



Issue Date: 22 February 2017

Case No.: 2017-SOX-00004

In the Matter of:

THOMAS REILLY

Complainant

v.

GLAXOSMITHKLINE, LLC

Respondent

DECISION AND ORDER GRANTING RESPONDENT’S MOTION TO DISMISS

This matter arises under Section 806 (the employee protection provision) of the Sarbanes-Oxley Act of 2002, as amended (“SOX” or “the Act”), 18 U.S.C. §1514A, and its implementing regulations found at 29 C.F.R. Part 1980 and Part 18, Subpart A. Section 806 provides “whistleblower” protection to employees of publicly traded companies against discrimination by employers in the terms and conditions of employment because of certain “protected activity” by the employee.

I. STATEMENT OF THE CASE

Thomas Reilly (“Complainant”) filed a complaint with the Occupational Safety and Health Administration (“OSHA”) on July 20, 2015. In that complaint, he alleged that GlaxoSmithKline, LLC (“Respondent”) created a hostile work environment and terminated his employment in retaliation for his complaining about the instability of Respondent’s global computer systems. *See* Complaint at 10. After conducting an investigation, the Secretary of Labor, acting through the Regional Administrator, dismissed the complaint by letter dated September 6, 2016. OSHA concluded that Complainant’s complaint was untimely filed. The Regional Administrator found that Respondent unequivocally notified Complainant of its decision to terminate Complainant’s employment in March 2014.

On October 7, 2016, Complainant requested a hearing before the Department of Labor (“DOL”), Office of Administrative Law Judges (“OALJ”). An Initial Prehearing Order and Notice of Hearing was issued on October 24, 2016, setting a hearing for March 14, 2017. On November 18, 2016, Respondent filed a Motion to Dismiss (“Motion to Dismiss”), arguing that Complainant’s SOX complaint should be dismissed as untimely. Respondent also filed an Unopposed Motion to Stay Discovery and Hearing Pending Resolution of Respondent’s Motion

to Dismiss. On December 1, 2016, Complainant filed a Response to Respondent's Motion to Dismiss Complaint ("Complainant's Response"). On December 2, 2016, an order was issued granting Respondent's Unopposed Motion to Stay Discovery and Hearing.

On December 19, 2016, Respondent filed a Motion for Leave to File a Reply Brief in Further Support of its Motion to Dismiss ("Reply Brief") and attached its Reply Brief as Exhibit A. Absent any objection, Respondent's Motion for Leave to File a Reply Brief is granted and the Reply Brief is admitted into the record.

II. ISSUES

The issues presented are as follows:

1. Is Complainant's OSHA complaint barred by the statute of limitations under SOX?
2. If Complainant's OSHA complaint is untimely under SOX, does equitable modification of the statutory limitations for filing apply?

III. FINDINGS OF FACT

Respondent is a global researched-based pharmaceutical company. Motion to Dismiss at 1. Complainant started working for Respondent in May 1999 in the Information Technology ("IT") Department for the AS/400 server. *Id.* at 2. Around 2003, Complainant was promoted to the position of a Senior Consultant within the AS/400 server team. *Id.* at 2. Complainant belonged to a five employee group which was part of Respondent's Enterprise Information Systems ("EIS") Department. *Id.*

In late 2011, Complainant began reporting computer instability issues with the AS/400 system. Complainant's Response at 1. In May 2013, Respondent started a project to reorganize the EIS Department. In December 2013, as part of the reorganization project, Respondent decided to outsource many of its IT services. Motion to Dismiss at 2. In January 2014, Respondent began outsourcing the service of the AS/400 server to a third party provider, Blue Chip. *Id.*

In March 2014, Complainant was informed that (1) part of his department was approved for outsourcing and (2) Respondent would retain only a manager and one permanent support role.¹ Complainant's Response at 5; Complaint at ¶ 32. Complainant was given a two week window to apply for the support position, but he did not apply. Complaint at ¶ 33. After the two week window, in March 2014, Respondent informed Complainant that he would be terminated due to outsourcing on August 29, 2014 and that his last day would be October 29, 2014.² *Id.*

¹ In his complaint, Complainant alleged that he was discouraged from applying for the support role and was "told for months during the outsourcing case development phase that he was not eligible to apply for the support role." Complaint at ¶ 7.

² Complainant wrote that in March 2014, Henry Bolton, iSeries Service Manager, told Complainant that his termination date was accelerated from October 2014 to May 2014 but Bolton later retracted his statement. Complaint at ¶ 37; Complainant's Response at 6.

In July 2014, Complainant went on a disability leave of absence for depression, stress and anxiety. Complainant's Response at 6. Throughout his leave, Complainant was asked to attend meetings. *Id.* In December 2014, Respondent hired a psychiatrist to perform a medical examination of Complainant. *Id.* On December 19 and 20, Suzanne Quinn, Nurse Case Manager for Respondent, had an email exchange with Henry Bolton, Claimant's manager, informing him that Complainant's short term disability leave would end on January 2, 2015, with Complainant then working from home for three months, and after which Complainant would return to full duty work on April 2, 2015. *Id.*; Exhibit 2 to Complainant's Response ("EX 2"). Complainant agreed to return to work in January 2015 with an accommodation of working from home. Complaint at ¶ 41.

On January 15, 2015, Complainant emailed Andrew Witty, Respondent's CEO, complaining about Respondent's unstable servers. Complainant's Response at 6. On January 21, 2015, Respondent notified Complainant that due to his complaints, Respondent would conduct an internal investigation and postpone Complainant's January 23, 2015 official notice of separation and instead place him on administrative leave during the pending investigation. *Id.*

On April 8, 2015, Jason Lord, Global Head of the Corporate Investigations Team, sent an email to Complainant notifying him that the internal investigation had been completed and that Complainant would be terminated effective the following month. *Id.* at 7; EX 2. Complainant's employment ended on June 30, 2015. *Id.*³

IV. EVIDENCE

Complainant submitted the following exhibits along with its Response to Respondent's Motion to Dismiss:⁴

Exhibit 1:

Exhibit 1 is an email from Scott M. Pollins, Esq., Complainant's counsel, to Jack Rudzki, an OSHA investigator, dated November 6, 2015. Claimant's counsel summarized the timeline of events in Complainant's SOX complaint and attached several documents. This exhibit lists the attachments but does not include them.

Exhibit 2:

Exhibit 2 is an email from Complainant's counsel to Respondent's counsel dated February 22, 2016, outlining the events in Complainant's SOX complaint as it relates to timeliness. The email includes the following attachments:

- A. *December 19-20, 2014:* Email exchange between Henry Bolton and Suzanne Quinn in which Quinn confirms that Complainant's return to work date from short term disability is January 2, 2015. She wrote that

³ In a letter addressed "to whom it may concern" dated May 1, 2015, Michelle Killian, Vice President of Employee Services for Respondent, wrote that Complainant's employment "was ended on June 30, 2015." *See* EX 2.

⁴ Respondent did not submit any exhibits with its Motion to Dismiss or with its Reply Brief.

Complainant will work from home for three months and his return to full duty work date is April 2, 2015.

- B. *January 21, 2015*: This is a memorandum from Michele Mulkern⁵ to Complainant in which she stated the following: 1) on January 28, 2014, Respondent informed Complainant that he will be part of a reduction in force; 2) on May 9, 2014, Complainant informed his manager, Bolton, that he did not want to be considered for a service analyst position; 3) because of Complainant's short term disability leave beginning in July 8, 2014, Complainant's "official notice of separation" was postponed until his January 2, 2015 return to work date; 4) on January 15, 2015, Complainant raised certain concerns to Respondent which required an internal investigation; and 5) Respondent decided to postpone Complainant's January 23, 2015 official notice of separation and place him on administrative leave during the pending investigation.
- C. *April 8, 2015*: Email exchange between Jason Lord, Global Head of the Corporate Investigations Team, and Complainant. Lord advised Complainant that the Legal/Equality and Inclusion Review was completed, with the finding that Complainant was displaced as a result of the proposed organization changes. Lord informed Complainant that his official date of separation is "April 8, 2014."⁶ Lord also advised Complainant that a separation package will be mailed to his home address on or near the date.
- D. *May 1, 2015*: Michelle Killian, Vice President of Employee Services, UK and US, wrote a letter addressed "to whom it may concern" confirming that Respondent ended Complainant's employment on June 30, 2015.

Exhibit 3:

Exhibit 3 is a March 24, 2016 email from Deborah A. Rzepela on behalf of Respondent's counsel, Sara A. Begley, to Jack Rudzki. In this email, Respondent's counsel explains why Complainant's SOX complaint is untimely.

V. PARTIES' CONTENTIONS

Respondent's Motion to Dismiss

Complainant's complaint is time barred because Complainant received final, unequivocal notice of his termination in March 2014. Motion to Dismiss at 6. In support of its position, Respondent noted that the limitation period begins to run when the employee becomes aware of the employer's decision, citing to *E.E.O.C. v. United States Parcel Serv., Inc.*, 249 F.3d 557,

⁵ The record does not include Ms. Mulkern's job title with Respondent.

⁶ In his February 22, 2016 email, Complainant's counsel explained that Lord acknowledges that the date is a typo and the correct separation date is April 8, 2015.

561-62 (6th Cir. 2001). Respondent maintains that Complainant was aware of its plan to outsource the AS400 team in March 2014. Motion to Dismiss at 7. Respondent also maintains that Complainant chose not to apply for the remaining open position. *Id.* Respondent argued that it has not wavered in its decision to terminate Complainant and Complainant has not alleged that Respondent changed its mind. *Id.*

Respondent stated that there is no evidence to suggest that Complainant would not be terminated. *Id.* at 8. Respondent took actions that merely postponed Complainant's termination; Complainant's disability leave and Respondent's internal investigation did not alter Respondent's decision to terminate Complainant. *Id.* Respondent argued that the standard for determining the employee's awareness of the employer's decision is an objective one and there is no objective evidence to support a finding that Complainant would not be terminated.⁷ *Id.* Respondent stated that the fact that Respondent allowed Complainant to remain employed during its investigation into Complainant's complaints has no bearing on the finality of the termination decision. *Id.* at 10. Respondent also argued that equitable tolling does not apply. Finally, Respondent contends that Complainant has not presented any evidence that it "lulled" Complainant into foregoing filing of a SOX complaint. *Id.*

Complainant's Response

Complainant summarized case law on timeliness, noting that the ARB has recognized at least four situations in which equitable tolling applies. Complainant contends Respondent changed Complainant's termination date numerous times. *See* Complainant's Response at 5. Complainant maintains that Michael Woods, Respondent's Global Compliance Officer, led him to believe that his employment would be protected pending the outcome of his investigation. *Id.* According to Complainant, Respondent's actions reveal that its March 2014 notice of termination was not final and unequivocal.

First, Respondent hired a psychiatrist to evaluate Complainant in December 2014, after Respondent notified Complainant that he would be outsourced. *Id.* Second, Respondent permitted Complainant to return to work from disability leave in January 2015, nine months after his termination date. *Id.* Third, Respondent continued to employ Complainant during its internal investigation. *Id.* Complainant asserted that because Respondent "had just informed [Complainant] that his notice of separation was again being postponed, [Complainant] could have reasonably interpreted this to mean that he would remain employed." *Id.* at 7.

Complainant argued that Respondent changed Complainant's termination date several times and "kept him employed long enough to use his knowledge and information against him in debunking his serious complaints and in a manner that reasonably led [him] to believe that he would not be terminated." *Id.* Complainant concluded that either his complaint is timely or

⁷ Respondent cited to an ALJ decision, *Sneed v. Radio One*, 2007-SOX-018 (ALJ Apr. 16, 2017), in which Judge Rosenow found that the standard for determining whether a termination notice is final and unequivocal is "an objective one, based not on what the complainant subjectively thought, but rather what a reasonable person in her position would have understood." The Administrative Review Board ("ARB" or "Board") affirmed the ALJ's holding but did not specifically discuss the objective standard. The ARB used the language of "reasonably prudent person" to determine whether the termination notice in the case was final. *Sneed v. Radio One*, ARB No. 07-072, ALJ No. 2007-SOX-018 (ARB Aug. 28, 2008).

equitable tolling should apply due to Respondent's conduct in lulling him into forego his SOX filing through the spring of 2015. *Id.* at 7-8.

Respondent's Reply Brief

In its Reply Brief, Respondent asserted that Complainant's complaint, as well as Complainant's response, confirms that Respondent notified Complainant of its decision to terminate Complainant's employment in March of 2014. *See* Reply Brief at 2. Respondent also asserted that Complainant has erroneously invoked the equitable tolling doctrine. *Id.* Respondent emphasized that Complainant has presented no evidence that: 1) Respondent actively mislead Complainant about its decision to terminate; 2) there were "extraordinary" circumstances preventing Complainant from filing his claim; 3) Complainant filed his claim in the wrong forum; or 4) Respondent engaged in any act or omission that Complainant relied on to forego pursuit of a claim. *Id.* at 3. In response to Complainant's position, Respondent presented the following arguments:

First, Respondent argued that "not once in his Complaint (or in the Opposition) does [Complainant] allege being told or believing he would *not* be terminated." *Id.* In fact, Complainant acknowledged in his complaint that Respondent told him that his termination will be postponed. *Id.* Second, Respondent argued that Complainant's subjective belief that he would not be terminated does not change the nature of the termination notice. *Id.* Respondent again cited to *Sneed v. Radio One Inc.*, 2007-SOX-18 (ALJ Apr. 16, 2007) which states that the standard for determining the finality of a notice is "an objective one, based not on what the complainant subjectively thought, but rather what a reasonable person in her position would have understood."

Third, Complainant's timeline of events as listed in his Response does not support his tolling argument. Complainant prefaced his own timeline of events by stating that these events show "[Respondent's] repeatedly changing termination dates." Respondent argued that the moving termination date does not change the ultimate analysis because what matters is the date the Complainant was notified of his termination. Respondent further argued that Complainant did not subjectively believe that he would not be terminated. Respondent maintains Complainant first raised the argument that his employment would be protected pending the outcome of the investigation in his Response to the Motion to Dismiss. Respondent cited to case law which states that a court is "limited on a motion to dismiss to facts contained and alleged in the complaint and may not consider facts raised for the first time by parties in a legal brief." *Onuffer v. Walker*, 2014 U.S. Dist. LEXIS 95665 (E.D. PA. Mar. 6, 2016).

Respondent maintained that it placed Complainant on administrative leave so that Complainant would remain available during normal working hours to provide information to Respondent for its internal investigation. *Id.* at 5. Respondent argued that there is no evidence it represented to Complainant that the outcome of the investigation would impact the decision to terminate Complainant. *Id.*

VI. PRINCIPLES OF LAW

A. Timeliness

An OSHA complaint alleging unlawful retaliation under SOX must be filed “within 180 days after an alleged violation of the Act occurs or after the date on which the employee became aware of the alleged violation of the Act.” 29 CFR 1980.103(d). The United States Supreme Court has held that the limitations period does not begin to run on a claim for employment discrimination until an employer makes and communicates a final decision to the employee. *See Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980). Once the employee is aware or reasonably should be aware of the employer's decision, the limitations period commences. *Id.*

The statute of limitations in whistleblower cases runs 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-055, slip op. at 6 (ARB Apr. 30, 2009); *Overall v. Tenn. Valley Auth.*, ARB Nos. 98-111, -128; ALJ No. 1997- ERA-053, slip op. at 40-41 (ARB Apr. 30, 2001), *citing Chardon v. Fernandez*, 454 U.S. 6 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful), and *Ricks*, 449 U.S. 250 (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated). “The date that an employer communicates a decision to implement such a decision, rather than the date the consequences of the decision are felt, marks the occurrence of a violation.” *Overall*, ARB Nos. 98-111, -128, slip op. at 40. Thus, the violation occurs when the employer communicates to the employee its intent to implement an adverse employment decision, rather than the date the employee experiences the consequences. *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054 (Aug. 31, 2005) (*citing Overall v. Tennessee Valley Auth.*, 97-ERA-53 (ARB) (Apr. 30, 2001); *Fernandez*, 454 U.S. at 8; *Ricks*, 449 U.S. at 258).

“Final” and “definitive” notice is a “communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change.” *Snyder*, ARB No. 09-008, slip op. at 6; *see also Halpern*, ARB No. 04-120, slip op. at 3. “Unequivocal” notice is a “communication that is not ambiguous, i.e., free of misleading possibilities.” *Ibid.*; *see also Halpern*, ARB No. 04-120, slip op. 3, cf. *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1141 (6th Cir. 1994) (three letters warning of further discipline did not constitute final notice of employer’s intent to discharge complainant). “Complaints that employment termination resulted from discrimination can present widely varying circumstances” and “the application of the[se] general principles . . . necessarily must be made on a case-by-case basis.” *Ricks*, 449 U.S. at 258 n.9.

Discussions regarding future employment status change an unequivocal notice to an equivocal one. *Avlon v. American Express Company*, ARB No. 09-089, ALJ No. 2008-SOX-051 (May 31, 2011). In *Avlon*, the possibility of returning to the company in an equivalent position remained an option for the Complainant, therefore, the Board found that the employer’s termination notice was not a final adverse action. *Id.*

In *Rollins v. American Airlines, Inc.*, ARB No. 04 140, ALJ No. 2004-AIR-00009 (ARB Apr. 3, 2007), a whistleblower complaint arising under both AIR21 and SOX, the respondent issued to the complainant a "Career Decision Day Advisory Letter" providing three choices: (1) commit to comply with the respondent's rules and regulations (including satisfactory work performance and personal conduct) and accept reassignment, (2) voluntarily resign with transitional benefits and agree not to file a grievance, or (3) accept termination with grievance options. Five days later, the complainant in *Rollins* informed the respondent that he would not agree to any of the options, and on that same day the complainant was provided a letter of termination. The whistleblower complaint would be timely if measured from the date of the termination letter, but untimely if measured from the date of the advisory letter. The ARB found that advisory letter provided final and unequivocal notice to the complainant that the respondent had decided to terminate his employment. The ARB observed that under *English v. Whitfield*, 858 F.2d 957, 962 (4th Cir. 1988), *rev'd on other grounds*, 496 U.S. 72 (1990) and *Wagerle v. The Hosp. of the Univ. of Pa.*, 1993 ERA 1, slip op. at 3 6 (Sec'y Mar. 17, 1995), the possibility that the complainant could have avoided the effects of the advisory letter by resigning voluntarily or accepting employment in another division did not negate the effect of the advisory letter's notification of intent to terminate the Complainant's employment. Thus, the complaint was untimely.

The ARB has recognized four principal situations in which equitable modification may apply: (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 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 foregoing prompt attempts to vindicate his or her rights. *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).

In his response, Complainant cited to *Snyder v. Wyeth Pharms.*, ARB No. 09-008, ALJ No. 2008-SOX-055 (ARB Apr. 30, 2009) as another example of a situation where the Board applies equitable tolling.⁸ In *Snyder*, the Complainant, Snyder, was suspended with pay pending the Employer's investigation of potential misconduct. *Snyder*, ARB No. 09-008, slip op. at 2. While suspended, Snyder sent an email to the Employer alleging retaliatory actions by the Employer. *Id.* In response, the Employer sent a letter informing Snyder that the company is investigating his allegations. *Id.* at 2-3. The letter stated that prior to Snyder's allegations, it has made the decision to terminate his employment due to his violation of company protocol. *Id.* at 3. The Employer offered Snyder the opportunity to submit evidence that addresses his misconduct and to provide specific information explaining why he thinks his termination is not justified. *Id.* The letter stated that if Snyder does not respond, then the company will assume that he has no information and it will proceed with his termination. *Id.* After conducting an investigation, the Employer concluded that Snyder's termination is appropriate and sent Snyder a termination notice. *Id.* at 4.

⁸ However, Complainant mischaracterized the holding in this case; the Board did not toll the statute of limitations but rather found that the employer's notice was not final and definitive.

The ALJ found that the Employer's initial letter informing Snyder of the investigation constituted a final, definitive, and unequivocal notice of his termination. *Id.* at 14. The Board reversed, finding that the Employer's initial letter was not final because Snyder had the opportunity to provide information to convince the Employer to not move forward with the decision to terminate. *Id.* at 15-16. The Board made a distinction between the Employer's offer in Snyder and formal grievance procedures that may change an employer's decision:

The opportunity [the Employer] offered Snyder to provide information that might change the termination decision was not in the nature of a formal procedure, similar to a grievance procedure that is collateral to the termination decision. Grievance procedures and other types of collateral procedures by definition are not invoked until the employer has made a final decision and do not in any way suggest that the employer's decision is ambivalent or equivocal. As the Court stated, these types of procedures are remedies for past decisions not an opportunity to influence the decision before the employer decides to move forward with it.

Id. at 15.

In *Pearson v. Macon-Bibb County Hosp. Auth.*, 952 F.2d 1274, 1279-80 (1992), the employer gave the complainant the option to resign, transfer, or be terminated. After the complainant unsuccessfully attempted to find work elsewhere or to transfer to another department and she took an extended leave, the employer terminated her employment three months after it had originally offered her the three options. The complainant argued that the limitations period began to run when her employment was terminated, not when she was offered the three options. The court held that although the complainant's termination was not inevitable, "the distinctive fact that she was offered an opportunity to seek a transfer is relevant only to the availability of equitable modification of the deadline, and not the determination of when the alleged underlying discriminatory act occurred."

B. Motion to Dismiss - Standard of Review

Under the governing procedural regulation, "[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." 29 C.F.R. § 18.70(c).

The Board has emphasized that "... SOX claims are rarely suited for Rule 12 dismissals," noting that "Rule 12 motions challenging the sufficiency of the pleadings are highly disfavored by the SOX regulations and highly impractical under the Office of Administrative Law Judge (OALJ) rules." *Sylvester v. Parexel Int'l LLC*, ALJ Nos. 2007-SOX-39, 42, slip op. at 13 (ARB May 25, 2011). The Board has held that because "federal litigation materially differs from administrative whistleblower litigation within the Department of Labor . . . a different legal standard for stating a claim" is required in cases pending before the agency. *Evans v. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 6 (ARB July 31, 2012), citing *Sylvester v. Parexel Int'l*, ARB No. 07-123, slip op. at 12-13 (ARB May 25, 2011). Thus, the heightened

pleading standard established in federal courts does not apply to SOX claims initiated with OSHA. *Sylvester*, ARB No. 07-123, slip op. at 12.

To survive a motion to dismiss in an administrative proceeding, a complaint is reviewed to determine whether it provides “fair notice of [Complainant’s] claim.” *Johnson v. The Wellpoint Companies, Inc.*, ARB No. 11-035, ALJ No. 2010-SOX-038, slip op. at 6 (ARB Feb. 25, 2013) citing *Evans*, ARB No. 08-059. A complainant’s claim provides fair notice by encompassing: “(1) some facts about the protected activity and alleging that the facts relate to the laws and regulations of one of the statutes under the ALJ’s jurisdiction, (2) some facts about the adverse action, (3) an assertion of causation, and (4) a description of the relief that is sought.” *Evans*, ARB Case No. 08-059 at p. 11.

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”⁹ *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim will have “facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This standard demands “more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

In considering a motion to dismiss, a court must accept as true all well-pleaded facts alleged in the complaint and must draw all reasonable inferences in the plaintiff’s favor. See *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3rd Cir. 2008) (a court must “accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine, whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.”). A complaint need not make “detailed factual allegations,” but it must contain more than mere “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). “The tenet that a court must accept a complaint’s allegations as true is inapplicable to threadbare recitals of a cause of action’s elements [which are] supported by mere recital of conclusory statements. ... While legal conclusions can provide the complainant’s framework, they must be supported by factual allegations.” *Iqbal*, 129 S.Ct. at 1940.

⁹ The Rules of Practice and Procedure for Administrative Hearings before the OALJ, 20 C.F.R. Part 18, did not originally contain a specific provision for motions to dismiss. *Neuer v. Bessellieu*, ARB No. 07-036, ALJ Case No. 2006-SOX-132 (ARB Aug. 31, 2009) (“The rules governing hearings in whistleblower cases contain no specific provisions for dismissing complaints for failure to state a claim upon which relief may be granted. It is therefore appropriate to apply Fed. R. Civ. P. 12(b)(6), the Federal Rule of Civil Procedure governing motions to dismiss for failure to state such claims.”); see also *Sylvester v. Parexel Int’l LLC*, ALJ Nos. 2007-SOX-39, 42, slip op. at 13 (ARB May 25, 2011). Accordingly, some Administrative Law Judges treated a motion to dismiss based on timeliness as a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. *Kelly v. State of Ala. Pub. Serv. Comm’n*, ALJ No. 2014-SOX-00030 (Jul. 7, 2014). The Board has held that Rule 12(b)(6) addresses a challenge to the statute of limitations. *Evans*, ARB Case No. 08-059, slip op. at 10.

VII. CONCLUSIONS OF LAW

A. Respondent has established that Complainant received final, definitive, and unequivocal notice of his termination more than 180 days before Complainant filed his SOX complaint

The record establishes that Complainant received final, definitive, and unequivocal notice of his termination in March 2014. The parties agree that Respondent notified Complainant in March 2014 his position would be outsourced and he would be terminated effective October 2014.¹⁰ See Complaint at ¶ 33; Motion to Dismiss at 6-7. Respondent asserts it has not wavered in its decision to terminate Complainant. Motion to Dismiss at 7. The evidence supports Respondent's assertion that its decision to terminate Complainant was not subject to change: Complainant has not pled any facts showing that Respondent was equivocal in its decision to terminate Complainant. Instead, Complainant's outline of events shows that Respondent merely postponed Complainant's termination date.

The record contains Respondent's January 21, 2015 letter to Complainant explaining that Complainant's official notice of separation will be postponed during the pending investigation and Complainant will be placed on Administrative Leave. EX 2. This letter shows that Respondent never reconsidered its decision to terminate Complainant. The letter states that on January 28, 2014, Complainant was informed that he will be part of a reduction in force. *Id.* On May 9, 2014, Complainant notified Henry Bolton, that he did not want to be considered for the Service Analyst position. The letter further states that Complainant's "official notification" of separation was postponed due to his short term disability leave from July 8, 2014 to January 2, 2015. On January 15, 2015, Complainant raised his concerns regarding Respondent's servers and, in response, Respondent decided to conduct an internal investigation. As a result, the January 21, 2015 letter to Complainant states that "we are going to postpone your January 23, 2015 official notice of separation from GlaxoSmithKline and place you on paid administrative leave during the pending investigation."

In the January 21, 2015 letter, Michele Mulkern used the word "postpone" to describe what happened to Complainant's official separation when Complainant went on disability leave and when Respondent decided to conduct an internal investigation. The letter's use of the word "postpone" in regard to Complainant's official separation demonstrates that Respondent made it clear to Complainant that he will ultimately be terminated. Thus, the January 21, 2015 letter is very explicit in informing Complainant that his termination has been "postponed." Nothing in the letter suggests that Respondent may change its decision to terminate Complainant. There is no other evidence in the record of communications between Respondent and Complainant regarding Complainant's termination. The documentary evidence supports Respondent's argument that its termination notice was final.

¹⁰ Although both parties agreed that Respondent notified Complainant of his termination in March 2014, Respondent's January 21, 2015 letter placing Complainant on administrative leave notes that Complainant turned down the support role position in May 2014, which is contrary to the date in Complainant's complaint. See EX 2

In support of his argument that Respondent's termination notice was not final, Complainant has cited Respondent's actions after March 2014. Specifically, Complainant has noted that Respondent: 1) hired a psychiatrist to perform an evaluation of him; 2) permitted him to return from disability leave nine months after his termination date; and 3) continued to employ him during its internal investigation. *See* Complainant's Response at 5-7. Based on these facts, Complainant argued that he believed he would remain employed. However, an employee's subjective belief is not sufficient to establish that an employer's termination notice was not final and unequivocal. The Board has agreed with the ALJ's finding that a Complainant's belief of his or her termination must be analyzed under an objective standard. *See Sneed v. Radio One, Inc.*, ARB No. 07-072, ALJ No. 2007-SOX-018, slip. op at 9 (Aug. 28, 2008). Complainant's facts, at most, support a finding that Respondent planned on delaying Complainant's termination for an unspecified duration.

Complainant's chronology does not show that Respondent reconsidered its decision to terminate Complainant. Respondent postponed Complainant's separation due to Complainant's disability leave and the internal investigation. In its reply, Respondent explained that Complainant was not terminated during the internal investigation because Complainant needed to be available to meet and provide information to Respondent regarding his complaints under that investigation. *See* Reply Brief at 5.

This case is distinguishable from *Snyder*. In *Snyder*, the employer gave the complainant an opportunity to provide information to the employer in order to determine if the termination decision was justified. Thus, in *Snyder*, the complainant had the opportunity to influence the employer's termination decision. In this case, Complainant has not alleged that he could have influenced Respondent's termination decision. Nor is there any evidence that Complainant could have changed Respondent's decision. Respondent's termination notice in March 2014 did not require a definitive termination date in order to be deemed unequivocal. *See Pearson*, 952 F.2d 1274, 1279-80. The fact that Respondent delayed the termination date does not change an unequivocal termination notice into an equivocal one.

Looking at the totality of Respondent's communications with Complainant, a reasonably prudent person in Complainant's position would have understood that he was being terminated. *See Sneed*, ARB No. 07-072 (holding that Complainant did not raise an issue of material fact regarding her termination because a "reasonably prudent person" would have understood that her Employer was taking a final adverse action). Complainant does not dispute that, in March 2014, Respondent informed him he would be terminated as of October 2014. Complainant does not dispute that he was not terminated on this date or that he went on disability leave and he was then placed on administrative leave due to an investigation. Respondent's January 21, 2015 letter to Complainant expressly states that Complainant's termination had been postponed. Based on these facts, a reasonably prudent person would have understood that Respondent was in fact postponing Complainant's termination date.

Complainant did not plead facts sufficient to survive a motion to dismiss. In order to survive a motion to dismiss in federal court, the complainant must present a "facially plausible" complaint. This standard requires more than a "sheer possibility" of the allegations. Complainant did not plead any facts to demonstrate that he was led to believe that he would not

be terminated. In fact, Complainant submitted exhibits demonstrating that his termination would be postponed. Although a changing termination date may lead one to believe that his or her job is secure, Complainant's evidence and facts show that Respondent explicitly told Complainant that his termination is postponed.

Complainant also alleged that he was led "to believe that his employment would be protected pending the outcome of his investigation." Complainant's Response at 5. However, Complainant did not plead any facts to support this allegation.

While the Board has announced a more lenient standard to survive a motion to dismiss in an administrative hearing, a complaint must still provide fair notice of the claim in order to survive a motion to dismiss. Fair notice requires pleading some facts about the protected activity and the adverse action. Although the ARB's standard only addresses motions to dismiss for failure to state a claim, it suggests that the complaint must have at least basic facts supporting the claim and an assertion of causation. Complainant's facts do not support his assertion that he was led to believe that his job would be protected. The pleaded facts support a finding that Complainant was told of his termination in March 2014 and his termination was subsequently postponed for several months.

B. Complainant is not entitled to equitable modification of the statute of limitations

If the OSHA complaint is deemed untimely, Complainant has argued that equitable modification should apply to his claim because Respondent lulled him into foregoing his SOX filing until spring 2015. See Complainant's Response at 7-8. As a matter of law, the complainant bears the burden of justifying the application of equitable modification principles.¹¹ See *Hyman v. KD Resources, et al.*, ARB No. 09-076, ALJ No. 2009-SOX-020 (ARB Mar. 31, 2010) (citing *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995)). As summarized above, equitable modification applies when: (1) the defendant has actively misled the plaintiff regarding the cause of action; (2) the plaintiff has in some extraordinary way been prevented from filing his action; (3) the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his or her rights. *Turin*, ARB No. 11-062, ALJ No. 2010-SOX-018, slip op. at 8.

The Board has held that under the fourth test, "it is immaterial whether the defendant engaged in intentional misconduct." *Hyman*, ARB No. 09-076, ALJ No. 2009-SOX-020. In *Hyman*, the employee asserted that he did not timely file his complaint because he relied on the employer's promises to pay him a substantial severance to compensate him for his retaliatory discharge and to correct the issues that he brought to their attention. *Id.* The Board found that equitable estoppel applies because the evidentiary documents show that the employer led Hyman

¹¹ Equitable modification consists of equitable tolling and equitable estoppel; two distinct principles in equity. *Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020 (ARB Mar. 31, 2010). "Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights." *Hyman*, ARB No. 09-076, slip op. at 6, quoting *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir. 1991). See also *Felty v. Graves-Humphreys*, 785 F.2d 516, 519 (4th Cir. 1986).

to reasonably believe that he would be returned to his former employment or an alternative contract job, he would be financially compensated, and the employer will resolve the SOX compliance issues. *Id.*

In *Bonham*, the Third Circuit held that equitable estoppel tolled the statute of limitations because the plaintiff made a post-termination effort to secure alternative employment with the employer and the employer was sending him positive signals.¹² *Bonham v. Dresser Indus.*, 569 F.2d 187, 193 (3d Cir. 1978). In a Fifth Circuit case, the court concluded that equitable estoppel applies where the employee, in reliance upon repeated assurances by his employer of its intention to reinstate him to his former position, failed to file an age discrimination claim within the prescribed time period. *Accord Coke v. General Adjustment Bureau*, 640 F.2d 584, 589 (5th Cir. 1981) (en banc).

In this matter, Complainant has not alleged that Respondent actively misled him regarding this claim, that he has in some extraordinary way been prevented from filing his action, or that he has raised this precise statutory claim in the wrong forum. Complainant has asserted that Respondent's acts or omissions have lulled him into foregoing prompt attempts to vindicate his rights. However, Complainant did not specify what acts or omissions lulled him into foregoing his rights. Complainant's Reply Brief suggests that Respondent's postponement of Complainant's termination induced Complainant to not file his SOX complaint until spring 2015. While Complainant's Reply Brief outlines the postponement of Complainant's termination date, Complainant cited no evidence to support finding Respondent's delay of his termination date lulled him into delaying his SOX filing.

Complainant's equitable tolling argument is unpersuasive for the reasons mentioned above. As discussed, a reasonably prudent person in Complainant situation would not have believed that his postponed termination date suggested that Respondent was reconsidering his termination. Since March 2014, Complainant was, or should have been aware, that he would be ultimately terminated from his employment with Respondent. Complainant has not described what actions Respondent took, other than postponing his termination date, that would have served to lull him into foregoing filing his SOX complaint.

Complainant's case is distinguishable from other equitable estoppel cases. In *Hyman*, *Bonhman*, and *Coke*, the employer led the employee to believe that he would be reinstated or placed in another position with the company. Unlike in *Hyman*, there is no documentary evidence in this case to suggest that Complainant would be reinstated or placed in another job. Instead, the documentary evidence demonstrates that Respondent explicitly informed Complainant that his termination is being postponed. In contrast to the facts in *Bonham* and *Coke*, Respondent did not give any reassurances or positive signals that Complainant could remain with the company.

¹² The Third Circuit also held that "a terminated employee who is still working should not be required to consult a lawyer or file charges of discrimination against his employer as long as he is still working, even though he has been told of the employer's present intention to terminate him in the future." *Bonham*, 569 F.2d 192. The Supreme Court overturned this principle in *Ricks*, holding that the date of the discriminatory decision commences the running of the statute of limitations. *Ricks*, 449 U.S. 259.

Complainant has not argued that there have been discussions regarding his future with the company after he was informed that he will be terminated. Nor did Complainant argue that Respondent's agents reassured him that he will remain employed.¹³

Complainant bears the burden of establishing the application of equitable modification. Complainant failed to establish that equitable estoppel applies to his case. Complainant did not present evidence to show that Respondent's actions after March 2014 lulled him into delaying the filing of his SOX complaint.

VIII. CONCLUSION

Respondent has established that Complainant's complaint was untimely. Respondent notified Complainant of its decision to terminate Complainant in March 2014. Respondent's termination notice was final, definitive and unequivocal. Complainant did not file his OSHA complaint until July 2015, more than 180 days after the final adverse action. Furthermore, equitable modification does not apply to toll the statute of limitations because there is no evidence that Complainant was lulled into forgoing filing his SOX complaint until July 2015. Respondent did not assure Complainant that he would remain employed with it nor did Respondent send any positive signals that Complainant could remain with the company. Complainant has not alleged that other equitable modification principles apply to his case, i.e., he has not alleged that Respondent actively misled him, that he has been prevented from filing his claim, or that he filed his claim in the wrong forum. All of the evidence suggests that Complainant's termination date was postponed, rather than reconsidered.

IX. ORDER

Respondent's Motion to Dismiss is **GRANTED**.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

¹³ Complainant's brief includes an assertion that Respondent led Complainant to believe his employment would be protected pending the outcome of an internal investigation of Complainant's concerns about Respondent's servers but cited to no evidence either to support that assertion or to indicate that any promised employment retention during an investigation affected Respondent's termination decision that Complainant received notice of in March 2014. *See* Complainant's Response at 5.

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).