Sarbanes Oxley Act within 90 days from the date of the alleged violation, and that the doctrine of equitable tolling is not applicable in this case. Thus, the Complainant’s claim under the Sarbanes Oxley Act is time-barred under § 1514(A)(b)(2)(D).

ORDER

Accordingly, IT IS HEREBY ORDERED that the Complainant’s complaint under the Sarbanes-Oxley Act is dismissed.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge

¹⁴ The fact that the Complainant alleged “questionable business practices” in connection with her gender discrimination claim filed with the EEOC is not sufficient to implicate the Sarbanes Oxley Act, as it does not raise a claim that the Respondents were defrauding shareholders or violating the securities laws.

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. *See* 29 C.F.R. § 1980.110(a). The Board’s address is: Administrative Review 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. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(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-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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(c). Even if you do file a Petition, 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 after the Petition is filed 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).