

UNITED STATES DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
BOSTON, MASSACHUSETTS

**Issue Date: 25 March 2016**

CASE NO.: 2016-SOX-00004

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*In the Matter of:*

JORGE ROMERO EXCLUSA,  
*Complainant,*

v.

COOPERATIVA AHORRO Y CREDITO DR. MANUAL ZENO GANDIA,  
*Respondent.*

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**DECISION AND ORDER DISMISSING COMPLAINT  
AND CANCELLING HEARING**

This proceeding arises from a complaint of discrimination filed under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of The Sarbanes-Oxley Act of 2002 (“SOX” or “the Act”), 18 U.S.C. § 1514A and the procedural regulations found at 29 C.F.R. Part 1980. On October 7, 2015, the Regional Administrator for the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”), acting as agent for the Secretary of Labor (“Secretary”), issued an order dismissing the complaint as untimely. OSHA based its determination on its finding that Jorge Exclusa (“Complainant” or “Exclusa”) was terminated by Cooperativa Ahorro Y Credito Dr. Manual Zeno Gandia (“Respondent”) on January 29, 2013, and his SOX complaint was filed on July 27, 2015; well beyond the 180-day statute of limitations period. On October 26, 2015, Complainant objected to the Secretary’s preliminary order dismissing his complaint, and requested a hearing pursuant to 29 C.F.R. § 1980.106.

On November 23, 2015, I issued a preliminary order notifying the parties I had been assigned to the case and scheduled an initial prehearing conference call. On December 1, 2015, I held the call with Complainant, a translator, and counsel for the Respondent. A formal notice of hearing was issued on December 9, 2015, setting a trial date of April 20, 2016. On February 16, 2016, I issued *Order to Show Cause Why Case Should Not Be Dismissed for Failure to File a Timely Complaint* (“Order”). On March 14, 2016, Complainant filed his response to my Order.<sup>1</sup>

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<sup>1</sup> Initially, Complainant was an unrepresented, pro se complainant. Complainant’s response to my *Order to Show Cause why Case Should not be Dismissed for Failure to File a Timely Complaint*, however, was drafted by an attorney he acquired sometime after the preliminary conference call on November 23, 2015.

## I. BACKGROUND<sup>2</sup>

Complainant alleged that sometime during the last week of December 2012, he expressed concerns about the mismanagement of “employees and credit union President’s pension plan” and potential ERISA violations to Vice President Ericsson Gomez. Complaint, 4. Approximately one month later, on January 29, 2013, Complainant was terminated by Efrain Domenech, Respondent’s Chief Executive Officer. Objection, 1. According to Complainant, Respondent told him he was being terminated because on January 26, 2013, “a maintenance employee under [Complainant’s] supervision did not perform a task he was supposed to do.”<sup>3</sup> *Id.* As a result, Domenech stated that Complainant could not continue working for Respondent and encouraged him to sign a severance agreement. *Id.*

The end of his seventeen year career at Respondent had a substantial, and immediate impact on Complainant’s well-being. Complainant claimed, “From that moment on I stayed at my house, I didn’t go anywhere. I couldn’t get the situation out of my mind. I would cry a lot, I hardly slept, and I was very angry, I constantly argued with the people around me.” *Id.* Beginning on September 26, 2013, Complainant began receiving “psychological and pharmacologic therapy to treat chronic Post Traumatic Stress Disorder (PTSD) and major moderate Depressive Disorder.” Response, 3; Response (EX-1).

On September 23, 2014, Complainant “filed a complaint to ERISA to investigate what happened with the pension plans of Mr. Efrain Domenech.” Objection, 2. Complainant included “a detailed report with the irregularities that occurred” in his ERISA complaint. *Id.* On January 15, 2015, Complainant learned that his case was closed because an investigation indicated that “employee deposits were not being affected.” *Id.*

Unsatisfied with the ERISA investigation, Complainant contacted attorney Andy Cordero Rosado, who eventually took Complainant to meet law professor Jorge Velazquez. Through the collaborative efforts of attorneys Rosado and Velazquez, Complainant learned “that through OSHA [he] may file through the Whistleblower and Sarbanes-Oxley law.” *Id.* He filed his OSHA Complaint on July 27, 2015. *See* OSHA Findings; Complainant, 1.

Complainant admits that “there is a substantial gap between the retaliatory act and the date of the complaint.” Response, 4. He argues, however, that “he did not file his claim on a timely manner [because] he was incapacitated from doing so given his mental condition.” *Id.* In an effort to substantiate this claim, he proffered a note from his clinical psychologist and documentation indicating the receipt of Social Security Administration disability benefits since February 2014.<sup>4</sup> Response (EX-1); Response (EX-2).

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<sup>2</sup> The relevant background is taken from Complainant’s OSHA Complaint (“Complaint”), filed on July 27, 2015; OSHA’s Findings, issued on October 7, 2015; Complainant’s Objection and Request for Review (“Objection”), filed on October 26, 2015; and, Claimant’s Response to my Order (“Response”), filed on March 14, 2016.

<sup>3</sup> Complainant elaborated: “I had already talked to the employee about not completing this task. I was told that he had decided to attack himself because I harassed him giving him too many instructions, yelling at him and disrespecting him in front of his coworkers.” Objection, 1.

<sup>4</sup> According to the letter provided by his doctor, Sylma Cuevas Padro, Complainant has received treatment for PTSD and major moderate depressive disorder since September 26, 2013 through present day. Response (EX-1). The

## II. DISCUSSION

Section 806 of SOX, codified at 18 U.S.C. § 1514A, creates a private cause of action for employees of publicly-traded companies who are retaliated against for engaging in certain protected activity. A SOX claim “shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.” 18 U.S.C. § 1514A(b)(2)(D). The statute of limitations begins to run “from the date an employee receives ‘final, definitive, and unequivocal notice’ of an adverse employment decision.” *Marc Halpern v. XL Capital, LTD*, ARB Case No. 04-120 (Aug. 31, 2005) (internal citation omitted).

The regulations provide “[t]he time for filing a complaint may be tolled for reasons warranted by applicable case law.” 29 C.F.R. § 1980.103(d). The Administrative Review Board (“ARB”) recognizes three instances in which the relief of equitable tolling is appropriate: “(1) when the Respondent mislead the Complainant concerning the filing of his complaint; 2) the Complainant was in some way extraordinarily prevented from filing his claim or 3) Complainant raised the issued in the wrong forum.”<sup>5</sup> *Halpern*, ARB Case No. 04-120 at 4; *see Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3-4 (ARB Nov. 8, 1999); *School District of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981) (noting that the restrictions on equitable tolling must be scrupulously observed). In contrast, ignorance of the law or unfamiliarity with the legal system does not warrant 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). The complainant bears the burden of justifying the application of equitable tolling. *Allentown*, 657 F.3d at 20.

Complainant admitted that his claim was untimely; therefore, the question presented is whether equitable tolling is warranted in this matter. *See* Response, 2, 4. Complainant did not argue that Respondent misled him in the filing of his complaint, or that he filed a SOX whistleblower claim in an inappropriate forum. Accordingly, my analysis will be limited to the question of whether extraordinary circumstances prevented Complainant from timely filing his claim.

The ARB has ruled that mental incapacity is a legitimate justification for tolling SOX’s statute of limitations. *See Reid v. The Boeing Co.*, ARB No. 10-110, ALJ No. 2009-SOX-27,

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symptoms of Complainant’s conditions include: “dizziness, imbalance, fatigue, high levels of anxiety . . . , panic attacks, poor attention and concentration, irregular eating and sleeping patterns.” *Id.* Dr. Padro averred that Complainant’s symptoms are triggered “at any moment where he understands is under stress, required cognitive or mental efforts, or feels without protection or pressed.” *Id.* Ultimately, Dr. Padro concluded that Complainant “has not been able to claim his rights under the mandatory period required by law” because of his mental health. *Id.*

<sup>5</sup> “These categories are not exclusive but courts ‘have generally been 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 (internal citations omitted).

slip op. at 4-5 (ARB Mar. 30, 2012); *Goode v. Marriott International, Inc.*, 2006-SOX-115 (ALJ Oct. 13, 2006) (clarifying that “had Complainant suffered a mental illness and been incompetent or unable to conduct his affairs he could arguably avail himself of this relief”). Evidence of a mental incapacity, however, does not permanently stop the statute of limitations from running. If there is proof that the complainant’s mental health and competency improved, the statute of limitations may begin running.

For example, the complainant in *Reid* produced medical evidence to demonstrate that he was unable to timely file a SOX claim—including his doctor’s “opinion that [the complainant’s] medical condition prevented him from filing before July 1, 2008.” *Reid*, ARB No. 10-110, slip op. at 4. Notwithstanding this evidence, the administrative law judge noted that the complainant’s doctor was unaware that: in March 2008 complainant had operated his employer-issued laptop; in April 2008 he contacted his healthcare provider to appeal its denial of short-term disability benefits and hired an attorney; and, as of May 2008, was in contact with OSHA to give statements in support of other former coworker’s complaints. *Id.* at 4-5. Ultimately, the ARB affirmed the administrative law judge’s finding that the complainant’s untimely filing was due to a misunderstanding about the law, and not due to his recovery from his alleged mental incapacity. *Id.* at 5.

The case at hand closely mirrors the circumstances in *Reid*. I am mindful of Complainant’s medical condition and the evidence he provided to demonstrate that his incapacity—which he alleges began on the date of his termination—prevented him from timely filing a SOX complaint. While the statute of limitations might have initially been tolled because of this incapacity, the record contains evidence of two subsequent events that reveal Complainant’s condition improved and triggered the statute of limitations clock.

First, after about a year of psychological and pharmacologic therapy, Complainant “filed a complaint to ERISA to investigate what happened with the pension plans of Mr. Efrain Domenech.” Objection, 2. Complainant specified that his ERISA filing included “a detailed report with the irregularities that occurred.” *Id.* The ERISA complaint arose from the same nucleus of facts that resulted in both Complainant’s termination and mental incapacity. If Complainant was able to overcome his “dizziness, imbalance, fatigue, high levels of anxiety . . . , panic attacks, poor attention and concentration, irregular eating and sleeping patterns” to file an ERISA claim in September 2014, then I find he would have been just as capable of filing a SOX whistleblower complaint at that time. *See* Response (EX-1). Using the date he filed an ERISA complaint, September 23, 2014, as the start date, I find that his July 27, 2015 OSHA complaint was filed 307 days after he had the capacity to file a SOX complaint—well beyond the 180-day statute of limitations period. Objection, 2.

Secondly, there is also evidence of Complainant’s improved mental capacity in January 2015. According to his objection to OSHA’s findings, Complainant received notice on January 15, 2015 that his ERISA case was closed because the investigation did not uncover any improprieties. Objection, 2. Complainant stated that he was “frustrated with the way [his] complaint was being attended,” and “[n]ot adhered to this resolution, [he] went to the office of Mr. Andy Cordero Rosado, Esq., for advice if there is any other law for which [he could] file.” *Id.* Similar to the cognitive abilities he demonstrated in September 2014, Complainant’s act of

contacting an attorney in hopes of righting what he perceived was an injustice reveals that he had the requisite mental capacity to pursue his SOX claim at that time. Using January 15, 2015—the date Complainant contacted or first thought about contacting an attorney—as the start date for the Act’s statute of limitations, I find that his OSHA complaint was filed 193 days later; again, beyond the 180-day statute of limitations. Accordingly, the facts presented by Complainant fail to warrant equitable tolling under the “extraordinarily circumstances” theory.<sup>6</sup>

### III. ORDER

After consideration of the evidence and arguments presented, I find that Exclusa’s complaint is untimely filed and the complaint is **DISMISSED WITH PREJUDICE**. The formal hearing scheduled for April 20, 2016 in Guaynabo, Puerto Rico is **CANCELLED**.

**SO ORDERED.**

**TIMOTHY J. McGRATH**  
Administrative Law Judge

Boston, Massachusetts

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<sup>6</sup> Although Complainant did not proffer an alternative theory that his circumstances warrant equitable tolling because he “raised the issued in the wrong forum,” I find it appropriate to note that his appeal for equitable tolling would be no more successful under that theory. First, there is no evidence or indications that his ERISA complaint referenced SOX or its whistleblowing provisions. *Greene v. Omni Visions, Inc.*, ARB No. 09-109, ALJ No. 2009-SOX-44 at 7 (ARB Mar. 9, 2011) (emphasizing that “[n]owhere in the False Claims Act did [the complainant] articulate conduct she reasonably believed constituted a violation of any of the enumerated laws contained in the SOX or request relief under the SOX”). Additionally, as previously discussed, Complainant filed an ERISA claim on September 23, 2014 and was informed that his case was closed on January 15, 2015. Therefore, even if his ERISA complaint was proven to be precisely the same claim as his SOX complaint, his appeal for equitable tolling would still fall short because he waited another 193-days to file his SOX claim after the ERISA claim was dismissed. *See id.*