



Issue Date: 04 August 2017

CASE NO.: 2017-SOX-00028
OALJ NO.: 5-2210-17-027

In the Matter of:

DEBORAH GREENLEE-KECK,
Complainant,

v.

J.P. MORGAN SECURITIES, LLC
Respondent.

**ORDER GRANTING RESPONDENT J.P. MORGAN SECURITIES, LLC'S
MOTION TO DISMISS WHISTLEBLOWER ONLINE COMPLAINT**

This proceeding arises under the whistleblower protection provision of the Corporate and Criminal Fraud Accountability Act of 2002, Title VII of the Sarbanes-Oxley Act, as amended, 18 U.S.C. § 1514A (hereinafter “the Act” or “SOX”), and the implementing regulations at 29 C.F.R. Part 1980. The statute prohibits retaliatory or discriminatory actions by covered employers against their employees who engage in activity protected by the Act. In this case, the Complainant has requested review by the Office of Administrative Law Judges (“OALJ”) of a finding by the Occupational Safety and Health Administration (“OSHA”) that the Complainant’s Complaint was not timely filed. The Complainant, Deborah Greenlee-Keck (hereinafter “the Complainant”), is unrepresented in this matter.¹

¹ Pursuant to a Notice of Assignment and Intent to Schedule Telephone Conference, a telephone conference with the parties was scheduled for June 9, 2017. On June 8, 2017, the Complainant left a telephone voice mail message with this office stating that she had retained an attorney (who was not identified) to represent her in this matter. The June 9th conference was therefore rescheduled for June 28, 2017 by my order issued June 20, 2017. After receiving the telephone message from the Complainant regarding representation, my legal assistant unsuccessfully tried to contact her by telephone to inform her that the attorney must file a Notice of Appearance (*see* 29 C.F.R. § 18.22). My legal assistant left several voice mail messages requesting that the Complainant return her calls. The Complainant did not return the telephone calls. No notice of appearance from an attorney on behalf of the Complainant was ever received, nor was my office ever contacted by anyone purporting to represent the Complainant.

On January 30, 2017, the Complainant filed a Whistleblower Online Complaint against J.P. Morgan Securities, LLC (hereinafter “the Respondent”) alleging that the Respondent retaliated against her by constructively discharging her on June 26, 2015 for activity specified in the Complaint. The Complaint also alleges that the Respondent’s conduct resulted in her discharge by a subsequent employer on October 2, 2015. On March 14, 2017, OSHA issued a determination dismissing the Complaint because it was not filed within the required 180-day period.

On July 10, 2017, the Respondent filed a motion to dismiss the Complaint on the grounds that it was not timely filed.² No response to the motion has been filed by the Complainant.³

An OSHA complaint alleging a violation of SOX must be filed within 180 days”after the alleged violation of the Act occurs or after the date on which the employee became aware of the alleged violation of the Act.” 29 C.F.R. § 1980.103(d).⁴ The statute of limitations in whistleblower cases begins to run when an employee receives “final, definitive and unequivocal notice of an adverse employment decision.” *Snyder v. Wyeth Pharms.*, ARB No. 09-008, ALJ No. 2008-SOX-55, slip op. at 6 (ARB Apr. 30, 2009); *Overall v. Tenn. Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-053, slip op. at 34 (ARB Apr. 30, 2001). *See also Halpern v. XL Capital, Ltd.*, ARB No. 01-120, ALJ No. 2004-SOX-054, PDF at 3 (Aug. 31, 2005).

² See 29 C.F.R. § 18.70(c), providing that a party may move to dismiss part or all of a matter for reasons recognized under controlling law, including untimeliness. The rule further states that if the opposing party fails to respond, the judge may consider the motion unopposed.

³ As noted above, on May 11, 2017, I issued a Notice of Assignment and Intent to Schedule Telephone Conference. The call was subsequently scheduled for June 9, 2017. On June 8th the Complainant left a telephone voice mail message with my legal assistant stating that she had retained an attorney and wanted to have the telephone conference rescheduled. As stated above, my office was unable to establish contact with the Complainant. On June 20, 2017, I issued an Order Rescheduling Telephone Conference for June 28th. The Order stated that the parties were expected to participate in the call either in person or by their representative. Counsel for the Respondent called in to participate in the telephone conference but the Complainant did not. I therefore issued another order on June 28th requiring the Complainant to file a response by July 19, 2017 stating why she did not participate in the phone conference and whether she wishes to continue pursuing her claim. On July 14th, the June 28th Order was returned to this office indicating “Attempted – Not Known Unable to Forward.” No response from the Complainant was ever received. On July 24, 2017, my legal assistant again called the Complainant and left a voice mail message asking her to call back and give us her new address. She has not returned that call or previous calls and has not made contact with this office or otherwise provided this office with a new address. After the Respondent filed its motion to dismiss, I issued a Notice to Complainant Regarding Pending Motion to Dismiss of Respondent J.P. Morgan Securities, LLC on July 7, 2017. On July 27th, the Notice was returned to this office with the same notation as the June 28th Order, indicating that it could not be delivered. I asked the Respondent to advise me whether the motion to dismiss it served Complainant with was returned as undeliverable. By letter dated July 27, 2017, the Respondent advised that a copy of the motion to dismiss was served on the Complainant by U.S. mail, at the same address used by my office, and was not returned and was therefore presumably delivered. Because the motion to dismiss appears to have been delivered to the Complainant, I will decide the motion on its merits.

⁴ This case was docketed with the Office of Administrative Law Judges as a claim under SOX, but OSHA’s determination letter references the claim as one under SOX and under Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567 (hereinafter “the CFPA). Under the CFPA, a complaint alleging a violation must also be filed “[w]ithin 180 days after an alleged violation of CFPA occurs.”

Here, the Complaint alleges that after reporting to a manager that a licensed banker with a JPM bank had stolen funds from a customer and opened an account in the customer's name with the intent to defraud her, the Complainant was subjected to harassment that resulted in her constructive discharge on June 26, 2015 and her discharge from a subsequent employer on October 2, 2015. *See* Complainant's Whistleblower Online Complaint filed January 30, 2017 Part 3 – "Allegation of Discrimination/Retaliation" (under "Adverse Action Dates").⁵ The Complaint was not filed within 180 days of either June 26, 2015 or October 2, 2015, the adverse action dates the Complainant alleges. Based on the record, the Complainant had final, definitive and unequivocal notice of the adverse actions she alleges no later than October 2, 2015.

In her objection to the Secretary's Findings, the Complainant states that she was represented by an attorney during the 180-day period following her discharge and he did not advise her that she could make a claim or inform her of a deadline for doing so. *See* the Complainant's appeal dated March 22, 2017 and filed April 4, 2017 (also attached to the motion to dismiss as Exhibit C). Even if the statement regarding her attorney were true, it would not be a defense to the failure to timely file the claim. The Administrative Review Board has recognized four principal situations in which "equitable modification" of a statute of limitations may apply. They are: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his or her action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) where the employer's own acts or omissions have lulled the plaintiff into forgoing prompt attempts to vindicate his or her rights. *See Turin v. Amtrust Fin. Servs., Inc.*, ARB No. 11-062, ALJ No. 2010-SOX-018, slip op. at 8 (ARB Mar. 29, 2013), citing *Selig v. Aurora Flight Sci.*, ARB No. 10-072, ALJ No. 2010-AIR-010, slip op. at 3-4 (ARB Jan. 28, 2011). With regard to the fourth situation, the Board stated that the issue is "whether the defendant's conduct, innocent or not, reasonably induced the plaintiff not to file suit within the limitations period" (quoting *McGregor v. Louisiana State Univ. Bd. Of Supervisors*, 3 F.3d 850, 865-66 (5th Cir. 1993)). The Board noted that these situations are not exclusive of other grounds for equitable modification. Here, of course the Complaint has not responded to the motion to dismiss and has not raised an issue of equitable tolling. Further, the Complaint does not allege any conduct by the Respondent on which an argument for equitable tolling could be based, nor is such conduct otherwise suggested by the record before me.

Based on the record before me, the Respondent has established that the Complainant did not file her Complaint within the prescribed 180-day period. The motion to dismiss will therefore be granted.

The Respondent has also requested an award of attorney fees and costs, alleging that the Complainant's Complaint and objection to OSHA's March 14, 2017 findings are baseless and

⁵ The Respondent's motion states that the Complainant was terminated on or about October 2, 2015.

that the Complaint was intended to harass the Respondent. The request for fees and costs will be denied. First, I note that the regulations require that a respondent who believes a complaint is frivolous or brought in bad faith and seeks an award of attorney fees must file objections and/or request a hearing within 30 days of receipt of the findings and preliminary order. 29 C.F.R. § 1980.106(a). Here, the Respondent has not done so. Further, the Respondent has provided no support beyond its bare allegation that the claim is baseless.

THEREFORE, Respondent J.P. Morgan Securities, LLC's Motion to Dismiss Whistleblower Online Complaint is **GRANTED** and Complainant's Complaint herein is hereby **DISMISSED**. Respondent's request for attorney fees and costs is **DENIED**.

SO ORDERED.

LARRY A. TEMIN
ADMINISTRATIVE LAW JUDGE