



Issue Date: 19 November 2014

Case No.: **2014-SOX-22**

In the Matter of:

JASON KLEINMAN,
Complainant,

v.

CBC COMPANIES, INC.,
Respondent.

**DECISION AND ORDER DISMISSING THE CLAIM
BECAUSE IT WAS NOT TIMELY FILED**

The claim is before me on “Respondent’s Motion for Summary Disposition and Attorneys’ Fees.” The Respondent, CBC Companies, Inc. (“CBC”), contends that the claim is untimely, as the Sarbanes-Oxley Act requires a complaint to be filed within 180 days of the alleged retaliation.¹ The complaint in this case was filed on March 1, 2014. Unless equitable tolling or equitable estoppel applies, the Complainant, Jason Kleinman, must show a retaliatory action which took place on or after September 2, 2013. CBC asserts that Mr. Kleinman cannot meet this burden. CBC also asserts that because the complaint is frivolous, reasonable attorneys’ fees should be awarded. The motion has been fully briefed by the parties. For the reasons stated below, I find that the complaint was not timely filed, and Mr. Kleinman has failed to establish grounds for equitable tolling or equitable estoppel. Thus the claim should be dismissed. But I find no basis for awarding CBC its attorneys’ fees. As a result, CBC’s motion is granted in part, and denied in part.

I. PROCEDURAL HISTORY

This proceeding arises from a claim of whistleblower protection under § 806 of the Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (“SOX”). Mr. Kleinman filed his claim on March 1, 2014, alleging that CBC retaliated against him because he reported it in 2010 for participating in unethical and fraudulent behavior, including tax fraud. In his complaint, he alleged that CBC retaliated by interfering with job opportunities in 2010, 2011, and 2012.

¹ 29 C.F.R. § 1980.103(d).

I held a scheduling conference on June 13, 2014, to discuss how the case should proceed. CBC stated its intention to file a dispositive motion based on the complaint being untimely filed. Based on the discussion during the conference, because the claim appeared to be untimely on its face, I issued an order (dated June 16, 2014) allowing the parties to engage in discovery limited to the issue of timeliness of the complaint. The parties were given until September 26, 2014, to complete discovery on that issue; CBC was to file its dispositive motion by October 27, 2014; Mr. Kleinman was to file his response by November 26, 2014; and CBC was to file its reply by December 11, 2014. In my order, I specifically ordered the parties to make a good faith effort to resolve discovery disputes before filing any motion with the court.

On August 26, 2014, Mr. Kleinman filed a motion to compel discovery. In its response, CBC pointed out, *inter alia*, that Mr. Kleinman had failed to confer with it before he filed his motion, and asserted that his requests were unrelated to timeliness, and, therefore, outside the scope of discovery set in the June 2014 order. Based on review of the motion and the response, both of those arguments by CBC were well-taken. On September 15, 2014, therefore, I issued an order to Mr. Kleinman to confer with CBC regarding the discovery dispute. My order provided that if the parties could not resolve the discovery dispute by October 6, 2014, Mr. Kleinman could file a new motion addressing only disputed discovery relevant to the issue of timeliness. I also stated that I would extend the schedule for filings related to CBC's dispositive motion once the discovery dispute was resolved. Mr. Kleinman filed a reply to CBC's response to his motion to compel on September 17, 2014, after I issued my September 15 order. Review of the reply, however, did not disclose any basis to reconsider the order. Mr. Kleinman never filed a new motion to compel as permitted in the order.

On September 26, 2014, CBC filed its "Motion for Summary Disposition and Attorneys' Fees." On September 29, 2014, Mr. Kleinman filed a "Request for Clarification as to the Schedule for Filings and Extension of Time," seeking additional time to engage in discovery and respond to CBC's motion for summary disposition. CBC opposed the request for an extension of time in a filing on September 30, 2014. But before I issued a ruling on the request for an extension of time, on October 14, 2014, Mr. Kleinman filed a response to CBC's motion. Then, on October 27, 2014, Mr. Kleinman filed supplemental exhibits, and CBC filed a reply. I find that Mr. Kleinman's request for an extension of time is moot, and the motion for summary disposition is ripe for ruling.

II. APPLICABLE STANDARD

The standard for summary decision under the OALJ Rules is similar to the standard that governs summary judgment in federal courts under Fed. R. Civ. P. 56.² The Administrative Law Judge "may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise... show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."³ A material fact is one whose existence affects

² Saporito v. Central Locating Services, Ltd., ARB No. 05-004, slip op. at 4 (Fed. 28, 2006) (CAA).

³ 29 C.F.R. § 18.40(d); see also Fed. R. Civ. P. 56(c), incorporated by reference into the OALJ Rules by 29 CFR § 18.1.

the outcome of the case.⁴ The nonmoving party creates a genuine issue of fact by producing sufficient evidence to require a hearing to resolve the parties' differing versions.⁵ The party moving for summary judgment has the burden of establishing the "absence of evidence to support the nonmoving party's case."⁶ The burden then shifts to the nonmoving party, who must go beyond the pleadings and present affirmative evidence to show a genuine issue of material fact exists.⁷ If I find that there is a genuine issue of material fact, I must set the case for hearing.⁸ In reviewing a request for summary decision, I must view all of the evidence in the light most favorable to the nonmoving party.⁹

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On March 1, 2014, Mr. Kleinman filed a complaint with OSHA, case number 5-1800-14-042 (OALJ No. 2014-SOX-22), alleging that CBC Companies, Inc. retaliated against him in violation of SOX when it interfered with his job search. Mr. Kleinman alleged adverse actions took place in the summer of 2010, October 2011, and the summer of 2012. *See* the complaint and the Secretary's Findings, dated March 5, 2014.
2. On March 5, 2014, OSHA issued findings dismissing the complaint because it was untimely filed. *See* Secretary's Findings, dated March 5, 2014.
3. On April 1, 2014, Mr. Kleinman filed objections to the Secretary's Findings, stating that the last date he became aware of retaliatory action against him was September 1, [2013], when he "hired a computer service which confirmed that his computer had been hacked and the network was infected with malware and that passwords could have been stolen." A timeline submitted to me also alleged September 2013 as the most recent date of retaliation. *See* Mr. Kleinman's letter to the Chief Administrative Law Judge dated March 23, 2014, and Mr. Kleinman's letter to me dated June 4, 2014, attachment entitled "Timeline of Significant Events with CBC Companies."
4. Before the merits of a whistleblower claim under Sarbanes-Oxley can be reached, it must be shown that the claim is timely. The Sarbanes-Oxley Act requires a complaint to be filed within 180 days of the alleged retaliation.¹⁰ For a complaint filed on March 1, 2014 to be timely, it must allege that a retaliatory action took place on or after September 2, 2013.
5. The retaliatory actions alleged by Mr. Kleinman in his complaint and other pleadings took place between 2010 and 2012, long before September 2, 2013, and as such are unambiguously untimely, falling well outside the 180-day statute of limitations for SOX claims.

⁴ Reddy v. Medquist, Inc., ARB No. 04-123, slip op. at 4 (Sep. 30, 2005) (SOX) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

⁵ *Id.*

⁶ Celotex v. Zenith Radio Cor., 475 U.S. 574, 587 (1986).

⁷ Anderson, *supra*, 477 U.S. at 257.

⁸ 29 C.F.R. § 18.41(b).

⁹ Darrah v. City of Oak Park, 255 F.3d 301, 305 (6th Cir. 2001).

¹⁰ 29 C.F.R. § 1980.103(d).

6. There is no evidence that CBC was responsible for hacking Mr. Kleinman's computer, infecting the network with malware, or stealing passwords in September 2013.
7. Mr. Kleinman also alleges The Law Offices of Cara Davis, and Experis enforced non-compete agreements against him. He has not given specific dates as to when these actions took place and has provided no evidence to support his allegations, but implies that the most recent actions by The Law Offices of Cara Davis and Experis took place at some point in 2014. Mr. Kleinman has provided no evidence that CBC enforced non-compete agreements against him since September 2013, nor any evidence that ties CBC Companies, Inc. to the alleged actions of The Law Office of Cara Davis or Experis in 2014.
8. Taking Mr. Kleinman's allegations concerning The Law Offices of Cara Davis and Experis as true, they bear no connection to CBC, and do not establish a timely claim against CBC.
9. Mr. Kleinman lists 10 "material facts in dispute" at p. 14 of his Response filed on October 14, 2014. There is no evidence in the record supporting any of the allegations contained in that list.
10. The 180 day limit can be tolled or set aside for equitable reasons. The Sixth Circuit has identified five factors that are relevant to an equitable tolling argument: "1) lack of notice of the filing requirement; 2) lack of constructive notice of the filing requirement; 3) diligence in pursuing one's rights; 4) absence of prejudice to the defendant; and 5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement."¹¹ This focuses on the complainant's reasonable lack of knowledge.
11. Mr. Kleinman is an attorney in the state of Ohio. An attorney that is diligent in pursuing his own rights is capable of determining the relevant filing requirements. Mr. Kleinman's lack of knowledge of the filing requirements under SOX was not reasonable, and there is no basis for tolling the statute of limitations.
12. Administrative law judges in the Department of Labor have also set aside the statute of limitations based on equitable concerns "(1) when the defendant has actively misled the plaintiff respecting the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from asserting her rights; or (3) where the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum."¹²
13. There is no evidence that CBC misled Mr. Kleinman as to the nature of his rights under SOX or prevented him from asserting his rights in any way. Mr. Kleinman attempted to file a complaint with the Equal Employment Opportunity Commission in March 2013. *See* letter to Mr. Kleinman from the EEOC dated March 19, 2013, attached to his letter to

¹¹ *Truitt v. City of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998).

¹² *Guy v. SBC Global Services*, 2005-SOX-113 (December 14, 2005). *See also*, *School District of Allentown v. Marshall*, 657 F.2d 16, 19 (3rd Cir. 1998); *Hyman v. KD Resources*, 2009-SOX-020, 6-7 (March 31, 2010).

me dated June 4, 2014. But he has not provided a copy of his complaint, without which it cannot be determined if he raised the “precise statutory claim” at issue here. Because there is no evidence that CBC misled or prevented Mr. Kleinman from pursuing his rights, and there is insufficient evidence that Mr. Kleinman raised his claim in the wrong forum, there is no basis for equitably setting aside the statute of limitations. Moreover, as an attorney, Mr. Kleinman should have known how to file a claim alleging a violation of SOX.

14. CBC’s motion to dismiss should be granted.

15. The award of attorneys’ fees to a respondent is appropriate when “upon the request of the respondent, the ALJ determines that a complaint was frivolous or was brought in bad faith.”¹³ In such a case, “the judge may award to the respondent a reasonable attorney’s fee, not exceeding \$1,000.”¹⁴ I find no basis for awarding CBC its attorneys’ fees under the circumstances in this case.

IV. ORDER

The claim filed with OSHA on March 1, 2014, is **DISMISSED** because it was not timely filed.

Alice M. Craft
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within 10 business days of the date of issuance 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. 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. 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. You must also serve

¹³ 29 C.F.R. § 1980.109(d)(2).

¹⁴ *Id.*

the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1980.110(a).

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) and 1980.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within 30 days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(a) and (b).