



Issue Date: 31 January 2011

In the Matter of:

Matthew P. Lawlor,
Complainant,

v.

Online Resources Corp.,
Respondent.

Case No. 2011-SOX-00012

RECOMMENDED ORDER OF DISMISSAL

The Complainant, Mr. Matthew P. Lawlor, alleges violations of the employee protection provisions in Section 806 of the Sarbanes-Oxley Act of 2002, codified at 18 U.S.C. § 1514A (“the Act”), and implemented at 29 C.F.R. Part 1980 (2010). Section 806 prohibits covered employers from discriminating against an employee in retaliation for reporting information that he or she reasonably believes violates 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission (“SEC”), or any provision of federal law relating to fraud against shareholders. The Act extends protection to employees of any company “with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 780(d))”

Procedural History

On May 19, 2010, Mr. Lawlor filed a formal complaint with the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”), alleging that his former employer, Online Resources Corporation (“Respondent” or “ORC”), retaliated against him in violation of the Act after he raised concerns that ORC’s largest shareholder was engaging in insider trading. After conducting an investigation, OSHA’s Regional Administrator issued a letter dated September 17, 2010 (received by Complainant’s counsel on November 1, 2010), dismissing Mr. Lawlor’s complaint as untimely. On December 1, 2010, Mr. Lawlor sent a letter to the Office of Administrative Law Judges objecting to the Administrator’s findings and requesting a formal hearing on the merits. Mr. Lawlor’s case was assigned to me on December 2, 2010.

On December 3, 2010, I issued an Order advising the parties that I would consider the timeliness of Mr. Lawlor's complaint as a preliminary matter. The parties submitted written briefs on January 7, 2011; Complainant's brief was accompanied by three exhibits (Comp. Brief, CX 1-3), and Respondent's brief was accompanied by fifteen exhibits (Resp. Brief, RX 1- 15).

Standard of Review

Summary decision may be granted for either party if the pleadings, affidavits, and 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), 18.41(a). 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). 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).

Background¹

Mr. Lawlor co-founded ORC in 1989. He served as ORC's Chief Executive Officer ("CEO") until he resigned in December 2009 and as Chairman of ORC's Board of Directors ("the Board") until January 20, 2010 (Comp. Motion at 1-2; Resp. Motion at 1).

Mr. Lawlor asserts that he was forced to resign from his position as ORC's CEO after he reported that the company's largest shareholder, Tennenbaum Capital Partners ("TCP"), engaged in insider trading. According to Mr. Lawlor's complaint, when TCP purchased ORC stock on December 8, 2009, its appointed Board member was in possession of a Board briefing book that contained material inside information (Compl. ¶ 14). Mr. Lawlor believed that the transaction was in violation of SEC Rule 10b5-1, and on December 10, 2009, he asked ORC's general counsel to bring it to the attention of the Board's lead independent director, Barry Wessler, for possible Board investigation and response (Compl. ¶ 15). However, three days later, on December 13, 2009, Mr. Wessler advised Mr. Lawlor that the Board intended to terminate his position as CEO unless he resigned (Compl. ¶16).

On December 14, 2009, the Board met to formally vote on Mr. Lawlor's future at ORC (Compl. ¶17). At the meeting, Mr. Lawlor stated that if he were to be separated from ORC, it was in the company's best interest for the process to be implemented in a consensual manner, and he suggested that the Board consider selling ORC (RX 1). Nevertheless, after Mr. Lawlor recused himself, the Board voted to remove him as Chairman and CEO.²

¹ Unless otherwise noted, the sequence of events discussed below is not disputed by either party.

² Citing to the minutes of the December 14, 2009 Board Meeting, Respondent states that at the conclusion of the meeting:

The next day, December 15, 2009, ORC issued a press release announcing Mr. Lawlor's retirement as CEO, effective immediately; it stated that Mr. Lawlor would remain Chairman of the Board to assist with the transition until February 15, 2010, but would continue to serve on the Board as a director thereafter. According to Catherine A. Graham, ORC's Chief Financial Officer (CFO), Mr. Lawlor reviewed, revised, and approved the press release before its public dissemination, and it was at Mr. Lawlor's urging that the initial classification of his departure as a "resignation" was re-characterized as a "retirement" (Graham Dec. ¶ 13-14). The press release also included the following statement by Mr. Lawlor:

I've thoroughly enjoyed my exciting years at Online Resources and am grateful to its wonderful community of employees, clients, partners and shareholders But it is time for me to move on, and it is time to turn the Company's leadership over to a new generation. I look forward to supporting a smooth transition that will position the Company for a strong future.

(RX 2). That same day, ORC filed a Form 8-K disclosing Mr. Lawlor's retirement as CEO, effective immediately. Like the press release, it stated he would remain Chairman of the Board until February 15, 2010 and continue to serve on the Board thereafter (RX 3). Both the press release and the Form 8-K noted that Raymond T. Crosier, then President and Chief Operating Officer of ORC, would serve as the interim CEO until a successor was named (RX 3, 4).

On December 16, 2010, Mr. Lawlor sent Ms. Graham an email outlining his record as CEO and listing ORC's achievements under his leadership (RX 4; Graham Dec. ¶ 16). The email stated that he was "leaving the Company to give it the opportunity to recruit new leadership and a path to a consensus Board strategy," and looked forward to "dressing casual every day of the week, re-engaging his public policy interest, and plotting his next project." *Id.*

Three days later, on December 19, 2010, Mr. Lawlor emailed Ms. Graham and Mr. Crosier to inform them that he would not be in the office during business hours the next week, but that he might "drop by one evening to start clearing out [his] personal affects [sic]" (RX 5). He mentioned that he was reachable by phone, and available to come in if they needed help with the transition, but cautioned:

I am now simply a Director, albeit Chairman of the Board for a very short period of time. So, like for any other Director, a timely response for appropriate

[T]he Independent Board Members unanimously resolved to accept Lawlor's resignation as CEO effective immediately and his resignation as Chairman of the Board and from employment with the company generally effective February 15, 2010. The Board further resolved that in the event that Lawlor did not agree to this course of action, his employment would be terminated effective immediately upon his refusal to do so.

(Resp. Brief at 4). Mr. Lawlor argues the Board minutes show only that Lawlor was present for a portion of the meeting discussing his resignation as CEO, and "[i]n any event, the minutes cannot be relied upon as credible evidence of the Board's deliberations" because they were prepared by ORC's litigation counsel and went through six revisions before they were finalized on February 24, 2010 (Comp. Brief at 6-7).

information and quick return of calls from all staff is appreciated. On the other hand, the staff reports to you, not me, and I pledge to keep out of management of the company [My] best intention is to be hands off management and to stick with being a director—with nose in fingers out.

Feel free to review this with the executive and corporate staffs who have typically dealt with me. We don't want any confusion as to who is now in charge of executive and management matters.

Id.

According to Ms. Graham, ORC carried out Mr. Lawlor's removal in stages, setting February 15, 2010 as his last day of employment (Graham Dec. ¶ 7). The parties intended to use this time to work out the terms of a severance agreement before Mr. Lawlor's complete removal from the company, as his termination would trigger a 90-day exercise period on certain stock options and prohibit ORC from accelerating the vesting of his yet unvested equity grants. Ms. Graham asserts that Mr. Lawlor ceased performing work for ORC on December 14, 2009, and that he returned to the Company's Chantilly, Virginia office on only two occasions after that date: once on December 15, 2009, and once over a weekend to clear out his office (Graham Dec. ¶ 11).

On December 28, 2009, ORC's attorneys sent a written draft of ORC's severance proposal to Mr. Lawlor's attorney and requested a response no later than Tuesday January 5, 2010 (RX 6).³ ORC later extended the deadline to January 15, 2010, but informed Mr. Lawlor that he would be removed as Chairman if he did not accept the proposal by the January 15, 2010 deadline (Resp. Brief at 7; Graham Dec. ¶ 19-20).

In a December 31, 2009 email to ORC's attorneys, Mr. Lawlor's attorney acknowledged receipt of ORC's deadline extension. The email stated Mr. Lawlor's understanding that ORC had a contractual obligation to provide him with severance benefits under the company's severance pay policy, and sought confirmation that Mr. Lawlor's unvested equity awards "would become fully vested at the time of his separation from the Company (tentatively listed as *January 15, 2009*)" (RX 7) (emphasis added). ORC's attorneys responded later that day, asserting that ORC did not believe it was under any contractual obligation to provide Mr. Lawlor with severance benefits,⁴ and clarifying that under ORC's severance proposal, the vesting of Mr.

³ An email submitted by Respondent indicates that Mr. Lawlor sent a severance proposal to ORC on December 22, 2009 (RX 15); neither party has submitted or discussed this initial proposal.

⁴ The email explained:

[T]he language of the Policy indicates that the entitlement to severance is as "approved" or "determined" by "Executive Management" Specifically, Section 1.0 states the purpose of the Policy is to provide "guidelines" for the application of severance, Section 2.0 provides that severance is provided on separation on an involuntary basis "as deemed appropriate by Executive management" and Section 3.0 provides that eligibility for severance is "determined by Executive management." Section 4.0 also specifically provides that all severance must be "approved in advance by Executive Management."

Lawlor's equity awards "would accelerate on the agreed separation date as to that portion of the awards that would have vested during the agreed severance period (which, under the Company's December 28 proposal, would begin January 16, 2010, and end January 15, 2012)." *Id.*

Mr. Lawlor did not respond to ORC's severance offer by the January 15, 2010 deadline, and on January 20, 2010, the Board voted to terminate him as Chairman, effective January 15, 2010 (Compl. ¶ 20; Graham Dec. ¶ 22; RX 10). Nevertheless, ORC presented Mr. Lawlor with a second severance proposal—the benefits described in ORC's severance pay policy—so long as he accepted the offer by February 15, 2010 (Graham Dec. ¶ 23).

On January 19, 2010, Mr. Lawlor sent an email to Ms. Graham confirming his understanding that he would "continue to be an employee of the Company, as agreed in December, through February 15, 2010" (RX 11). That same day, Mr. Lawlor's attorney sent an email to ORC's attorneys seeking clarification that Mr. Lawlor "would continue as a Board member at least through his term of May 15, 2010" and "continue as an employee of the Company—albeit at a reduced rate of pay—through February 15, 2010" (RX 9). ORC's attorneys replied the next day, January 20, 2010, confirming that Mr. Lawlor's Board status "would continue in the normal course" and that his employment status would "continue until February 15." *Id.* Later that day, after being informed of his removal as Chairman of the Board, Mr. Lawlor resigned from the Board altogether (Compl. ¶ 20). Nevertheless, he continued to remain an employee of ORC (Comp. Brief at 4).

On January 29, 2010, Mr. Lawlor's attorney wrote an email to ORC's attorneys arguing that Mr. Lawlor's resignation from the Board triggered a "change in control" of the company, which entitled Mr. Lawlor to severance benefits under the company's Change in Control Severance Agreement (RX 12). ORC's attorneys responded on February 2, 2010, stating "the Company disagrees with the position stated in your letter that a 'Change in Control' as defined in the [Change in Control Severance] Agreement has occurred or that the payments to Mr. Lawlor as described in the Agreement are required to be made" (RX 13).

On February 8, 2010, Mr. Lawlor filled out ORC's COBRA Continuation Coverage Election Form (RX 14).

While the Executive's Change in Control Severance Agreement also references the Policy, it states only that the severance benefits that are payable prior to a change in control are "as set forth" in the Policy, and the Policy itself does not create a contractual obligation to pay severance without action by the Board. We note also that the Company's proxy statement disclosure and other public filings with the SEC are consistent with this view and do not acknowledge any agreement to pay severance to the Executive in the event of termination prior to a change in control.

....

However, notwithstanding the absence of a contractual obligation to pay severance as described in the Policy, as we have discussed, it is the intention of the Board to pay the severance to the Executive in accordance with the proposals previously made.

(RX 7).

On February 18, 2010, three days after ORC's second severance proposal expired, Mr. Lawlor's attorney sent a counter proposal to ORC's attorneys (RX 15). It stated that Mr. Lawlor was willing to make a number of concessions, many in direct response to ORC's "specific requests/demands" in earlier negotiations, but warned that he was prepared to file lawsuits in multiple forums if ORC did not accept the proposal. *Id.*

On February 19, 2010, Catherine A. Graham, ORC's Chief Financial Officer (CFO), sent Mr. Lawlor a letter notifying him that his employment with ORC was terminated, effective immediately (CX 1). That same day, ORC filed a preemptive lawsuit in the Delaware Court of Chancery, seeking the court's affirmation that Mr. Lawlor was not contractually entitled to severance under the parties' Change in Control Severance Agreement (CX 2).

Mr. Lawlor contends that his termination was an abrupt change in course, and that the parties had been negotiating the possible terms of a severance agreement up until he received his termination letter on February 19, 2010 (Comp. Brief at 4, 6).

DISCUSSION

Under the Act, an employee alleging 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).⁵ The limitations period begins to run on the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision; "final" and "definitive" denotes communication that is decisive or conclusive (*i.e.*, leaving no further chance for action, discussion, or change), while "unequivocal" refers to communication that is not ambiguous (*i.e.*, free of misleading possibilities). 29 C.F.R. § 1980.103; *Marc Halpern v. XL Capital, Ltd*, ARB Case No. 04-120, ALJ No. 2004-SOX-54, at 3 (Aug. 31, 2005). Importantly, such notice is measured from the date an employer communicates its intent to implement the alleged adverse employment decision, rather than the date that the complainant actually experiences the consequences of that decision. *See id.* at 3-4; *see also Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (placing focus on when employee receives notification of the discriminatory act, not when consequences of the act become apparent); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (holding that limitations period began to run when tenure decision was made and communicated rather than on the date employment terminated).

The parties do not dispute that Mr. Lawlor filed his complaint on May 19, 2010 (Comp. Brief at 4; Resp. Brief at 10). Consequently, in order for his claim to be timely filed, the whistleblower violations Mr. Lawlor complains of must have occurred in the 90 days before the filing, or no earlier than February 18, 2010.

Termination

⁵ Although the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 amended the statute of limitations for SOX whistleblower claims 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 does not apply to the instant claim.

Mr. Lawlor contends that he was not given “final, definitive and unequivocal notice” regarding his termination until February 19, 2010, the date he received ORC’s letter informing him that he had been terminated. He argues that ORC could not have possibly provided such notice before February 19, 2010, because the Board did not vote to terminate his employment until that date.⁶ Although the Board minutes from the December 14, 2009 meeting indicate that the Board had already voted to terminate Mr. Lawlor’s employment effective February 15, 2010, Mr. Lawlor contends that the minutes are not credible evidence of the Board’s deliberations because they were prepared by ORC’s litigation counsel and went through six revisions before they were finalized on February 24, 2010—five days after he was terminated (Comp. Brief at 6-7).

Respondent concedes that Mr. Lawlor was not officially terminated until February 19, 2010, but asserts that he had “final, definitive and unequivocal notice” of his termination in December 2009, when the decision was made and communicated, and that Mr. Lawlor understood the decision was final at that time. In support of this assertion, Respondent points to a number of communications that Mr. Lawlor and his attorney exchanged with ORC and its attorneys between December 16, 2009 and February 8, 2010.⁷

Mr. Lawlor insists the communications cited by Respondent do not prove he had “final, definitive and unequivocal notice” of his termination, because ORC continued to take affirmative steps to maintain his employment and negotiate his severance benefits after the communications were sent (Comp. Brief at 7). Citing *Snyder v. Wyeth Pharmaceuticals*, ARB No. 09-008, ALJ No. 2008-SOX-55 (ARB Apr. 30, 2009), Mr. Lawlor argues that even if, as the communications suggest, he realized that there was a possibility he might be terminated, ORC’s subsequent actions regarding his employment status and severance negotiations introduced sufficient ambiguity to keep the statute of limitations from running (Comp. Brief at 7).

However, as Respondent contends, Mr. Lawlor’s citation to *Snyder* is inapposite. In *Snyder*, although the complainant received a letter stating that his employer had decided to terminate him, he was provided an opportunity to submit evidence regarding his alleged misconduct, and warned that his employer would proceed with his termination if such evidence was not provided. *Snyder*, ARB No. 09-008, at 2-3. Because the complainant was granted an opportunity to respond to his proposed termination, the ARB concluded that the employer injected “an element of ambiguity into the transaction and an opportunity for further action,

⁶ Mr. Lawlor cites the complaint ORC filed in Delaware Chancery Court on the day he was terminated; it states “[o]n February 19, 2009, discussions with Lawlor as to the terms of his separation from Online Resources reached an impasse. As a result, the Board voted to terminate Lawlor’s employment” (CX 2 at ¶23).

⁷ Specifically, Respondent points to two emails Mr. Lawlor sent in December 2009 that indicated he was leaving the company; an affidavit from ORC’s CFO, Ms. Graham, which states that Mr. Lawlor did not perform any work for the company after the December 14, 2009; an email Mr. Lawlor sent to Ms. Graham on January 19, 2010 to confirm that he would “continue to be an employee of the Company, as agreed in December, through February 15, 2010”; a January 20, 2010 email from ORC’s attorneys to Mr. Lawlor’s attorney stating that Mr. Lawlor’s employment status would continue until February 15; and Mr. Lawlor’s February 8, 2010 submission of a COBRA election form (Resp. Brief at 12-13).

discussion or change,” which rendered its termination letter insufficient to constitute “final, definitive, and unequivocal notice.” *Id.* at 8.

In contrast to the Respondent in *Snyder*, ORC clearly and unequivocally communicated its decision to terminate Mr. Lawlor to him—and to the public—on December 15, 2009, when it issued a press release and filed a Form 8-K disclosing Mr. Lawlor’s retirement as CEO and his forthcoming resignation as Chairman of the Board. These documents left no doubt that Mr. Lawlor would no longer serve as CEO or Chairman of ORC, and although he was not officially terminated until February 19, 2010, it is clear that his employment between December 16, 2009 and February 19, 2010 served one purpose—to provide the parties time to work out the terms of a severance agreement.⁸

Even assuming the minutes from the Board’s December 14, 2009 meeting are not credible, Mr. Lawlor’s own statements in ORC’s December 15, 2009 press release reveal that he was aware his employment with ORC was coming to an end; the fact that his termination was not effective until February 19, 2010 does not toll the running of the limitations period. Indeed, Mr. Lawlor’s claim that his termination was an “abrupt” change in course and that he was unaware of the Board’s December 14, 2009 decision to terminate his employment is directly contradicted by his communications throughout December and January 2009. Thus, on January 19, 2010, he sent an email seeking to confirm that he would “continue to be an employee of [ORC], *as agreed in December*, through February 15, 2010” (RX 11) (emphasis added). Communications from his attorney during this period are also telling; in a December 31, 2009 email, he described Mr. Lawlor’s “separation” from ORC to be “tentatively listed as January 15, 2009,” and in a January 19, 2010 email, he sought confirmation that Mr. Lawlor would “continue as an employee of the Company—albeit at a reduced rate of pay—through February 15, 2010.”

Mr. Lawlor’s own actions reflect that he realized his position with ORC had been terminated, and that all that remained to do was to negotiate the terms of any severance agreement. Mr. Lawlor does not dispute Ms. Graham’s affidavit stating that he only returned to ORC’s offices on two occasions after December 14, 2009, one of which was to clean out his office. Mr. Lawlor executed a COBRA election form, extending his health benefits after his termination, on February 8, 2010. Mr. Lawlor has alleged no facts that suggest any ambiguity in ORC’s decision to terminate him or imply that there was a possibility that ORC might reconsider its decision. Indeed, Mr. Lawlor was replaced as CEO as of December 15, 2009, and he has not indicated what position he would have held at ORC had his employment continued.

Consequently, I find that Mr. Lawlor had “final, definitive and unequivocal notice” of his termination no later than December 15, 2009.⁹

⁸ Complainant admits as much in his brief, stating “Lawlor disagreed with the company’s position [that there had been no “Change in Control” of the company’s Board under his Severance Agreement], and the company maintained Lawlor’s employment, in part to avoid making a final resolution as to these issues” (Comp. Brief at 4).

⁹ Complainant argues his claim is timely under a continuing violation theory, because ORC “engaged in a pattern of hostile conduct that culminated in his termination and the company’s unilateral denial of all severance benefits” (Comp. Brief at 9). However, Mr. Lawlor does not allege that he was subjected to a hostile working environment; the only alleged discriminatory employment decisions he identifies—his termination, and ORC’s decision not to make severance payments—are “discrete” adverse actions which are not actionable under the “continuing violation”

Denial of Severance

In his Brief, Mr. Lawlor asserts that ORC denied him severance, and contends that this was “an additional discriminatory action that is separately actionable under Sarbanes-Oxley.” (Comp. Brief at 6).¹⁰ However, the complaint he filed with OSHA on May 19, 2010 contains no such allegation, and he is now time barred from amending it to include this claim. In his complaint, Mr. Lawlor alleges:

Online Resources violated § 806 when it terminated Lawlor as CEO, Chair of its Board, and a Company employee, and when it adopted the position that his stock options would terminate after three months, because those acts were taken in retaliation against Lawlor for raising concerns about TCP’s illegal conduct.

(Compl. ¶ 27). In his brief, Mr. Lawlor does not further address his claim that ORC’s “position” regarding his stock options constituted an adverse action in retaliation for his protected activity. Respondent has explained that Mr. Lawlor’s termination from ORC triggered a 3 month period for him to exercise the options, and that the effect of keeping Mr. Lawlor on the books as an employee, albeit unpaid, while the parties negotiated severance terms, was to delay the triggering of this three month window. Mr. Lawlor has not alleged any facts that would support the characterization of the Respondent’s “position” as anything more than a consequence of his termination, as opposed to a separately actionable adverse employment action.

But even if I were to find that Mr. Lawlor’s allegation that ORC failed to pay him severance was encompassed in his original complaint, it was nevertheless untimely. Mr. Lawlor was on notice that ORC did not believe it was under any contractual obligation to provide him severance benefits on December 31, 2009, when his attorney received an email from ORC’s attorneys clearly stating ORC’s position (RX 7). In addition, on February 2, 2010, ORC informed Mr. Lawlor that it did not agree with him that a “Change in Control” under his “Change in Control Severance Agreement” had occurred, or that it had an obligation to provide him with severance under the agreement (RX 13).

Mr. Lawlor does not dispute the Respondent’s claim that, despite its belief that it was not contractually obligated to do so, it extended two separate severance package proposals to him,

theory. See *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101(2002) (identifying termination as an example of a “discrete act” to which the continuing violation theory did not apply). While Mr. Lawlor may have felt the effects of the Board’s December 2009 decision to terminate him well into February 2010, the characterization of this discrete action as “a pattern of hostile conduct” does not relieve Mr. Lawlor of his obligation to timely file his complaint.

¹⁰ In his brief, Mr. Lawlor alleges that ORC did not pay him any severance at all upon his termination, despite the fact that the company provided substantial severance packages to other former employees who were not the founder, CEO, and Chair of the company (Comp. Brief at 4; CX 3) (citing the severance benefits paid to Mr. Crosier, the interim CEO of ORC, which consisted of six months’ base salary health benefit plan coverage for 12 months). Respondent avers that ORC’s denial of severance does not constitute an adverse retaliatory action because ORC offered Mr. Lawlor severance proposals on two different occasions, and argues “to the extent that [Mr. Lawlor] did not receive a severance, that was his own choice” (Resp. Brief at 14).

which he did not accept. His characterization of the Respondent's actions as a "failure" to pay him severance does not convert his declination of these two severance package proposals into an adverse action on the Respondent's part. Mr. Lawlor knew, as early as December 31, 2009, and no later than February 2, 2010, that the Respondent denied any contractual obligation to pay him severance benefits. That the Respondent "failed" to pay Mr. Lawlor severance benefits upon the effective date of his termination is the direct consequence of Mr. Lawlor's failure to accept the proposed severance packages, not any adverse action on the part of the Respondent.

Equitable Tolling

In the event his claim is barred by the statute of limitations, Mr. Lawlor contends that he should nevertheless be allowed to proceed under the doctrine of equitable tolling. He argues that "equitable modification" is appropriate because ORC intentionally maintained his employment and discussed benefits it proposed to pay him up until February 19, 2010, despite its knowledge that Mr. Lawlor believed one of ORC's principal motivations in terminating him as CEO and Chair of the Board was as retaliation for his whistleblowing activity (Comp. Brief at 8-9).

The Administrative Review Board (ARB) has allowed for equitable tolling under the following circumstances: (1) when the respondent has actively misled the complainant respecting the cause of action; (2) when the respondent's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights; (3) when the complainant has in some extraordinary way been prevented from asserting her rights; or (4) when the complainant mistakenly raised the precise statutory claim at issue in the wrong forum. *Marc Halpern v. XL Capital, Ltd.*, ARB Case No. 04-120, ALJ No. 2004-SOX-54, at 4 (Aug. 31, 2005); *Hyman v. KD Resources*, ARB Case No. 09-976, 2009 SOX-20, at 7 (Mar. 31, 2010). Although these categories are not exclusive, the ARB is "much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Halpern*, ARB Case No. 04-120, at 4, quoting *Wilson v. Secretary, Department of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995).

Citing *Hyman v. KD Resources*, Mr. Lawlor argues that equitable modification is appropriate if a whistleblower was dissuaded from filing a complaint because the respondent led him to believe that he would receive a substantial severance and the compliance issues he reported would possibly be remediated (Comp. Brief at 8). The facts in *Hyman*, however, are clearly distinguishable from the instant case. In *Hyman*, the ARB remanded an ALJ's summary dismissal after finding evidence to support the *pro se* complainant's allegation that his former employer led him to "believe that he would be returned to his former employment or alternatively given a one-year consulting contract, that he would be financially compensated for having been wrongfully terminated (including payment of back salary), and that [respondent] would resolve the SOX compliance issues that Hyman raised." ARB Case No. 09-976, at 8. In doing so, the ARB distinguished a party's reliance upon settlement negotiations (which does not toll the running of the statute of limitations), and was careful to note that it construed the *pro se* complainant's pleadings liberally and with a degree of adjudicative latitude in deference to his lack of training in the law. *Id.* at 8-9.

Unlike the pro-se complainant in *Hyman*, Mr. Lawlor was represented by counsel in his severance negotiations and is currently represented by counsel in the instant claim. ORC never indicated an intention to reinstate Mr. Lawlor's employment, nor did it ever suggest that he would be compensated for his "wrongful" termination. Although he claimed in his brief that ORC appeared to be considering governance modifications and other steps to address his concerns about TCP's misconduct, he cites no evidence to support such a claim, and the complaint he filed with OSHA directly contradicts this assertion.¹¹

Nor does Mr. Lawlor allege facts that would establish that the Respondent lulled him into inaction by leading him to believe that he would receive a substantial severance. Indeed, the Respondent made it clear to Mr. Lawlor that it did not believe it had a contractual obligation to pay him *any* severance benefits. Mr. Lawlor claims that the benefits package offered to him was not sufficiently generous, or in line with what had been offered to others in the past; but his decision to decline the Respondent's offers in hope of receiving a more generous package does not mean that the Respondent lulled him into a prompt attempt to vindicate his rights, or in some extraordinary way prevented him from asserting those rights.

In short, Mr. Lawlor has alleged no facts that, even if proven true, would establish that ORC actively and deliberately misled him, or prevented him from filing a SOX complaint within the limitations period; indeed, ORC offered Mr. Lawlor two separate severance proposals with clear terms and corresponding deadlines, which, with the advice of counsel, he chose not to accept. The mere fact that ORC engaged in negotiations regarding a possible severance agreement is insufficient to toll the statute of limitations. See *Beckman v. Alyeska Pipeline Servs. Co.*, ARB No. 97-057, ALJ No. 1995-TSC-016 (ARB Sept. 16, 1997) (settlement negotiations in the absence of any showing that the employer misled or otherwise prevented the employee from filing a complaint held insufficient to toll running of limitations period).

CONCLUSION

I find that the adverse employment action alleged in Mr. Lawlor's complaint—his termination as CEO, Chairman of the Board, and employment with ORC generally—occurred on December 14, 2009, when ORC issued a press release and Form 8-K publically announcing Mr. Lawlor's retirement as CEO and Chairman of its Board. Consequently, Mr. Lawlor had 90 days from December 14, 2009 to file his complaint under the Act; however, his complaint was not filed until May 19, 2010. Since I have found that there is no basis for tolling the limitations period, his complaint was untimely and must be dismissed.

¹¹ Specifically, Mr. Lawlor's complaint alleges that ORC:

[D]id not take any steps to investigate [his] concerns until late January 2010, and has never taken any significant steps to investigate or otherwise address the insider trading, despite the fact that several Board members (including TCP's hand-picked nominees), outside counsel, and the Company's general counsel acknowledge that the December 8, 2009 acquisition of Company stock by TCP occurred during a prohibited time period for such a purchase.

(Compl. ¶ 19). In any event, even if ORC were taking steps to address Mr. Lawlor's concerns, that would not be sufficient to toll the running of the statute of limitations for filing a claim.

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

SO ORDERED.

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LINDA S. CHAPMAN
Administrative Law Judge

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).