



Issue Date: 27 May 2016

Case No.: 2016-SOX-00024

In the Matter of

TOWAKI KOMATSU
Complainant

v.

NTT DATA, INC./
CREDIT SUISSE
Respondents

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

This matter arises under the employee protection provision of the Sarbanes Oxley Act (hereinafter, "SOX" or "the Act"), 18 U.S.C. § 1514A, as amended by § 922(c) of the Dodd-Frank Act of 2010, Public Law 111-203 (July 21, 2010). Applicable regulations are set forth at 29 C.F.R. Part 1980. The governing procedural regulation is at 29 C.F.R. Part 18. The Complainant is not represented by counsel. A hearing in this matter has not been scheduled.

Procedural History

On October 29, 2015, the Complainant filed a retaliation complaint against the Respondents under SOX with the Occupational Safety and Health Administration (OSHA). On February 11, 2016, the OSHA Secretary determined that the Complainant's complaint was untimely, finding that the Respondents eliminated the Complainant's position on April 27, 2012, and the Complainant did not file his complaint with the Secretary of Labor until October 29, 2015 or 1,280 days after his termination. Because the Complainant did not file his complaint within 180 days of the alleged adverse action, the Secretary deemed it untimely. By correspondence dated February 25, 2016, the Complainant objected to OSHA's findings by submitting "Valid objections and request for a hearing" ("Objections") to the Chief Administrative Law Judge.

This case was subsequently assigned to me and I issued an Initial Order Informing Parties that Matter has Been Docketed; Directing Parties to Submit Initial Statements; and Providing Additional Guidance ("Initial Order") on March 9, 2016. This Initial Order directed the parties to submit their initial statements within 14 days. See Initial Order, at 2-3. The Complainant did not serve his Objections on the Respondents, so this office mailed the Complainant's Objections to the Respondents that same day. The Respondents timely filed their initial statement on March 23, 2016 and this office received it the next day. The Complainant filed his initial statement

(“Complainant’s Initial Statement”) on April 8, 2016, in which he stated that he did not receive a copy of my Initial Order until March 23, 2016 and explained the circumstances.¹ See Complainant’s Initial Statement, at 7-8. Based on the Complainant’s representation that he did not receive my Initial Order until March 23, 2016, I deemed the Complainant’s Initial Statement as timely. See Order of Apr. 25, 2016, at 1-2.

On April 11, 2016, through counsel, the Respondents filed a Motion to Dismiss. On April 18, 2016, the Complainant submitted his Memorandum of Law in Support of Motion in Opposition to Motion to Dismiss (“Complainant’s Opposition”). Because the Complainant, a pro se litigant, had already responded to the Motion to Dismiss before being advised of the requirements for opposing and the consequences for failing to respond to a motion for summary disposition set out in my Order, I informed the Complainant of his opportunity to supplement or substitute his prior Opposition within 14 days of my Order. See Order of Apr. 25, 2016, at 3-4. On May 11, 2016, the Complainant requested a one-day extension to supplement his Opposition. As the Respondents did not oppose it, I granted the Complainant’s request for an extension. See Order of May 12, 2016, at 1-2. The Complainant thereafter filed his Reply Affidavit to Supplement his Motion in Opposition to Respondents’ Motion to Dismiss (“Complainant’s Supplement”).

The Complainant’s Initial Statement

In his Initial Statement, the Complainant disputed that his OSHA complaint was untimely. See Complainant’s Initial Statement, at 9. The Complainant suggested that I had not considered whether his complaint had equitably tolled. Id. Despite not timely filing his complaint, the Complainant averred that equitable tolling is warranted in his case because he filed a complaint with the Wage and Hour Division of the U.S. Department of Labor (“WHD”) on October 10, 2012, within 180 days of his termination, and WHD took no action. Id. at 9-10. Instead, the Complainant contended, WHD mishandled his October 10, 2012 complaint and misled him into believing that his only course of action against the Respondents was to file a private lawsuit. Id. at 14. Following this advice, the Complainant filed a private lawsuit that did not invoke SOX. Id. Had WHD informed the Complainant that he could file a complaint to OSHA pursuant to SOX, the Complainant stated, he would have done so within 180 days. Id. The Complainant stated that he received similar advice from the New York State Department of Labor and National Labor Relations Board (NLRB) prior to filing his complaint with WHD. Id. Because these three agencies purportedly misled the Complainant into believing that a private lawsuit was his only course of action, he maintained, equitable tolling should attach. Id. at 14-15.

In addition, the Complainant asserted that WHD egregiously mishandled his complaint because it failed to investigate his claims, failed to refer the complaint to OSHA pursuant to a memorandum of understanding between the two agencies, failed to accurately and fully record the nature of his claims, and informed the Complainant that it did not assist independent contractors. Id. at 15. The Complainant cited the “Whistleblower Investigations Manual” for

¹ My office erroneously sent the Complainant’s copy of the Initial Order to his former address. After the Complainant contacted my office on March 18, 2016, my office provided him with a copy of the Initial Order.

the proposition that tolling of deadlines for filing a complaint under SOX may be appropriate when:

(2) The employee is unable to file within the statutory time period due to debilitating illness or injury;² or

(4) The employee mistakenly filed a timely retaliation complaint relating to a whistleblower statute enforced by OSHA with another agency that does not have the authority to grant relief (e.g., filing an AIR21 complaint with the FAA or filing an STAA complaint with a state plan state).

Id. at 17.

The Complainant further cited case law indicating that equitable tolling may be granted based on misleading conduct by the employer or ineffective but diligent conduct by the employee that caused the employee to miss a deadline.³ Id. at 18-19. The Complainant cited another case identifying several factors to consider in deciding whether to apply equitable tolling.⁴ Based on these propositions, the Complainant argued that he took diligent yet ineffective steps to pursue legal action between his April 27, 2012 discharge and October 10, 2012 WHD complaint when he consulted with an employment law firm about his claim, contacted the three agencies discussed above regarding his claim, contacted legal aid, and performed his own legal research. Id. at 19-21. Because the Complainant could not secure legal representation and has been involved in a substantial amount of litigation since 2012, the Complainant maintained, it is within the bounds of reason that he remained unaware of the notice requirement under SOX. Id. at 21-22.

The Complainant further contended that the alleged wage-theft, fraudulent acts, and retaliation perpetrated upon him by the Respondents and the misleading information provided to him by the aforementioned three agencies has caused him debilitating and irreparable harm and outweighs any prejudice suffered by the Respondents such that equitable tolling should attach. Id. at 22. In addition, the Complainant cited the propositions that equitable tolling is warranted when the plaintiff has in some extraordinary way been prevented from asserting his rights or when the plaintiff has asserted the precise statutory claim at issue, but has mistakenly done so in the wrong forum.⁵ Id. at 22-23.

² The Complainant contended that OSHA did not limit its broad phrasing of “debilitating illness or injury” and appeared to argue that the misguided advice provided to him, the need to secure legal counsel, and the need to care for his ill parents and his own health after he was defrauded out of wages constitute a debilitating illness or injury. Id. at 18.

³ See Andrews v. Orr, 851 F.2d 146, 150 (6th Cir. Ohio 1988)

⁴ These factors include (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one’s rights; (4) absence of prejudice to the defendant; and (5) a plaintiff’s reasonableness in remaining ignorant of the notice requirement. See Andrews, 851 F.2d at 151 (citing Wright v. State of Tennessee, 628 F.2d. 949, 953 (6th Cir. Tenn. 1980).

⁵ See Turgeon v. Admin. Review Bd., 446 F.3d 1052, 1055 (10th Cir. 2006).

The Respondents' Motion to Dismiss

In the Motion to Dismiss, the Respondents first argue that the Complainant's OSHA complaint is untimely. The Respondents cite 18 U.S.C. § 1514A(b)(2)(d) to show that a complainant alleging discharge or discrimination must file an OSHA complaint within 180 days of the alleged violation or 180 days after the date the complainant becomes aware of it. See Motion to Dismiss, at 1. The Respondents point out that the Complainant filed his complaint on October 29, 2015, 1,280 days after the April 27, 2012 alleged retaliatory termination, and argue that the Complainant conceded that this lapse rendered his complaint untimely. Id. at 2; see also Complainant's Initial Statement, at 9. The Respondents characterize the Complainant's argument that WHD failed to inform him in October 2012 that he could file a complaint with OSHA as without merit, because the Complainant's wage and hour complaints do not fall within OSHA's purview under SOX. See Motion to Dismiss, at 2. The Respondents also maintain that the Complainant's equitable tolling argument is equally without merit. Id. Further, the Respondents denied that they concealed any facts from the Complainant or misled him as to why they terminated their employment relationship with him such that equitable tolling would be available to the Complainant and requested leave to submit a supplemental memorandum addressing this issue should I warrant it. Id. at 2 n. 1.

The Complainant's Opposition and Supplement to Opposition to the Respondent's Motion to Dismiss

In his Opposition to the Motion to Dismiss, the Complainant reiterated his argument that his OSHA complaint be deemed timely. Specifically, the Complainant asserted that OSHA is an inadequate forum in which to bring his claim because it mistakenly sent him private information regarding a third party and cannot be entrusted to safeguard the personal information of complainants. Id. at 10-11, 14. The Complainant further argued that because OSHA failed to comply with the regulation that it issue findings within sixty days of the filing of a SOX complaint, his delay in filing with OSHA in October 2012 is excusable. Id. at 14. On May 12, 2016, the Complainant filed the Complainant's Supplement and this office received it on May 16, 2016. Complainant's Supplement did not address the equitable tolling argument.

Motion to Dismiss Standard

The Department's procedural rules permit a party to move for a motion to dismiss. See § 18.72(c). A party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness. Id. If the opposing party fails to respond, the judge may consider the motion unopposed. Id. In this matter the Complainant has submitted responses to the Respondents' Motion to Dismiss, and I have considered the Complainant's submissions.

Timeline

A timeline summarizing the chronological events and pertinent dates related to the Complainant's complaint is set forth below:

DATE	EVENT
April 27, 2012	Complainant is terminated from employment
May 7, 2012	Complainant sends correspondence to Respondent alleging violations of its code of conduct, harassment, and failure to pay earnings and overtime wages
October 10, 2012	Complainant files complaint with the U.S. Department of Labor Wage and Hour Division concerning Respondent's failure to pay overtime wages
October 27, 2012	180-day window for the Complainant to make a SOX complaint expires
October 1, 2015	Complainant makes a FOIA request to U.S. Department of Labor Wage and Hour Division seeking his original complaint from October 10, 2012
October 23, 2015	U.S. Department of Labor Wage and Hour Division complies with the Complainant's FOIA request
October 29, 2015	Complainant files SOX claim with OSHA
November 3, 2015	Complainant emails U.S. Department of Labor Wage and Hour Division claiming that his FOIA request results provided only an abbreviated version of his claim and elaborates on his claim
December 1, 2015	Complainant receives a letter from U.S. Department of Labor Wage and Hour Division in response to his request to deny Respondents' request for an ERISA exemption and have the Respondents investigated for misclassifying employees as independent contractors; letter informs Complainant that the statute of limitations for a wage claim under FLSA has expired and advises him that the statute of limitations for filing an FLSA retaliation claim is two years or three years for a willful violation
February 11, 2016	OSHA deems Complainant's SOX claim untimely
February 25, 2016	Complainant objects to OSHA's findings

Analysis- Equitable Tolling

As a matter of law, the Complainant bears the burden of justifying the application of equitable modification principles. See Hyman v. KD Resources, et al., ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 17 (ARB Mar. 31, 2010) (citing Wilson v. Sec'y, Dep't of Veterans Affairs, 65 F.3d 402, 404 (5th Cir. 1995)). The time for filing a complaint may be tolled for reasons warranted by applicable case law. For example, OSHA may consider the time for filing a complaint equitably tolled if a complainant mistakenly files a complaint with the another agency instead of OSHA within 180 days after becoming aware of the alleged violation. See 29 C.F.R. 1980.103. When faced with the decision whether to relax the limitations period, the Administrative Review Board ("ARB" or "the Board") has called upon a Third Circuit case that provides circumstances in which equitable tolling is proper: when (1) the defendant has actively misled the plaintiff respecting the cause of action; (2) the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum. See Harvey v. Home Depot

U.S.A., Inc., ARB No. 04-114, ALJ No. 2004-SOX-020, slip. op. at 37-38 (ARB June 2, 2006) (citing School Dist. of the City of Allentown v. Marshall, 657 F.2d 16, 18 (3d Cir. 1981)). I will address the Complainant's arguments in turn.

Advice from the Wage Hour Division

Among the Complainant's arguments was his contention that WHD, the New York State Department of Labor, and the NLRB all misled the Complainant into believing that the only way to pursue his claim was to file a private lawsuit. A similar situation arose in Jones v. First Horizon Nat'l Corp., ARB No. 09-005, ALJ No. 2008-SOX-060 (ARB Sept. 30, 2010). There, the complainant filed race and sex discrimination complaints with the EEOC both before and after her November 2006 termination, as well as filing suit in federal district court. Id. at 2-3. In June 2008, more than a year and half after her discharge, the complainant filed a letter with OSHA alleging a SOX violation, which OSHA deemed untimely. Id. at 3-4. In appealing this ruling to the ARB, the complainant argued that the Board should toll the limitations period because she filed in the wrong forum and because the EEOC and her former attorney failed to instruct her to file her claim with the Department of Labor. Id. at 8-9. Affirming the ALJ's decision that the complainant's SOX complaint failed to satisfy the criteria for equitable tolling, the Board definitively stated the complainant's "claim that the EEOC failed to instruct her how to file a SOX complaint does not justify application of equitable tolling." Id. at 12. The complainant did not show evidence that the EEOC or the respondent actively misled her and neither were obligated to inform her of Section 806 of SOX or its filing requirements, the Board concluded. Id.

Here, the Complainant presented a parallel argument. Like the complainant in Jones, this Complainant argued that two federal agencies, the WHD and the NLRB, as well as the New York State Department of Labor, did not advise him of his right to file a whistleblower complaint under SOX. The Complainant maintained that had the WHD informed him of his right to file an OSHA complaint pursuant to SOX, he would have done so within the requisite 180 days. However, Jones very clearly stands for the proposition that a complainant cannot rely on an agency's failure to inform the complainant of his right to file under OSHA to justify equitable tolling. Similarly, the Complainant here cannot rely on such lapses by these three agencies to toll his claims as they relate to SOX.

The Complainant also contended that these agencies not only failed to advise him of his right to file under OSHA, but also deceived him into believing that a private lawsuit was his lone cause of action. As part of Complainant's Initial Statement, the Complainant attached a December 1, 2015 letter from WHD responding to the Complainant's request that the Department of Labor deny the Respondents' application for an ERISA exemption and to investigate their alleged misclassification of workers as independent contractors. This letter also appeared to address his overtime wage complaint, which I presume to be a response to his October 2012 WHD complaint. See Complainant's Initial Statement, at Ex. A. In that letter, a WHD representative advised the Complainant that his back wage claim was beyond the statute of limitations under the FLSA. Id. The letter further states:

With regard to your retaliation complaint, section 15(a)(3) of the FLSA states that it is a violation for any person to “discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding...”

An employee who is discharged or in any other manner discriminated against because they have filed a complaint, may file a retaliation complaint with the WHD or may file a private cause of action.

Id.

It is clear that this letter from WHD advised the Complainant of his rights under an analogous whistleblower provision of the FLSA, not under OSHA. I find that WHD did not actively deceive the Complainant into believing that the only way to pursue his SOX claim was through a private action because the Complainant did not invoke the SOX whistleblower provision in his complaint to WHD in the first place.⁶ Because the Complainant’s complaint to WHD did not implicate the SOX whistleblower provision, the Complainant’s argument that his OSHA complaint should be equitably tolled based on misinformation provided by these agencies is insufficient to defeat the Respondents’ Motion to Dismiss.

WHD’s Failure to Investigate and Refer Complaint to OSHA

Next, the Complainant argued that WHD mishandled the complaint by failing to investigate it, failing to refer his complaint to OSHA pursuant to a memorandum of understanding (“MOU”) between the agencies, failing to accurately and fully record the nature of his claims, and informing the Complainant that the WHD does not assist independent contractors. As cited by the Complainant, the MOU states that its purpose is “to establish a complaint/referral system between the two Agencies which will provide for a coordinated enforcement effort, thereby securing the highest level of compliance.” Memorandum of Understanding Between the U.S. Department of Labor Occupational Safety and Health Administration and Employment Standards Administration, Apr. 5, 1990, OSHA-ESA, I. Purpose.⁷ Among its policies, the MOU provides that OSHA and the ESA shall arrange referrals whenever appropriate, respond to the other agency concerning potential violations of that agency’s requirements by conducting investigations in a timely manner, and exchange information relating to complaints taken to enforce pertinent laws and regulations. Id. at III. Policies.

As will be described in more detail below, the Complainant’s WHD complaint discussed an alleged failure of the Respondents to compensate him for overtime wages. Nothing in his WHD complaint indicated the Respondent retaliated against the Complainant for reporting that the Respondent had engaged in the type of fraudulent conduct that SOX seeks to prevent. Therefore, a referral from WHD to OSHA would not have been appropriate because WHD would have no reason to refer the Complainant’s overtime wage or misclassification complaint

⁶ The Complainant did not provide any correspondence from the New York State Department of Labor or the NLRB indicating that they provided similar advice.

⁷ The Memorandum of Understanding is not included in the record, even though the Complainant referenced it in his Initial Statement.

to OSHA, since such complaints do not fall under OSHA's purview. As to the Complainant's claim that WHD did not investigate his complaint, the letter from WHD attached to the Complainant's Initial Statement indicates otherwise, as it sets out for the Complainant why WHD rejected his wage and hour claim and referred him to the steps he could take if he wanted to pursue a whistleblower claim pursuant to the FLSA or a private cause of action. The letter also did not take a stance on whether the Complainant was properly classified as an employee or independent contractor. Therefore, the Complainant's assertion that WHD's mishandling of his complaint should allow for equitable tolling is off the mark.

Complainant's Diligent, Yet Ineffective Conduct

The Complainant then argued that his diligent, yet ineffective conduct in pursuing his OSHA claim gives him grounds for equitable tolling. In support of his theory, the Complainant cited to Andrews v. Orr, 851 F.2d 146, 150 (6th Circ. Ohio 1988) for five factors the court considered in determining whether equitable tolling is applicable. Those factors include (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement. Id. It should be acknowledged that this case noted that the most common situation calling for equitable tolling involves an affirmative representation by the employer that causes an employee to miss a filing deadline. Id. at 151. The Complainant did not attribute his missed deadline to actions by the Respondent. Nevertheless, Andrews identifies circumstances unrelated to an employer's conduct that may justify tolling, namely the aforementioned five factors. Id. In that case, the court determined that it was reasonable for the plaintiffs to believe that a prior court order had the effect of preserving a class action as long as the lead plaintiff formally raised that question within 30 days. Id. In holding for the plaintiff, the court quoted the district court's opinion that "by setting short time limitation periods and establishing a maze of regulatory appeals, the government virtually assures that any but the most astute worker will find his or her claim barred by some procedural technicality once he or she gets to the United States District Court." Id. at 152.

Applying these five factors to this matter, although the Complainant may not have had actual notice that he had 180 days from the date of his termination to file a complaint with OSHA, he certainly had constructive knowledge since he could have researched the SOX filing deadlines. Because the crux of the Complainant's original complaint centered on his overtime wage and misclassification claims, it makes sense that the Complainant did not refer to the SOX whistleblower provision at that time, since his complaint was not related to mail fraud, wire fraud, bank fraud, securities fraud, a Securities and Exchange Commission (SEC) rule or regulation, or any provision of Federal law relating to fraud against shareholders.

Although the Complainant demonstrated a degree of diligence by consulting with a law firm and various legal aid organizations, it does not excuse the Complainant's ignorance of the 180-day requirement under SOX, as the Complainant has shown himself capable of doing at least a modicum of legal research as evidenced by his thorough pleadings featuring a number of case citations. Such capability demonstrates that he could have learned of this requirement on his own. Instead, the Complainant's first mention of SOX came in October 2015, three and a

half years after his April 2012 termination. Unlike in Andrews, the Complainant was not confronted with a maze of regulatory appeals. Instead, the Complainant simply needed to file a complaint invoking SOX within 180 days of his termination. On balance, when weighing the Andrews factors, the Complainant cannot show that he is entitled to equitable tolling on this ground.

Precise Statutory Claim

Finally, the Complainant asserted that he timely raised a precise statutory claim, albeit in the incorrect forum. In Butler v. Anadarko Petroleum Corp., ARB No. 09-047, ALJ No. 2009-SOX-001, slip op. at 6 (ARB Feb. 17, 2011), the respondent terminated the complainant's employment in May 2006 and the complainant filed a complaint with OSHA in December of that year, more than the 90 days after the alleged adverse action.⁸ Although the complaint was untimely on its face, the ARB held that the complainant's July 31, 2006 filing in the Southern District of Texas alleging that respondent terminated her employment in violation of SOX's whistleblower provision should be equitably modified. Id. at 9-10, 14. The Board determined that for a complainant to make a "precise" statutory claim, he or she needs to clearly identify that it is a SOX claim in order to satisfy the time limitation bar. Id. at 10. Additionally, the wrongly filed claim must be the same claim as the OSHA complaint ultimately filed. Id. In this particular case, the Board found that the complaint in district court was the precise statutory complaint as was filed by the complainant with OSHA in December 2006 because the federal court complaint specifically referenced a March 9, 2006 letter allegedly containing SOX disclosures sent to the respondent's CEO, which was included in the complainant's letter to OSHA. Id. at 11. Because the Board deemed the federal court complaint to be a precise statutory claim and the complainant otherwise complied with the initial filing requirements as required by SOX, the Board found that equitable tolling applied. Id. at 11, 14.

As part of his argument, the Complainant asserted that he is entitled to equitably toll his SOX complaint on similar grounds as the complainant in Butler; specifically that equitable tolling applies in instances where the plaintiff has asserted the precise statutory claim at issue, but has mistakenly done so in the wrong forum. Here, the Complainant contended that he timely filed his SOX complaint on October 10, 2012, which was assigned an identification number by WHD. See Complainant's Initial Statement, at 9. As part of his Objections, the Complainant attached a summary of his October 10, 2012 complaint, which states:

C alleged that the ER failed to pay hours worked over 40 per week at 1/2. Hours worked over 40 paid ST. The ER paid C a IC C worked F/T at the company C has no other client. C worked the company website...C worked on a fixed schedule.

Objections, at 21.

Nothing in this narrative indicates or suggests that the Complainant's WHD complaint in any way implicates SOX. On its face, the Complainant's complaint concerned only a claim for

⁸ In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act modified the SOX whistleblower provision to allow complainants 180 days instead of 90 days from the date of the alleged adverse action to file their complaints. See Pub. L. 111-203 § 922(c)(1)(A).

overtime wages. Elsewhere in his Objections, the Complainant attached an email from November 3, 2015, in which he sought a full copy of his October 2012 complaint under the Freedom of Information Act (FOIA). In the email, the Complainant recounted the substance of his 2012 complaint, which he averred included allegations that the Respondent denied him payment of overtime, misclassified him as an independent contractor, retaliated against him after he filed valid complaints regarding the “fraudulent” denial of his overtime and “fraudulent” misclassification as an independent contractor by terminating his employment, and blacklisted him from future employment opportunities. I find that the record reflects that the first time that the Complainant attempted to draw a link to SOX was through his OSHA complaint, filed on October 29, 2015, three and a half years after his 2012 termination.

Unlike in Butler, where the complainant’s timely complaint in federal court invoked violations of SOX, the Complainant’s WHD claim for overtime wages and alleged misclassification as an independent contractor does not further the goals of SOX to protect employees who “provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.” 18 U.S.C. § 1514A(a)(1). Although the Complainant’s October 10, 2012 complaint was filed within 180 days of his termination, it does not invoke concern over any kind of fraud that the Respondent may have perpetrated. Instead, his complaint concerned a wage discrepancy personal to the Complainant. Likewise, his November 2015 email that summarized his prior complaint also does not invoke the whistleblower provision of SOX. Even though the Complainant worded his overtime and misclassification allegations as “fraudulent,” he continued to assert that the Respondent’s actions impacted only him, a former employee, and not the company or its shareholders. Because the Complainant’s original WHD complaint did not invoke SOX, as opposed to the timely federal court complaint in Butler, it does not amount to a precise statutory claim. As such, the Complainant’s WHD complaint cannot be equitably tolled on this ground.

Reasonable Belief Standard

In Sylvester v. Parxel Int’l, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042, slip op. at 14 (ARB May 25, 2011), the Board held that a complainant need only have a reasonable belief of a SOX violation in order for the complaint to be considered protected activity. In order to satisfy the reasonable belief test, a complainant must have both a subjective and objective belief that the conduct complained of constitutes a violation of relevant law. Id. at 14-15. That is, a complainant must have actually believed that such conduct constituted a violation and a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee must be deemed to have believed the same. Id. The complainant also need not actually convey a reasonable belief to management or authorities in order to engage in protected activity. Id. at 15.

Subsequent ARB case law clarified the definition of an objectively reasonable belief. In a later case, the Board definitively stated that a complainant may be afforded protection for complaints regarding infractions beyond the scope of those relating to shareholder fraud. Zinn v.

American Commercial Lines, ARB No. 10-029, ALJ No. 2009-SOX-025, slip. op. at 8 (ARB May 28, 2012). Thus, a clear and reasonable belief about a violation of any SEC rule or regulation, even if devoid of any accusation of securities fraud, could constitute an objective belief. Id. In addition, Zinn held that a complainant need not establish the elements required in a securities fraud statute or describe an actual violation of law to demonstrate a reasonable belief that an employer engaged in SOX-related activity, even if the complainant is mistaken in either instance. Id. at 9-10.

The Complainant in this case cannot be said to have either a subjective or objective belief that the Respondent engaged in practices that violate SOX. In his October 2012 complaint, there was no evidence suggesting that the Complainant actually believed the Respondent to have violated a SOX provision, because he limited his complaint to a personal overtime discrepancy and made no mention of mail, wire, bank, or securities fraud or any other SEC regulation. Thus, there is no evidence that the Complainant had a subjective belief that the Respondent engaged in any of these illegal activities. I further find that, at the time he filed his WHD complaint in October 2012, the Complainant did not have an objectively reasonable belief that SOX was at issue, because his complaint did not assert that the Respondent's purported practice constituted harm to shareholders or put the company at risk in some way. In this regard I note that the Complainant is relatively sophisticated in his ability to articulate ostensible violations of the law by the Respondents. Moreover, even assuming the Complainant had an objectively reasonable belief that Respondent violated SOX, his complaint does not constitute protected activity under the Sylvester test because there is no indication that, at the requisite time, he held a subjective belief that Respondent engaged in conduct that breached SOX.

Conclusion

I find that the Complainant first invoked the SOX whistleblower provision on October 29, 2015, 1,280 days after his termination. For the reasons stated above, the Complainant's arguments that his SOX claim should be equitably tolled must be rejected. Accordingly, I find that the Complainant's SOX complaint was untimely.

Order

The complaint for whistleblower protection under the Sarbanes-Oxley Act filed by Towaki Komatsu with OSHA on October 29, 2015 is hereby DISMISSED as untimely filed.

SO ORDERED.

ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When 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 the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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(e) and 1980.110(b). 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 thirty (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(b).