



Issue Date: 30 June 2011

Case No.: 2010-SOX-00018

In the Matter of

BENTZION S. TURIN
Complainant

v.

AmTRUST FINANCIAL SERVICES, INC.;
MAIDEN HOLDINGS, LTD.; MAIDEN INSURANCE
COMPANY LIMITED, MAIDEN HOLDINGS NORTH
AMERICA, LTD.; and
ART RASCHBAUM, Individually;
GEORGE KARFUNKEL, Individually;
BARRY KARFUNKEL, Individually;
MICHAEL KARFUNKEL, Individually; and
BARRY ZYSKIND, Individually
Respondents

DECISION AND ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS THE COMPLAINT

This proceeding arises from a complaint filed under §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 (“the Act”). The applicable regulations are contained in 29 C.F.R. Part 1980. Complainant Bentzion Turin (“Complainant”) alleges that he was dismissed by AmTrust Financial Services, Inc., Maiden Holdings, LTD, Maiden Insurance Company Limited, Maiden Holdings North America, LTD, and officers of those companies (collectively, “Respondent”) for reporting violations of federal securities laws.

In a letter dated December 31, 2009, the Occupational Safety and Health Administration (“OSHA”) denied the complaint because it was untimely. OSHA based this determination on its finding that Complainant had received notice of termination on December 19, 2008 but had not filed his complaint until April 3, 2008. Such complaints are subject to a ninety-day statute of limitations under § 1514A(b)(2)(D) of the Act and the regulations at 29 C.F.R. § 1980.103.¹ As

¹ I note that the Dodd-Frank Wall Street Reform and Consumer Protection Act extended this limitations period to 180 days when it was enacted on July 21, 2010; however, that Act is not retroactive and therefore does not apply to the instant claim. Sec. 1057(c)(1)(A); Sec. 1058.

OSHA determined that 109 days had elapsed between the date on which Complainant became aware of the adverse action and the date he filed, the complaint was dismissed.

Complainant filed a timely request for a formal hearing, and on January 25, 2010 the case was assigned to me. On June 25, 2010, Respondent filed a motion to dismiss the complaint on the grounds that it was untimely filed, or, in the alternative, to dismiss AmTrust Financial Services, Inc. as a party. Respondent's position is that Complainant's actions and the objective evidence support the conclusion the Complaint was untimely by eighteen days. (Respondent's Brief ("Resp. Br.") at 7, 10). Respondent also claims that the existence of a valid employment agreement does not preclude termination. (*Id.* at 13). Finally, Respondent argues the Complaint did not properly name AmTrust as a party or state any claim against AmTrust upon which relief could be granted. Complainant has opposed the Motion to Dismiss. Under the applicable regulations, an administrative law judge's review under section 806 of the Act is *de novo*. 29 C.F.R. § 1980.107(b).

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Legal Standard: Motion to Dismiss

The regulations do not specifically provide for summary decision or dismissal on the issue of timeliness. However, appropriately filed motions may be entertained pursuant to the regulations at 29 C.F.R. Part 18. 29 C.F.R. §§ 18.1, 18.41; *see, e.g., Howard v. TVA*, 90-ERA-24 (Sec'y July 3, 1991); *Eisner v. United States Environmental Protection Agency*, 90-SDW-2 (Sec'y Dec. 8, 1992). The Administrative Review Board ("Board") has stated that, when evidence outside the pleadings is considered, it treats a motion to dismiss as a motion for summary judgment under 29 C.F.R. § 18.40. *Reddy v. Medquist*, ARB No. 04-123, ALJ No. 2004-SOX-00035 (Sept. 30, 2005).

As in a summary decision, the standard governing a dismissal on the issue of timeliness requires that there be no genuine issue of material fact. 29 C.F.R. § 18.41. All ambiguities should be resolved in favor of the non-moving party. *See Burg v. Gosselin*, 591 F.3d 95, 97 (2d Cir. 2010)²; *Sneed v. Radio One, Inc.*, ARB No. 07-072, ALJ No. 2007-SOX-00018 (Aug. 28, 2008), at 6.

B. Undisputed Facts

Complainant was employed as General Counsel for U.S. Operations at AmTrust Financial Services, Inc. ("AmTrust") from March 2007 through June 2007. In the spring of 2007, Complainant was invited to participate in the formation of a new corporation, Maiden Holdings, LTD ("Maiden"). He was offered the position of General Counsel and later Chief Operating Officer of Maiden. (Complaint at 3).

² This case arises in the jurisdiction of the Second Circuit Court of Appeals because Complainant is located in New York, New York. Certain of the companies named in the complaint are located in New York, while others have offices in Bermuda.

The relationship between the individuals and companies named and referred to in this claim is complex. AmTrust Financial Services (“AmTrust”) is a publicly-traded multinational insurance holding company (See Respondent’s Initial Submissions, ¶ III) located in New York, New York. AmTrust registers securities under Section 12 or files reports under Section 15(d) of the Securities Exchange Act of 1934. (Id.) AmTrust’s President and Chief Executive Officer is Respondent Barry Zyskind.

Maiden Holdings, LTD (“Maiden”) is the parent corporation to Maiden Insurance Company Limited (“Maiden Insurance”) and Maiden Holdings North America, LTD (“Maiden Holdings NA”), all of which maintain offices in Hamilton, Bermuda. Maiden, Maiden Insurance and Maiden Holdings NA register securities under Section 12 or file reports under Section 15(d) of the Securities Exchange Act of 1934. (Respondent’s Initial Submissions, ¶ III). Maiden is a publicly traded company, with its shares traded on the NASDAQ exchange since May 2008. (Complaint at 4). The Chief Executive Officer of Maiden was originally Max Caviet, but is now Respondent Arturo Raschbaum, and the non-Executive Chairman of the Board is Mr. Zyskind. Mr. Zyskind’s in-laws, Respondents Michael, George and Barry Karfunkel, allegedly hold a majority interest in AmTrust, as well as significant shares in Maiden, both individually and through various foundations. (Complaint at 4, 6).

On July 3, 2007, Complainant executed an employment agreement with Maiden which named him Chief Operating Officer, General Counsel, and Secretary of the Company. (Complainant’s Exhibit “CX” A; Respondents’ Exhibit “RX” 14; RX 15). Under this agreement, he served at the pleasure of Maiden’s Board of Directors and reported on a day-to-day basis to the President and Chief Executive Officer. The initial period covered by the employment contract was July 3, 2007 through December 31, 2007. The agreement provided for one automatic renewal period, provided Complainant had not entered into a successive employment agreement prior to the expiration of the initial contract term. The expiration of the second renewal period was June 30, 2008. Under the agreement, Complainant would become an at-will employee if no successive employment agreement was executed prior to June 30, 2008.

In February 2008, Complainant became a director of AmTrust’s Bermuda subsidiaries, AII Insurance and AII Insurance Management (collectively, “AIIM”). (Turin Deposition (“Turin Dep.”) at 45-47). These subsidiaries are not publicly traded. Complainant received \$5,000.00 per month in exchange for his services.³ (Id. at 115-16).

In the summer of 2008, Maiden began working to acquire GMAC RE. (Complaint at 4). On Monday, December 15, 2008, Complainant met with Respondent Barry Zyskind, the President and Chief Executive Officer of AmTrust and Chairman of Maiden, regarding the acquisition of GMAC RE. Complainant stated the purpose of the meeting was to advise Mr. Zyskind to comply with his fiduciary duties to shareholders and have the transaction reviewed by

³ Complainant stated that acting as a corporate director was an exception to Bermuda’s work permit requirements, but that his work with AIIM made him a *de facto* employee of that company. As such, he admitted that he may have violated Bermuda law by not filing for an additional work authorization, but said that the related nature of Maiden and AmTrust may have meant that his existing permit covered that work. (Turin Dep. at 290). I do not decide here whether Complainant was an employee of AIIM, because it is not necessary to my decision.

the Board of Directors of Maiden. (Complaint at 10). Later that day, Mr. Zyskind called Complainant into his office and told Complainant his employment with Maiden was being terminated. Complainant “asked Zyskind to reconsider; he agreed to do so but said ‘don’t expect me to change my mind.’” (Id. at 11).

The following day, Complainant and another Maiden employee, Lawrence F. Metz, flew to Bermuda, where Maiden is based. (Turin Dep. at 237). Complainant testified at his deposition that he removed personal belongings from his office such as workout clothes, books, and photographs. (Turin Dep. at 247).

A series of email conversations followed. On Thursday, December 18, 2008, Complainant wrote an email to Respondent Art Raschbaum stating “Barry terminated my employment with Maiden on Monday, December 15. He did not indicate what the effective date of termination was. I am continuing in my position at Maiden pending further notice.” (CX G). He also wrote that Mr. Zyskind was open to a severance package and/or consulting arrangement with AmTrust, but wanted Complainant “out of the ‘Maiden Equation.’” Complainant indicated that he was open to further discussion but that he desired the advice of counsel to assist him and to prepare the potential consulting agreement.⁴

Complainant then discussed scheduling a meeting with Mr. Zyskind and Mr. Raschbaum in emails dated December 19-20, 2008. (RX 4; RX 7; RX 8; RX 12). Complainant wrote to Mr. Zyskind to detail a telephone conversation he had with Mr. Raschbaum, in which he expressed that he wanted to meet soon and anticipated a productive conversation. He said that he had told Mr. Raschbaum, “it might be naïve of me, but I still believe there is a good chance that we can repair things at Maiden and that I will in fact continue to work for you in my current role.” Mr. Raschbaum then stated that he felt the offered severance package of one year’s salary plus bonus was generous, and that Complainant should not also ask for legal fees. Mr. Zyskind replied that if Complainant did not meet with him and Mr. Raschbaum the following Monday, he would consider it insubordination.

The record contains an email from Robert D. Mercurio, an attorney at Windels Marx, to Stephen Unger, an officer at Maiden, dated December 22, 2008. (RX 13). Mr. Mercurio wrote, “[my firm has] recently been asked by [Complainant] to represent him in connection with his employment by MaidenRe and the possible termination of that employment.” As Windels Marx had previously represented Maiden, Mr. Mercurio was requesting a conflict waiver in order to represent Complainant in the termination and severance negotiations.

On December 31, 2008, Complainant emailed Mr. Raschbaum, stating that he had not heard from the audit committee regarding an interview and that “the termination, or attempted termination of a Sarbanes Oxley Whistleblower triggers significant duties on the board of directors under Sarbanes Oxley and other federal and state statutes.” (CX G). Mr. Raschbaum replied and said that he was reiterating the substance of their phone call that day in saying “I

⁴ Complainant denied ever having sent such an email. (Turin Dep. at 185). When asked to read the email out loud during his deposition, he did not explain his earlier denial, but simply said that Mr. Zyskind had not actually terminated him and was merely attempting to intimidate him. (Id. at 189). The email chain has been submitted into the record by both parties, thus I find the documents speak for themselves.

communicated to you our decision to terminate your employment effective today. I also requested that you return all company property as soon as possible.” Claimant then inquired whether there were minutes from a meeting of the full board of directors that reflected the decision to take such action, and whether the independent directors had met to discuss the ramifications under the Act.

The following day, January 1, 2009, Complainant sent an email to Mr. Raschbaum and another recipient named Mike stating, “Remember what Roy Sedore said about most IRS Audits being triggered by other litigation and/or federal enforcement action that incidentally brings up tax improprieties. . . . I just want the board to act in the interests of the shareholders and I want to be treated fairly.” (CX G).

Extracts from the minutes of a January 9, 2009 meeting of Maiden’s board of directors show the board ratified the decision to remove Complainant from all his positions at the company and determined that good cause existed to do so. (CX H). Mr. Raschbaum, in his capacity as Chief Executive Officer of Maiden, sent Complainant two letters on January 15, 2009. The first states that Complainant’s filing of the purported employment agreement with the Securities and Exchange Commission was a breach of fiduciary duty (see discussion of employment agreements below), that no such contract existed, and that his Executive powers and role with the company were terminated with immediate effect. (CX I). The second letter states that the Board of Directors had decided to terminate Complainant’s contract for cause effective that day. (CX J). Complainant was also sent a letter on January 20, 2009 stating that he remained as a director on the Board of Directors of Maiden Insurance, a subsidiary company of Maiden, until a vote could be taken to remove him. (CX K). The minutes of a board meeting of AII Insurance Management Limited also reflect that Complainant was removed as a director of that company on January 12, 2009.

On January 20, 2009, Maiden filed a Form 8-K with the SEC, reporting that Complainant was no longer employed as the company’s Chief Operating Officer and General Counsel. This form reported that Complainant had been terminated on January 15, 2009. (CX L).

Complainant filed a complaint with OSHA alleging violations of the Sarbanes-Oxley Act on April 2, 2009. On December 31, 2009, the Secretary issued a Findings and Order dismissing the complaint as having been untimely filed. Complainant timely requested a hearing before the Office of Administrative Law Judges.

C. Disputed Facts

This claim was predicated on Complainant’s assertion that, during the course of Maiden’s acquisition of GMAC RE, he noticed a number of important corporate governance concerns. These included improper process when raising capital, failure to negotiate terms at arm’s length in a related party transaction, and theft of corporate opportunity from Maiden by AmTrust, without Maiden’s consent. (Complaint at 4). Complainant asserts that he brought these concerns to the attention of corporate officers and outside counsel, but that he was rebuffed. (*Id.* at 8, 9, 10). Thus, he claims whistleblower status under the Act.

While the nature of Complainant's allegedly protected activity would be germane to a resolution of the claim on its merits, it is not material to whether the complaint was timely filed. I thus find this issue does not require resolution before a decision can be reached on the Motion to Dismiss.

Complainant also contends that he and the company entered into an employment agreement which extended his employment for two years, effective April 1, 2008. (CX B). This agreement bears the electronic signatures of Complainant and Mr. Caviet. The record contains undated draft minutes of an Audit Committee meeting in the Cayman Islands, during which the employment agreement was allegedly approved. (CX B; RX 17). According to Complainant, his power of attorney authorized him to enter into the agreement on the company's behalf and to file the agreement, containing electronic signatures, with the SEC. (Turin Dep. at 294-95). Steven Nigro, a director of Maiden and head of the compensation committee, said that the committee had voted on bonuses at the Cayman Islands meeting, but did not approve any employment agreements at that meeting, or at any other place or time. (Nigro Dep. at 65-66, 79).

Taking the facts in the light most favorable to Complainant, I will consider his employment agreement to have been properly approved, entered into, and in effect at the time of his dismissal. I find this factual dispute is not material to the issue of when Complainant received notice of Respondent's adverse action. Provided no good cause for dismissal existed, Mr. Zyskind's termination of Complainant's employment could constitute a breach Complainant's employment contract. Although such action may have violated laws governing the contract between the parties, the very premise of a whistleblower complaint under the Act is that the employer's action is wrongful. The fact that the action may have violated state common law or state statutes in addition to the Act is not relevant to the Sarbanes-Oxley complaint or its timeliness.

The parties have also disputed the extent of Complainant's relationship with AIIM and the timing of Respondent's alleged adverse action against Complainant. In particular, Complainant contends he did far more work for AIIM than a director would; he calls himself a "*de facto* employee." Respondent asserts Complainant did only the work expected of a director, and further points out that the Complaint contains no allegations against AIIM. Complainant also avers he could only be terminated by vote of Maiden's entire board of directors, while Employer asserts that the non-Executive Chairman and President and CEO's earlier actions were sufficient to start the clock running on the statute of limitations and the board's ratification of those acts is not relevant to the timeliness analysis. Complainant also claims equitable estoppel based on a March 12, 2009 email between James Zane at Zane and Rudofsky (Complainant's counsel) and Jay Miller, Esq. I find these are issues of law, rather than purely factual disputes, and will now consider each in turn.

D. Analysis

1. Dismissal of AmTrust as a Defendant

AmTrust argues that they should be dismissed as they are not a proper party. Complainant acknowledges that he was not employed by AmTrust during the relevant period,

but argues that AmTrust is liable as the publicly traded parent corporation for AII Insurance and AII Insurance Management (collectively “AIIM”). The parties agree that AIIM is a wholly-owned subsidiary of AmTrust. Respondent has asserted that AmTrust must be dismissed as a party because the Complaint does not allege any retaliation by either AmTrust or AIIM, does not request any relief from those companies, and because neither company was a covered employer under the Act. Complainant argues that AmTrust is a proper party because its senior management exercised direct control over AIIM’s operations.

Until recently, the question of whether a publicly traded parent company can be liable under the Act for the actions of its non-publicly traded subsidiaries has been an open question. However, on July 21, 2010, the President signed the Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203, amending Section 806 of the Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes Oxley Act, 18 U.S.C. 1515A (“Dodd-Frank Act”). Among other things, Section 929A of the Dodd-Frank Act amended Section 806 of the SOX Act by inserting the language “including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company.” Thus, the Dodd-Frank Act clarifies that non-publicly traded subsidiaries may not retaliate against whistleblowers.

The Board has made clear that Section 929A of the Dodd-Frank Act is not retroactive, but rather, clarified the existing law of Section 806 of the SOX Act. Thus, Section 929A clarifies that the SOX Act has always been intended to cover subsidiaries of publicly traded companies. The law, as clarified in the Dodd-Frank Act, therefore, applies to cases like this one, which was filed prior to the enactment of the Dodd-Frank Act. Johnson v. Siemens Building Technologies, Inc., ARB Case No. 08-032 (March 31, 2011). Therefore, as AmTrust is a publicly traded parent of the AIIM subsidiaries, it is subject to the Act and can be named as a defendant.

Nevertheless, Complainant’s allegations against AmTrust are vague and fail to state a cognizable claim. He did not list his position as an AIIM director as “employment” in the Complaint; he listed only his earlier position as General Counsel at AmTrust, which he had voluntarily resigned to work at Maiden. (Complaint at 3). Complainant alleges that, when the interests of AmTrust and Maiden diverged during the course of the companies’ business, Mr. Zyskind was to advocate for AmTrust while Complainant advocated for Maiden. (Id. at 4). This apparently occurred during the acquisition of GMAC RE, as Complainant felt AmTrust was stealing corporate opportunities from Maiden and was perpetrating a fraud on its shareholders. (Id. at 5, 10). Per his understanding of the agreement and in keeping with his position as Maiden’s General Counsel, Complainant brought his concerns to the attention of Mr. Zyskind and others involved in the transaction. This advocacy on Maiden’s behalf constitutes the only act of whistleblowing Complainant alleges, and he states the adverse action was the termination of his employment with Maiden. (Id. at 12-13). As Complainant did not allege in the Complaint that he was an employee of AmTrust at the relevant time, his employment there could not have been terminated in retaliation for whistleblowing. I find he has not stated a claim upon which relief could be granted against AmTrust, however, we must still analyze whether AmTrust is liable as the parent corporation to AIIM.

Although Complainant did not claim to be an AmTrust or AIIM employee in his Complaint, he later claimed to be a *de facto* employee of AIIM. (Turin Dep. at 290). In title, he was an outside director, meaning a director who was not employed by the company, but he claims he spent four to five hours per week working on AIIM business including financial reporting. (Id. at 118). He also claims he was compensated for this work. (Id. at 115-16).

There is no case law governing whether a director may also be considered an employee under the Act. In Vodicka v. DOBI Medical Int'l, Inc., 2005-SOX-111 (ALJ Dec. 23, 2005), the ALJ noted that “[t]he question of whether a person would qualify as a protected “employee” under the Act where his sole relationship with a covered employer is as a member of its board of directors appears to be an issue of first impression.” He stated that “directors are a different genus of corporate creature than both officers and those who clearly are employees” and that Congress could have clearly identified directors in the legislation if they were intended to be covered, but that public policy favored protecting whistleblowing directors. (Id.) The administrative law judge in Vodicka decided the case on other grounds, and the question of whether directors are covered does not appear to have been revisited since. Like the administrative law judge in Vodicka, I also do not resolve this question, as Complainant’s allegations against AmTrust as parent of AIIM fail for a different reason.

Complainant now asserts that AmTrust, as the publicly traded parent of AIIM, retaliated against him when AIIM removed him as a director in retaliation for his whistleblower activities at Maiden. He did not, however, allege his removal as a director of AIIM was a retaliatory action in the complaint he submitted to OSHA. Hence, OSHA was not able to investigate this issue, and he cannot now raise it on appeal to the Office of Administrative Law Judges. See Coates v. Southeast Milk, Inc., ARB No. 05-050, ALJ No. 2004-STA-60 (July 31, 2007) (holding that an employee seeking to invoke the protection of the TSCA whistleblower provision must submit his complaint to the Secretary of Labor for investigation by OSHA, which is an absolute prerequisite for a hearing and subsequent appeals. As OSHA did not issue a notice of determination concerning the relevant issue, the ALJ had no power to adjudicate such a complaint). Here, OSHA made no initial determination as to Complainant’s status as a director of AIIM or the complex legal and factual issues surrounding his removal because he did not plead this issue. Thus, I do not have the power to adjudicate this issue.

I find AmTrust is not a proper party to this claim. Complainant has not stated any claims against AmTrust or AIIM upon which relief could be granted, and has raised issues on appeal which were not raised in his complaint. I therefore ORDER AmTrust dismissed as a respondent to this claim.

2. Timeliness of the Complaint

The Act requires a complainant to file a complaint within ninety days of the date on which the alleged violation occurred⁵. 18 U.S.C.A. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d).

⁵ Although the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 amended the statute of limitations for SOX whistleblower claims from ninety to 180 days, it was not enacted until July 21, 2010. Pub. L. 111-203. The amendment contains no specific provisions to alter the Dodd-Frank Act’s general effective date (the day after its enactment, *i.e.*, July 22, 2010), and thus the change to 180

Generally, the limitations period begins to run when the employer communicates an adverse employment decision to the employee, and the facts are such that a person with a “reasonably prudent regard for his rights” would recognize that a discriminatory act has occurred. Ross v. Florida Power & Light Co., ARB No. 98-044, ALJ No. 1996-ERA-036, slip op. at 4 (ARB Mar. 31, 1999); Allen v. U.S. Steel Corp., 665 F.2d 689, 692 (11th Cir. 1982).

The statutes of limitation for whistleblowers begin to run on the date an employee receives “final, definitive, and unequivocal notice” of an adverse employment decision. Corbett v. East Energy Corp., ARB No. 07-00044, ALJ No. 2006-SOX-00065 (Dec. 31, 2008). The relevant date is the date on which an employer communicates its intent to implement an alleged adverse employment action, not the date on which a complainant experiences the consequences of that decision. Lawlor v. Online Resources Corp., 2011-SOX-00012 (ALJ Jan. 31, 2011), (citing Halpern v. XL Capital, Ltd., ARB Case No. 04-120, ALJ No. 2004-SOX-54 (Aug. 31, 2005), at 3; Chardon v. Fernandez, 454 U.S. 6, 8 (1981)). “Final” and “definitive” notice is a communication that is decisive or conclusive, *i.e.*, leaving no further chance for action, discussion, or change. Coppinger-Martin v. Nordstrom, Inc., ARB Case No. 07-067, ALJ No. 2007-SOX-00019, at 4. “Unequivocal” notice means communication that is not ambiguous, *i.e.*, free of misleading possibilities. Id.

In termination cases, the ninety-day clock begins to run when notice of termination is communicated, even if the possibility of avoiding termination exists. Lawrence v. AT&T Labs, 2004-SOX-65, at p. 6 (ALJ Sept. 9, 2004) (citing English v. Whitfield, 858 F.2d 957 (4th Cir. 1988); Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976)); see also Rollins v. Am. Airlines, Inc., ARB No. 04-140, 2004-AIR-9 (ARB Apr. 3, 2007), (holding that final and unequivocal notice of the company’s decision to terminate the complainant occurred when the company issued a letter offering the choice of reassignment, voluntary resignation or involuntary termination; the possibility that the complainant could have avoided termination by resigning voluntarily or accepting alternate employment did not override the company’s notice of intent to terminate him); Carter v. Champion Bus, Inc., 2005-SOX-23, at p. 2 (ALJ Mar. 17, 2005) (holding that the statute of limitations began to run when the complainant was first made aware of the decision to terminate, notwithstanding discussions of severance or possible reinstatement); Levi v. Anheuser-Busch Co., ARB Case Nos. 06-102, 07-020, 08-006, at pp. 2, 10 (ARB Apr. 30, 2008) (holding that the relevant date was the date on which the complainant had notice of termination, not the date on which his discharge became final); Pearson v. Macon-Bibb County Hosp. Auth., 952 F.2d 1274, 1279-80 (11th Cir. 1992) (holding that “the equivocal character of the adverse employment decision . . . does not deprive that decision of its status as an operative act”).

The Board recently issued a decision clarifying when an adverse action is considered to have occurred for purposes of triggering the statute of limitations in SOX claims. Avlon v. Am. Express Co., DOL ARB, No. 09-089 (May 31, 2011). The facts of this case are distinguishable from Avlon for several reasons. In Avlon, the employee was still on the company’s payroll while most of the events were taking place; she was on administrative leave and was apparently drawing her full pay and benefits. She had every opportunity to remain an employee until she

days does not apply to the instant claim. See Lawlor v. Online Resources Corp., 2011-SOX-00012 (ALJ Jan. 31, 2011)

received an email stating the only option left for her was to attempt to work out the terms of a separation agreement. She did not do so, and was terminated according to the terms in the email. The email was therefore her notice under the Act. In this case, there is no evidence Complainant was still drawing a salary, and in fact his corporate email and intranet access was cut off around the New Year. He had been told in mid-December he had no future with Maiden and was told at that time his only option was to accept a consulting agreement with AmTrust or Mr. Zyskind's help securing alternate employment. No option was left open for him to return to Maiden, though he hoped he could convince Mr. Zyskind to reconsider.

Moreover, I note that in both cases, the evidence contained a proposal listing options for the aggrieved employee. In Avlon, the company drafted a proposal offering the employee either her old position or a severance agreement. Here, however, Complainant was the one who drafted a proposal and offered it to the company. (RX 5, RX 22). While this is evidence that Complainant wanted to stay on at Maiden and was willing to do so if he had the chance, there is no indication the management or board of directors ever seriously considered the proposal or gave an objective indication they would accede to the demands Complainant made therein. For these reasons, I have considered the ARB's reasoning in Avlon but do not find it applicable to the specific facts of this case.

In order to dismiss the case based on the untimely filing of a complaint, there must be no genuine dispute of material fact as to when the statute of limitations began to run. See Sneed v. Radio One, Inc., ARB No. 07-072, ALJ No. 2007-SOX-00018 at 5 (Aug. 28, 2008). An employer is not required to give a definite date of termination in order to start the ninety-day clock. (Id. at 8). A complainant's subjective belief that he or she had or had not been terminated is insufficient to establish a genuine issue of material fact; the correct analysis is whether such a belief was objectively reasonable. (Id. at 8-9). A fact-finder may consider the totality of the communications between the employer and employee in determining whether a reasonably prudent person would interpret notice of termination as being final and definitive. (Id. at 9). Finally, even if a material issue exists regarding the effective date of the employee's separation from the company, there is no genuine question of material fact regarding the termination itself once the employee knows that it is not in question and is imminent. (Id. at 9-10).

Complainant has posited several reasons why his conversation with Mr. Zyskind on December 15, 2008 was not an adverse action which would start the clock running on the statute of limitations. He has argued that he could not be fired by anyone other than the full board of directors due to the existence of his employment contract. Thus, he did not believe his employment was really being terminated that day. He also argued that the decision was not final and unequivocal because there were talks of a severance package and he harbored hopes of returning to his position at Maiden.

The standard for determining whether an adverse action is sufficient to start the clock on the statute of limitations is whether a person with a "reasonably prudent regard for his rights" would recognize the discriminatory action. Allen, 665 F.2d at 692; Ross, ARB No. 98-044. Here, Complainant clearly appreciated the nature of the action because he wrote emails in the following days stating he had been "terminated . . . on Monday, December 15" and "the termination, or attempted termination of a Sarbanes Oxley Whistleblower triggers significant

duties on the board of directors under Sarbanes Oxley and other federal and state statutes.” Complainant, a lawyer, is not an unsophisticated complainant. The fact that on December 31 he identified himself as a SOX whistleblower in an e-mail works against him. He was sufficiently familiar with SOX to understand the duties of the board; he should also have been educated enough to understand the time limits for filing a claim.

The facts show that Complainant was already contemplating his rights under the Act by the time he wrote the second email quoted above on December 31, 2008. The Complaint makes evident that Complainant felt written notice was required before the statute of limitations would be triggered,⁶ however, this is incorrect. Notice simply involves communication of the adverse decision, regardless of what form the communication takes. See Sneed at 9.

Although Complainant argues that he did not believe he was terminated on December 15, 2008 because under the terms of his employment contract, he served “at the pleasure of the Board of Directors” and could not be dismissed without cause, I have found the existence of an employment contract not material to this case. Furthermore, under existing case law, a complainant’s subjective belief does not control. Sneed, ARB No. 07-072. While he was free to bring a wrongful termination action against the company for such conduct, I do not find a reasonable attorney would assume a breach of contract to be so impossible as to entirely preclude his dismissal.

Moreover, the undisputed facts here show that Complainant was told on December 15, 2008 that Maiden was terminating his employment. The parties agree that Mr. Zyskind told Complainant “You’re fired” on December 15. (Complaint at 10; Respondent’s Brief at 11). Complainant then flew to Maiden’s headquarters in Bermuda, where he removed personal effects from his office before returning to New York. He wrote an email three days later to Mr. Raschbaum stating, “Barry terminated my employment with Maiden on Monday, December 15. He did not indicate what the effective date of termination was. I am continuing in my position at Maiden pending further notice.” (CX G). He also engaged in discussions about a severance package and a possible consulting agreement for AmTrust. (RX 4; RX 7; RX 8; RX 12). Although Complainant later asserted that he did not believe Mr. Zyskind was serious about the termination, the contemporaneous record indicates he did expect and prepare for the end of his employment. Complainant himself stated it was “in hindsight with the benefit of seeing the context of the things that happened the following days” that he decided Mr. Zyskind had not really wanted to fire him that day. (Turin Dep. at 190).

I also note, despite Complainant’s December 18 email to Mr. Raschbaum saying he intended to continue performing his duties at Maiden until he was given an effective date for his termination, the facts do not show he ever returned to the New York office after he returned from Bermuda, nor did he continue to use the Bermuda office after that date. The emails indicated he may have been on vacation for several days, but he did not, in fact, continue to perform work for

⁶ See page three of the Complaint, which reads in relevant part:

The date on which my employment was terminated (written termination) was: January 15, 2009.

This complaint is filed within ninety (90) days of the date of termination stated above.

Maiden after mid-December. His emails to Lisa Greene on January 4 show his access to the company's computer files and email had been shut off and his Blackberry "wiped clean" by that date. (RX 29). Thus, it seems evident that Complainant was no longer performing his duties as General Counsel or Chief Operating Officer of Maiden by the beginning of January, at the latest.

Complainant has also argued that Mr. Zyskind did not have the authority to make decisions regarding his employment status. (Comp. Br. at 34). Because of this, Complainant contends he was not given final, unequivocal notice until the January 15, 2009 letters were sent. Complainant cites Corbett, ARB No. 07-00044, which states the general rule for triggering the statute of limitations, and Coppinger-Martin, ARB Case No. 07-067, which defines "final," "definitive," and "unequivocal." (Comp. Br. at 2). Again, looking to the record of Complainant's contemporaneous acts, Complainant did not inquire about a board vote on the matter until December 31, after he had removed his personal possessions from the company's offices, reported his termination to several people, and engaged in discussions regarding a severance package. The totality of his actions demonstrates he believed, at the time Mr. Zyskind gave him notice, his employment was at or near its end.

Complainant believes that the decision to fire him was not final on December 15 because Mr. Raschbaum made reference to his status not being resolved during the December 18 email conversation, and Complainant later drafted a proposal by which he would either remain at Maiden in return for Maiden giving in to additional demands on his part, or he would resign in return for a one-year consulting agreement at Maiden (not, apparently, at AmTrust, as had been offered by Mr. Zyskind). (RX 5). This proposal was not accepted. (RX 22). However, the case law clearly shows that discussions of severance packages and even possible reinstatement do not stop the clock for statute of limitations purposes. See, e.g., Carter, 2005-SOX-23.

In Complainant's own words, "contemporaneous actions speak much louder than . . . current dissembling." (Comp. Br. at 16). The timing of notice sufficient to start the clock on the statute of limitations relies not on whether the person who purported to fire the employee was actually able to do so, but on whether a reasonable person in the employee's shoes would believe that the company intended to implement an adverse employment decision. The totality of Complainant's statements and actions in the days following December 15 clearly shows that he acknowledged Mr. Zyskind's stated decision to remove him from his positions at Maiden. Even though Complainant hoped that he could persuade Mr. Zyskind to reconsider and that they could "repair things," Mr. Zyskind's oral communication to Complainant on December 15 that he was fired was still an adverse employment action for purposes of the Act.

Assuming *arguendo* the December 15 conversation was insufficient notice, Complainant could not have continued to reasonably assume that Maiden still employed—and intended to keep employing—him after his December 31 conversation with Mr. Raschbaum. At his deposition, Complainant testified to what he thought this conversation meant. He said his understanding was that "Barry called him up and said call Ben and tell him that we're firing him today, and he did that. He followed Barry's direction." (Turin Dep. at 259). He said that he did not think that the term "our decision" included the Board, although it could have, but that "basically what he was saying was that he had agreed with Barry to go to the board and propose that they terminate me . . . certainly at that point in time, Art had agreed with Barry that they

were going to recommend to the board to fire me or to terminate.” (Id. at 260). I find it would be unreasonable to believe, on the facts of this case, that the board would defy the joint recommendation of its Chairman and the President and CEO.

Complainant also believes the filing date of the Form 8-K supports his position that the termination actually occurred on January 15, 2009. He says that this form must be filed within four business days of a reportable event, such as the departure of a Chief Operating Officer or General Counsel. (Comp. Br. at 59). While it is certainly possible the company followed improper filing procedures, the Form 8-K filing date has no bearing on when Complainant received notice that Maiden was terminating his employment.

Complainant has raised the theory of equitable estoppel in response to Respondent’s motion to dismiss, citing the March 23, 2009 correspondence between James Zane and Jay Miller.⁷ The statute of limitations for claims under the Act is subject to equitable tolling or equitable estoppel, in the discretion of the court. Levi v. Anheuser Busch Cos., Inc., ARB Nos. 06-102, 07-020, 08-006, at 11 (ARB Apr. 30, 2008); Harvey v. Home Depot, ARB Nos. 04-114, -115, ALJ Nos. 2004-SOX-020, -036, slip op. at 16 (ARB June 2, 2006). Equitable tolling applies to the employee’s excusable ignorance of the facts underlying the employer’s act, while equitable estoppel applies when the employee was precluded from exercising his or her statutory rights due to the employer’s misrepresentations. Hyman v. KD Resources, ARB No. 09-076, ALJ No. 2009-SOX-020 (Mar. 31, 2010). A separate and discrete adverse action may restart the clock on the statute of limitations. Richardson v. JPMorgan Chase & Co., 2006-SOX-00082 (ALJ Jul. 7, 2006). These acts must be independently discriminatory, and charges addressing them must be timely filed. Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). Examples of discrete acts are failure to promote, denial of transfer, termination, and refusal to hire. (Id. at 114). The emphasis must be on whether there is a present violation, not on a mere continuity of practices. (Id. at 112).

In an email, Mr. Zane asserted, among other things, that the date of termination was January 15, 2009, and Mr. Miller replied, “your email of this date reflects our understanding.” However, the statute of limitations had already run by the time this conversation took place, as it was more than ninety days after Complainant was given notice on December 15. Moreover, this conversation does not rise to the level of a misrepresentation or miscommunication that would lull Complainant into a false sense of security about what action the company would take. Under the agreement between Mr. Zane and Mr. Miller, either party had only to give ten days notice before filing a complaint; nothing prohibited Complainant from giving such notice and filing his Sarbanes-Oxley complaint. He did, in fact, file his complaint eleven days later, and nothing in the record shows that he gave notice on March 24 as required by the purported agreement. Finally, the emails reflect an agreement as to the effective date of termination, not the date Complainant was given notice that termination was imminent. The application of equitable estoppel is discretionary, and based on the facts presented here, I find this is not an appropriate situation in which to apply it.

⁷ Mr. Zane’s email states that he represents Complainant while Mr. Miller represents Maiden and AmTrust. It refers to an attached agreement which was not included in the exhibits, the substance of which is unknown. I note Mr. Miller is not listed as counsel of record for Respondent in this proceeding.

II. CONCLUSION

For the reasons set forth above, Respondent's Motion to Dismiss on the grounds that the Complaint was not timely filed is GRANTED. The Complaint is barred by the ninety-day statute of limitations in 18 U.S.C. § 1514A(b)(2)(D), which began to run on December 15, 2008, when Complainant was notified that Maiden was terminating his employment. Thus, the Complaint was filed nineteen days too late.

ORDER

It is ORDERED that the complaint herein is dismissed.

A

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

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, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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 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).