



Issue Date: 05 July 2011

OALJ Case No.: 2011-SOX-00035

In the Matter of:

GUY DEFAZIO,
Complainant,

v.

SHERATON STEAMBOAT RESORTS & VILLAS,
Respondent.

**ORDER DISMISSING COMPLAINT
AS UNTIMELY**

This proceeding arises under 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 (“Sarbanes-Oxley” or “SOX”).

Guy DeFazio (“Complainant” or “DeFazio”) alleges that he was unlawfully terminated from his employment at Sheraton Steamboat Resort and Villas (“Employer” or “Sheraton”). The issue presently before me is whether Complainant’s SOX complaint should be dismissed as untimely.

The procedural history and exact nature of DeFazio’s claim, both before and after he filed objections to the Secretary’s findings and requested a hearing before the Office of Administrative Law Judges (“OALJ”), have been somewhat obfuscated by DeFazio’s current *pro se* status and by apparent errors in some of the documents generated by the Occupational Safety and Health Administration (“OSHA”) when this matter was before it. The background information and chronology set forth below has been gleaned from prior pleadings and documents, including the parties’ recently filed responses to my request for supplemental information.

Background and Procedural History

DeFazio’s employment with Sheraton was terminated on January 21, 2010.

On March 11, 2010, Barry D. Roseman, DeFazio’s attorney, wrote to Sheraton’s Senior Director and Associate General Counsel stating that Complainant had been fired because he reported what he believed in good faith to be substandard work by a company hired by Sheraton to perform modifications involving removal of wall-mounted HVAC units in 200 guest rooms

which resulted in the reappearance of mold that originally occurred as a result of a \$20 million renovation project. Respondent's Response to Notice of Docketing and Order to Show Cause, "Attachment A" at 1-4. DeFazio's attorney stated that the termination of Complainant's employment violated public policy and, although he noted he and his client were investigating whether Sheraton's decision to terminate DeFazio violated the anti-retaliation provision of the Sarbanes-Oxley Act, he stated: "We are neither alleging such a violation at this time, nor are we ruling that out." *Id.* at 4-5. Complainant's counsel stated that he had been authorized by his client to settle the matter for, *inter alia*, payment of \$95,000.

On June 7, 2010, DeFazio sent a two-page letter to Claudia Noakes of The Sunshine Kids Foundation in Houston, Texas in which he alleged that Sheraton had "concealed a serious mold infestation that was taking place throughout the rooms in which The Sunshine Kids and hundreds of other guests were staying." The letter further alleged that Sheraton "continuously kept the mold infestation from the public [to avoid a substantial loss of income]." DeFazio noted that because of Sheraton's violations of "clearly defined public policy regarding employee reporting rights," he had retained counsel to assist him.

On June 10, 2010, DeFazio wrote to Herb Gibson, OSHA's Area Director in Denver Colorado, and attached a copy of his June 7, 2010 letter to The Sunshine Kids Foundation. In his letter to Gibson, DeFazio stated that he "was fired from [Sheraton's] engineering team for repeatedly speaking-up about the grossly inadequate and unethical measures being taken to address [a serious mold outbreak which posed a serious and repeated health threat to the public and Sheraton's employees]." Complainant also stated that he could provide OSHA with additional "information concerning other safety and health violations at that property." In one of the closing paragraphs in his letter, DeFazio stated that he had sent an email to Sheraton's Director of Human Resources, Carl Sokia which

outlined numerous areas of public policy being violated by Sheraton, including referring to the fact that "all business activities should be conducted in a fair and ethical manner, in strict compliance with applicable competition and trade practice laws and regulations," as well as the fact that the hotel should "not provide anyone with any fraudulent information or misrepresentations of any kind." Two days after receiving that email, Sokia fired me.

On August 18, 2010, Complainant filed with OSHA a complaint under Section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. § 660(c) (hereinafter "Section 11(c)"), alleging that he was fired by Respondent for reporting a mold problem.

In an August 23, 2010 letter from OSHA,¹ Complainant was informed that his Section 11(c) complaint was being dismissed as untimely.

¹ The OSHA letter is not in the record. However, The "Final Investigation Report" dated March 9, 2011 prepared by OSHA Regional Supervisory Investigator Cory Wilson and forwarded to OALJ's Chief Docket Clerk states: "Mr. DeFazio received a letter dated August 23, 2010, that stating [sic] his [Section 11(c) complaint] was untimely filed."

On November 18, 2010, DeFazio filed another Section 11(c) complaint alleging tortious interference by Respondent with his claim on July 23, 2010 in the form of a threat of a “SLAPP”² suit against Complainant by Sheraton.

According to a “Discrimination Case Activity Worksheet” completed by OSHA Regional Supervisory Investigator Cory Wilson on November 18, 2010, Complainant was deemed to have filed a complaint alleging termination of his employment by Sheraton in violation of the anti-retaliation provisions of SOX on August 18, 2010.³

In a March 9, 2011 letter, OSHA Regional Supervisory Investigator Cory Wilson notified Complainant that his Section 11(c) complaint⁴ had been dismissed.

In a March 9, 2011 letter to DeFazio from Gregory J. Baxter, OSHA Regional Administrator, Complainant was told that OSHA had completed its investigation of DeFazio’s SOX complaint⁵ in which he alleged that he was fired by Respondent because he reported to management there was mold in rooms being sold to The Sunshine Kids Foundation. Under the heading “Secretary’s Findings,” DeFazio was told that his August 18, 2010 complaint alleging unlawful termination on January 21, 2010 was “deemed untimely filed and dismissed.”

On March 30, 2011, Complainant filed an objection to the Secretary’s Findings and requested a hearing before an administrative law judge pursuant to 29 C.F.R. § 1980.106.

On April 6, 2011, I issued a Notice of Docketing and Order to Show Cause directing the parties to explain within thirty days from the date the order was issued why DeFazio’s complaint should not be dismissed as untimely. Relying on the OSHA Regional Director’s March 9, 2011 letter, I incorrectly noted under the “Procedural History” section of my order that DeFazio had filed a SOX complaint on November 9, 2010, while also noting in the “Timeliness of Complaint” section of my order that DeFazio’s SOX complaint was filed on August 18, 2010.

On April 16, 2011, DeFazio responded to my order in a letter alleging that Respondent’s attorneys “purposely delayed their response to the Denver attorney [Roseman] who initially agreed to represent my wrongful termination case . . . until exactly ninety-days after the date of

² “SLAPP” is an acronym for “strategic lawsuit against public participation” which is commonly used to refer to a lawsuit brought by a party with the intent of intimidating or silencing critics by burdening them with the costs of defending against the lawsuit.

³ Exactly why or how OSHA determined in November 2010 that DeFazio filed a SOX complaint on August 18, 2010, the same date he filed his first Section 11(c) complaint, is not evident from the record. I can only assume that Complainant’s reference in his June 10, 2010 letter to OSHA’s Area Director concerning “fraud” was later construed by Regional Supervisory Investigator Cory Wilson in November 2010 as a SOX complaint. For purposes of the instant decision, however, I will utilize the August 18, 2010 date for determining the timeliness of DeFazio’s SOX complaint.

⁴ Although the date of the Section 11(c) complaint is not specified in the letter, it can only refer to the November 18, 2010 complaint since the original Section 11(c) complaint filed by DeFazio had already been dismissed as untimely on August 23, 2010.

⁵ According to the introductory paragraph of the March 9, 2011 letter to DeFazio from the Regional Administrator, the SOX complaint was purportedly filed on November 9, 2010. However, the “Discrimination Case Activity Worksheet” completed by Regional Supervisory Investigator Cory Wilson on November 18, 2011 for DeFazio’s SOX complaint notes the date the complaint was filed as August 18, 2010.

my termination (January 21, 2010).” DeFazio further stated that his attorney “did not tell me that my ninety-day Sarbanes Oxley reporting requirement was expiring, until two-days after that date had passed.” According to Complainant, it was after receiving the April 21, 2010 response from Sheraton’s attorneys that he began drafting his June 7, 2010 letter to The Sunshine Kids Foundation and then wrote the June 10, 2010 letter to the OSHA Area Director in Denver. DeFazio states that it was the June 10 letter which outlines, *inter alia*, his allegations of fraud and misrepresentation and attempted to clarify the confusion resulting from the Regional Administrator’s reference to a November 9, 2010 SOX complaint. He wrote:

With regard to the statement in your April 6, 2011 letter [sic – order] that “my SOX complaint was filed on November 9, 2010,” please allow me to clarify that this SOX investigation was/is a result of the information that I provided to OSHA during the investigation of the countersuit threat (SLAPP suite) that Starwood has made against me, following my letter to The Sunshine Kids Foundation. I first reported that countersuit threat to OSHA on August 15, 2010, within the thirty-day reporting requirement. As a result of the information they discovered during their SLAPP suit investigation, OSHA then opened this investigation under SOX.

On April 19, 2011, I issued a Notice of Ex Parte Contact and Order Extending Period for Responding to Show Cause Order in which I informed the parties that I had received the April 16, 2011 correspondence from DeFazio and stated that it did not appear to have been served on Respondent or its counsel. I attached a copy of DeFazio’s correspondence to the notice and extended the period for responding to my show cause order until May 6, 2011.

On May 6, 2011, I received responses from both parties addressing the timeliness of DeFazio’s SOX complaint. In DeFazio’s response, he reiterated his claim that Sheraton’s attorneys had manipulated him and Barry Roseman, his Denver attorney, by delaying a response to DeFazio’s settlement demand “until exactly 90-days after my termination date.” Complainant’s Brief (“Comp. Br.”) at 1. He further stated that Sheraton’s threat of a “SLAPP” suit, which according to DeFazio was made on July 22, 2010, exactly 180-days after his termination, was based on his June 7, 2010 letter to The Sunshine Kids Foundation. *Id.* at 1-2. DeFazio’s brief includes a chronology of certain email correspondence between himself, his attorney and Sheraton’s attorney, as well as excerpts from that correspondence. In an excerpt from an April 23, 2010 email from DeFazio to his attorney, he states: “Now that we have the hotel’s retaliation against me in writing (attacks and lies), how do we stand regarding Sarbanes Oxley?” In his response that same date, Complainant’s attorney wrote: “[I]t appears that the deadline to file a Sarbanes-Oxley complaint with OSHA may have passed two days ago.”

Respondent argued in its brief that Complainant’s August 18, 2010 SOX complaint was untimely and that equitable tolling does not apply. Regarding DeFazio’s claim that “Starwood’s threat of a SLAPP suit” was a discriminatory act under SOX, Sheraton argued that the claim was both disingenuous and misleading. According to Respondent: “DeFazio’s SOX Complaint clearly stated that the alleged discriminatory act was ‘termination of employment,’” and DeFazio cannot “resurrect an untimely Complaint by maintaining, for the first time, that there was some other action other than his termination that violated SOX.” Respondent’s Brief (“Resp. Br.”) at 8, n. 6.

Because of the confusion regarding the filing dates and the number of SOX complaints purportedly filed by DeFazio, I issued an order on May 26, 2011 directing the parties to file supplemental briefs. Given the fact that the record before me did not include copies of any SOX complaint filed by DeFazio, and the confusion surrounding when and how many such complaints he had filed, I specifically noted that the parties' briefs should be accompanied by copies of all relevant documentation regarding DeFazio's SOX complaints.

On June 14, 2011, Complainant responded to my order directing the parties to file supplemental briefs. He alleges, *inter alia*, that he has been harassed by the outside contractor whose work caused the mold-related issues he reported to Sheraton prior to the termination of his employment on January 21, 2010. Complainant's Supplemental Brief ("Comp. Supp. Br.") at 1. According to DeFazio, the contractor called his cell phone and hung up which he construes as an attempt to harass and intimidate him. *Id.* at 1-2. Regarding the November 9, 2010 date referenced in the OSHA Regional Administrator's March 9, 2011 letter informing DeFazio that his SOX complaint was being dismissed as untimely, Complainant states "I've now spoken with OSHA's Regional Supervisory Investigator in Denver, Cory Wilson, and he has confirmed that that is the date on which their Amended OSHA Form-82 was filed." *Id.* at 6. DeFazio further states that his attorney in Denver, Barry Roseman, informed him in a July 23, 2010 email that Sheraton had threatened to file a tortious interference and/or defamation claim against Complainant and Roseman would not represent him with regard to any counter-claim unless DeFazio paid him for such representation. *Ibid.*

On June 15, 2011, Sheraton filed its response to my May 26, 2011 order asking for supplemental briefs. Respondent states that DeFazio filed three separate complaints with OSHA: a Section 11(c) complaint filed on August 18, 2010 alleging Sheraton unlawfully terminated Complainant for reporting a mold problem; an "amended complaint" under Section 11(c) alleging Sheraton had retaliated against DeFazio by threatening to file a "SLAPP" lawsuit against him; and a SOX complaint "treated as having been filed on August 18, 2010" which alleged unlawful termination from employment on January 21, 2010. Respondent's Supplemental Brief ("Resp. Supp. Br.") at 2-3, Exhibits 1-3. According to Sheraton, DeFazio's original Section 11(c) complaint was dismissed because it was filed more than 30 days following the date he was fired; the amended Section 11(c) complaint was dismissed on its merits; and the SOX complaint was dismissed as untimely. *Id.* at 4-5.

Discussion

As noted above, there has been a great deal of confusion throughout this case as to just how many SOX complaints were actually filed by DeFazio, as well as the dates of those filings. It is now clear that there was just one SOX complaint, construed by OSHA as having been filed by DeFazio on August 18, 2010. This complaint specifically alleges that DeFazio's firing on January 21, 2010 violated the anti-discrimination provisions of SOX. On March 9, 2011, OSHA dismissed this complaint, finding that it was untimely, and DeFazio thereafter filed objections to the dismissal and requested a hearing before OALJ.

Section 806 of the Sarbanes-Oxley Act and the implementing regulations at 29 C.F.R. Part 1980 prohibit retaliation by publicly traded companies against employees who provide information to a supervisory employee, a federal agency, or Congress, alleging violation of federal laws relating to certain types of fraud, including fraud against shareholders. 18 U.S.C. § 1514A(a), 29 C.F.R. § 1980.102(b). At the time the events at issue occurred, SOX section 1514A(b)(2)(D) provided that an action shall be commenced not later than 90 days after the date on which the alleged violation occurs. 18 U.S.C. § 1514A(b)(2)(D).⁶ The limitations period begins to run the date an employee receives “final, definitive, and unequivocal notice” of a discharge or any other discriminatory act. *See Sneed v. Radio One*, ARB No. 07-072, ALJ No. 2007-SOX-018, slip op. at 6-7 (ARB Aug. 28, 2008).

Complainant alleges wrongful termination of his employment on January 21, 2010. In order to have filed a timely SOX complaint, DeFazio should have filed his complaint no later than April 21, 2010. His complaint was filed with the Denver Regional Office of OSHA on August 18, 2010. DeFazio’s SOX complaint was filed 209 days after his employment with Sheraton was terminated, and, accordingly, DeFazio’s complaint is untimely.

Equitable Tolling

Complainant alleges that principals of equitable tolling should apply in this case to excuse his failure to file a timely SOX complaint. Generally, there are three situations in which the application of equitable tolling is proper: (1) when a defendant has actively misled the plaintiff respecting the cause of action; (2) when a plaintiff has in some extraordinary way been prevented from asserting his or her rights; or (3) when the plaintiff has raised the precise statutory claim at issue but has mistakenly done so in the wrong forum. *City of Allentown v. Marshall*, 657 F.2d 16, 20 (3rd Cir. 1981).

Courts have held that the restrictions on applying equitable tolling must be scrupulously observed. *Id.* at 19. Equitable tolling 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). A plaintiff bears the burden of justifying the application of equitable tolling principles. *See Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995).

DeFazio argues that Respondent’s attorney has continually manipulated his rights by delaying until exactly 90-days after he was fired a response to a demand letter that his former attorney sent to Sheraton. As noted above, in support of this allegation, DeFazio has submitted several redacted e-mails between his former attorney and Respondent’s attorney that purportedly show how Respondent’s attorney manipulated him and caused his complaint to be untimely. Based on this alleged “manipulation,” DeFazio claims that equitable tolling principals apply. Comp. Br. at 3; Comp. Supp. Br. at 5.

⁶ On July 21, 2010, Sections 922(b) and (c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203, amended Section 806 of the Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes Oxley Act, 18 U.S.C. 1515A to lengthen the time for filing a complaint to 180 days. Since Claimant was terminated on January 21, 2010, this amendment does not affect his claim.

Respondent argues that part of the confusion over what and when DeFazio complained of to OSHA is a result of the fact that he filed three separate complaints: an untimely Section 11(c) complaint submitted to OSHA on August 18, 2010; an “amended” Section 11(c) complaint based on Sheraton’s threat to file a “SLAPP” lawsuit which was dismissed on the merits after an investigation; and the SOX complaint noted in OSHA’s November 18, 2010 “Discrimination Case Activity Worksheet” which was deemed by OSHA to have been filed on August 18, 2010 and dismissed as untimely. According to Respondent, DeFazio’s one and only SOX complaint “has always been strictly related to [his] separation from employment.” Resp. Supp. Br. at 5. Sheraton contends that DeFazio’s complaint based on the purported threat of a SLAPP suit was made solely in the context of Section 11(c) of the OSH Act and states that he “is now attempting to maintain that the alleged threat of a lawsuit violated SOX when this claim *was never presented to OSHA.*” *Id.* at 5-6 (italics in original).

According to Respondent, equitable tolling does not apply in this case to excuse DeFazio’s late filing. Sheraton denies that it ever “actively misled” Complainant at any time and says that its delayed response to DeFazio’s demand letter⁷ in which it stated it was “investigating” a possible SOX claim was in no way “actively misleading” to DeFazio or his counsel. Resp. Br. at 4-5. Respondent analogizes this situation presented here to that in *Beckman v. Alyeska Pipeline Service, Co.*, ARB No. 97-057, ALJ No. 1995-TSC-016 (ARB Sept. 16, 1997), where the employer “had engaged in settlement discussions” with the employee and where the ALJ found (and the ARB affirmed) that the employer “did not mislead” the employer or “prevent him from filing a complaint.”

Respondent also asserts that DeFazio has not “in some extraordinary way” been prevented from asserting his rights because Complainant was represented by counsel throughout the applicable statute of limitations period and thus had access to the means by which he could acquire information as to his rights. Resp. Br. at 5-6. Respondent asserts that DeFazio’s claim that he was not informed of the statute of limitations until after the filing deadline passed is an issue that should be raised with his former attorney and not with this Court. Resp. Br. at 6. Respondent also argues that DeFazio concedes he never even raised a SOX claim with OSHA and that it was OSHA which opened an investigation under SOX as a result of information they discovered during their SLAPP suit investigation.

Lastly, Respondent argues that DeFazio never raised his claim in any forum during the 90-day limitations period, thus he does not meet the standard of the third prong for equitable tolling, *i.e.*, that the plaintiff has raised the precise statutory claim but has mistakenly done so in the wrong forum. Resp. Br. at 8.

While I am required to construe his pleadings liberally in deference to his *pro se* status and lack of training in the law,⁸ I find that Complainant has failed to establish that equitable tolling applies based on the facts of this case.

⁷ Attached as “Attachment A” to Sheraton’s Reply Brief is a copy of the March 11, 2010 letter to Sheraton’s Associate General Counsel from Barry D. Roseman.

⁸ *See, e.g., Ubinger v. CAE Int’l*, ARB No. 07-083, ALJ No. 2007-SOX-036, slip op. at 6 (ARB Aug. 27, 2008) (*quoting Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-003, slip op. at 6 (ARB Apr. 25, 2003)).

Regarding the first justification for application of equitable tolling, there is simply no evidence that DeFazio was actively misled by Sheraton or its counsel with regard to filing a SOX cause of action. First of all, the record before me demonstrates that DeFazio and his attorney were clearly contemplating filing a SOX complaint well within the 90-day filing period. In his March 11, 2010 letter to Sheraton's Director and Associate General Counsel, Barry Roseman, DeFazio's attorney, stated that the termination of Complainant's employment on January 21, 2010 violated public policy, he and his client were investigating whether Sheraton's decision to fire DeFazio violated the anti-retaliation provision of SOX, and they had not ruled out the possibility of filing such a claim. Respondent's Response to Notice of Docketing and Order to Show Cause, "Attachment A" at 4-5. Furthermore, while DeFazio alleges that Respondent's attorney "manipulated his rights" by delaying its response to the March 11, 2011 letter, Complainant's letter to Sheraton was nothing more than an offer of settlement to which Sheraton was under no obligation to even respond. Sheraton in fact did respond and informed Complainant and his counsel that it would reply to the demand letter by April 21, 2010. As Respondent correctly notes, Complainant and his attorney accepted this timeline and neither one of them ever asserted that such a date would be unacceptable because of an upcoming statute of limitations deadline. Sheraton's attorney clearly did nothing to mislead DeFazio or his attorney, and there is nothing about these settlement discussions which prevented Complainant from filing a timely SOX complaint. *See Beckman v. Alyeska Pipeline Service, Co.*, No. 1995-TSC-016 (ALJ Feb. 11, 1997), slip op. at 3 (employer did nothing during settlement discussions to mislead complainant or prevent him from filing timely whistleblower complaint).

Similarly, there is no evidence that DeFazio was in some extraordinary way prevented from asserting his rights. The fact that DeFazio is not an attorney, and the fact that he may not have known of the time requirement established by the statute, does not excuse his failure to file a complaint within the 90-day filing period. *See, e.g., Barrow v. New Orleans Steamship Ass'n*, 932 F.2d 473, 478 (5th Cir. 1991) (plaintiff's unfamiliarity with legal process, lack of representation, or ignorance of legal rights insufficient to justify equitable tolling); *Larson v. American Wheel & Brake, Inc.*, 610 F.2d 506, 510 (8th Cir. 1979) (lack of knowledge of applicable filing deadlines not basis for equitable tolling); *James v. USPS*, 835 F.2d 1265, 1267 (8th Cir. 1988) (neither unfamiliarity with legal process nor lack of representation during applicable filing period sufficient for application of equitable tolling); *Smale v. Torchmark Corp.*, ARB No. 09-012, ALJ No. 2008-SOX-057, slip op. at 7 (ARB Nov. 20, 2009) ("[I]gnorance of the law is generally not a factor that can warrant equitable modification."); *Flood v. Cendant Corp.*, ARB No. 04-069, ALJ No. 2004-SOX-016, slip op. at 4 (ARB Jan. 25, 2005) (same). I also note that DeFazio, while *pro se* now, was represented by counsel throughout the statute of limitations period. Complainant's argument that he was not informed of the statute of limitations until after it passed is insufficient to justify application of equitable tolling in this case.

Finally, although equitable tolling may apply when a plaintiff has raised the precise statutory claim at issue but has mistakenly done so in the wrong forum, there is no evidence that DeFazio raised a SOX claim in any forum during the statute of limitations period. He was fired by Sheraton on January 21, 2010 and the 90-day period for filing a SOX complaint expired on April 21, 2010. The first contact DeFazio had with any judicial or administrative forum was

when he wrote to OSHA on June 10, 2010 in a letter addressed to Herb Gibson, OSHA's Area Director in Denver Colorado. In that letter, Complainant alleged that he was fired two days after sending an email to Sheraton's Director of Human Resources, Carl Sokia, in which he stated that "all business activities should be conducted in a fair and ethical manner, in strict compliance with applicable competition and trade practice laws and regulations," as well as the fact that the hotel should "not provide anyone with any fraudulent information or misrepresentations of any kind." April 16, 2011 Letter from Guy DeFazio to Stephen L. Purcell, Chief Administrative Law Judge at 2. Even if OSHA had construed this June 10, 2010 contact as a SOX complaint, which it did not, it was received 52 days after the 90-day deadline for filing a SOX complaint had expired. Furthermore, as Complainant himself acknowledges, it was not the June 10, 2010 contact with OSHA that instigated OSHA's SOX investigation. Rather, it was after DeFazio "reported [the countersuit threat (SLAPP suit)] to OSHA on August 15, 2010" that OSHA, on its own initiative, opened its SOX investigation. More importantly, while neither report was timely, both reports were made to OSHA, which is *not* the wrong forum. Equitable tolling therefore does not apply to excuse DeFazio's late filing of his SOX complaint.

Allegations of Post-Termination Retaliation

As noted in my May 26, 2011 order directing the parties to file supplemental briefs, it appeared from the record before me at the time that DeFazio may have filed two SOX complaints: the August 18, 2010 allegation of retaliation by Sheraton when it fired him on January 21, 2010; and a subsequent complaint alleging that Respondent retaliated against him by threatening to file a "SLAPP" suit on July 23, 2010. Based on the background and procedural history noted above, it is clear that DeFazio's complaint of retaliation based on the threatened SLAPP suit was not predicated on a SOX violation but rather was filed under Section 11(c) of the OSH Act.

Sheraton's threat regarding the SLAPP lawsuit, according to DeFazio, was communicated to him on July 22, 2010. Comp. Br. at 2. According to the November 15, 2010 "Discrimination Case Activity Worksheet" completed by OSHA Supervisory Investigator Cory Wilson, however, the threat occurred on July 23, 2010 and the complaint relating to the threat was filed by DeFazio on August 18, 2010. Irrespective of whether the threat was made on July 22 or July 23, OSHA deemed the complaint to have been filed under Section 11(c) of the OSH Act, determined that it had been filed within thirty days and was thus timely, and then dismissed it on the merits.

Like OSHA, I construe DeFazio's complaint relating to Sheraton's threatened lawsuit to have been filed under Section 11(c) and not under SOX. Since OALJ has no jurisdiction to review whistleblower complaints filed under the OSH Act, DeFazio's objections to OSHA's determination and request for a hearing regarding the July 2010 complaint must therefore fail.

Finally, even if I were to construe DeFazio's July 2010 complaint to have been filed under the whistleblower provisions of SOX, considered it to be part of his original SOX complaint investigated by OSHA, and found it timely because it was filed within 90 days of the alleged retaliatory act, Complainant could still not prevail. As the ARB has noted recently: "The SOX defines adverse action as discharging, demoting, suspending, threatening, harassing,

or in any other manner discriminating against an employee in the terms and conditions of his or her employment.” *Farnham v. International Manufacturing Solutions*, ARB No. 07-095, ALJ No. 2006-SOX-00111 (ARB Feb. 6, 2009), slip op. at 10. Like the complainant in *Franham*, DeFazio’s employment with Sheraton had ended long before the threat of a lawsuit was allegedly made by Sheraton, and Complainant has failed to establish how Sheraton’s purported threat seven months after he was fired injured him in any way in relation to the “terms and conditions of employment.” *Ibid.*

Order

Based on all the foregoing, the complaint of Guy DeFazio filed under Title VIII of the Sarbanes-Oxley Act is hereby DISMISSED.

A

STEPHEN L. PURCELL
Chief Administrative Law Judge

Washington, D.C.

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).