



Issue Date: 24 May 2011

OALJ Case No.: 2011-SOX-00018

In the Matter of:

JOEL GOODLING,
Complainant,

v.

ABB, LIMITED,
Respondent,

ORDER OF DISMISSAL

On September 24, 2010, Joel Goodling (Complainant) filed a SOX complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent violated Section 806 of the Sarbanes-Oxley Act. Complainant alleged that Respondent retaliated against him for voicing concerns regarding alleged fraudulent activities. On December 1, 2010, the OSHA Regional Administrator found that Complainant did not file his complaint with OSHA within 90 days of the date that the alleged adverse employment actions took place and therefore dismissed the complaint as untimely. On December 22, 2010, Complainant filed an objection to the Secretary's Findings and requested a *de novo* hearing before an Administrative Law Judge ("ALJ") pursuant to 29 C.F.R. § 1980.106. On January 14, 2011, I issued a Notice of Docketing and Order to Show Cause. The show cause order directed the parties to explain why complainant's case should not be dismissed as untimely under the Act.

Through counsel, respondent filed a letter supporting dismissal. On February 21, 2011, complainant submitted a statement with a number of attachments in response to the January 14 Order. Complainant states that he received a hand delivered notice of termination on July 27, 2009. After receiving the termination letter, complainant continued in the employ of respondent until the termination became effective on January 31, 2010. Complainant requests that the time limitation in the Act be tolled on the grounds of equitable estoppel. In essence, he argues that he did not receive a final notice of termination until August 14, 2010 when he received an email from the ABB Chief legal Officer denying all requests, including reinstatement that he made with the respondent

An employee alleging a SOX retaliation violation must file his complaint within 90 days of the date on which the alleged violation occurred. (18 U.S.C.A. §1514A (b) (2) (D)). The

period begins to run from the time that the complainant knows or reasonably should know that the challenged act has occurred. *Allen v. U.S. Steel Corp.*, 665 F.2d 689, (11Cir.1982). Thus, an employer violates Sox on the day that it communicates to the employee its intent to take an adverse employment action, rather than the date on which the employee experiences the adverse consequences of the employer's action. *Overall v. Tennessee Valley Authority*, ARB Nos. 98-111, 98-128, (ARB April 30, 2001). In general in whistleblower cases, statutes of limitations run from the date an employee receives "final, definitive, and unequivocal notice of the adverse action. "Final" and "definitive" notice is a communication that is decisive or conclusive of an adverse employment action which leaves no further chance for action, discussion, or change. *Rollins v. American Airlines*, ARB No. 04-140 ARB Apr.3, 2007 (reissued). "Unequivocal" notice means communication that is not ambiguous. *Larry v. Detroit Edison Co.*, 1986 ERA 032, (Sec'y June 28, 1991).

Mr. Goodling argues that from July 27, 2009 until August 14, 2010, he was deceived by various persons within ABB that it was probable that he would be reinstated as an employee. In support of his assertions, he cites a number of contacts with various officials within ABB about his situation, including the Ombudsman office and the Office of Special Investigations. According to Mr. Goodling these contacts caused him to believe that he was following appropriate procedures and that his reemployment with ABB was likely. However, he provides little, if any, support for his assertions.

ABB responds that Mr. Goodling's last date to file his complaint under the Act was October 27, 2009, the 90th day after he received the July 27, 2009 notice of termination. In their view, he missed that date by almost eleven months.¹

I have reviewed the parties' submissions and must find against the complainant. The only statement of possible equivocation within the notice of termination that Mr. Goodling refers to is a statement that says if he finds new employment within ABB during the next six month notice period, the notice will be invalid. This is not enough to toll the limitations within the Act. As noted, the alleged comments from ABB officials about his likely reinstatement as an employee are not supported. The ninetieth day after receiving the notice of termination for Mr. Goodling to file his complaint was October 27, 2009. Even if I were to assume that Mr. Goodling was deceived by the respondent to believe that he would be reinstated as an employee, such deception ended on January 31, 2010 when he was terminated and separated from the company. The ninetieth day after January 31, 2010 was May 1, 2010. Complainant did not file his complaint with OSHA until September 24, 2010. Thus, by any reasonable measure the complaint was not filed within the limitations of the Act and must be dismissed.

¹ ABB asserts that complainant was not an employee of ABB Ltd., but rather ABB Information Systems Ltd. which is headquartered in Zurich, Switzerland. Mr. Goodling responds that there is no difference in the two entities. It is not necessary to decide this question in view of my finding that the complaint is untimely.

Accordingly, it is ordered that this complaint is dismissed.

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JOHN M VITTONI
Administrative Law Judge