



Issue Date: 26 May 2017

CASE No.: 2017-SOX-00025

In the Matter of

ZUBAIR SHAIKH

Complainant

v.

NATIONAL BANK OF PAKISTAN

Respondent

ORDER GRANTING MOTION FOR SUMMARY DECISION

This proceeding arises from a complaint filed under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (“SOX”), as amended, 18 U.S.C. § 1514A, and the implementing regulations at 29 C.F.R. Part 1980. SOX prohibits certain covered employers from, *et al.*, discharging or otherwise discriminating against employees who provide information to a covered employer, a federal agency, or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), 1348 (security fraud), any rule or regulation of the Securities and Exchange Commission (“SEC”), or any provision of federal law relating to fraud against shareholders. Complainant alleges that Respondent engaged in retaliatory employment practices prohibited under SOX.

On April 21, 2017, Respondent filed a Motion for Summary Decision. It argues that summary decision is warranted on two grounds: (1) Complainant’s complaint is untimely, and (2) the Respondent is not a covered entity under SOX. Complainant, who appears *pro se*, submitted a response on May 8, 2017. For the reasons that follow, this tribunal grants Respondent’s Motion for Summary Decision.

I. Procedural History

According to the documents Complainant has submitted to this tribunal, he began working for Respondent in October of 2006. Beginning on March 25, 2016, Complainant worked in the Payment and Receipts (“P&R”) department of Respondent’s New York branch, where he also handled compliance inquiries. He noticed various issues and deficiencies within the P&R department. On March 25, 2016, Complainant discovered what he believed was an illegal transaction, and brought it to the attention of two P&R department supervisors. When neither of these supervisors took any action, Complainant reported the suspicious transaction to

the bank branch's New York compliance department. He understood this reporting to be his duty.

Respondent issued a memo to Complainant on April 21, 2016, which stated that his sharing of the transaction details to the compliance department was a "violation of privacy and confidentiality." The next day, he met with his supervisor to resolve the matter. Complainant's supervisor asked him to apologize in writing and give assurances that he would not share information with other departments—including the compliance department—in the future. Complainant refused, believing such a promise to be in violation of U.S. laws and Respondent's own policies and procedures. Complainant's supervisor continued to pressure him, and Complainant again refused to comply on April 29, 2016.

On the next working day—May 2, 2016—Complainant sent an email to the Office of Foreign Assets Control of the U.S. Department of the Treasury, reporting the allegedly illegal transaction. That same day, Respondent issued a termination letter to Complainant. It stated that Complainant's position had become redundant due to company reorganization.¹ The termination letter ended Complainant's employment with Respondent at the close of the May 2, 2016 business day. Complainant subsequently met with examiners from the Federal Reserve and New York State Banking Department on May 6 and 9, 2016. He reported details concerning the incident and provided documents to the examiners.

On November 3, 2016, Complainant filed a whistleblower retaliation complaint against Respondent with the Occupational Safety and Health Administration ("OSHA"). His complaint lists a number of Respondent's alleged retaliatory actions, with termination occurring on May 2, 2016. Complainant stated that he first learned that the adverse actions would be taken against him on April 21, 2016. He averred that he was discriminated against and ultimately fired by Respondent for reporting illegal transactions to a compliance officer.

OSHA completed its investigation on February 1, 2017, and informed Complainant that they had dismissed his complaint. Specifically, OSHA found: (1) the complaint was untimely, as Complainant filed it outside of the 180-day statutory filing period, and (2) Respondent is not covered by SOX because it "neither has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. §78I) nor is it required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §78o(d))." By letter dated February 28, 2017, Claimant appealed OSHA's finding to the Office of Administrative Law Judges.

II. Standard for Summary Decision

In cases before this tribunal, the standard for summary decision is analogous to that developed under Rule 56 of the Federal Rules of Civil Procedure. Frederickson v. The Home Depot U.S.A., Inc., ARB No. 07-100, slip op. at 5 (ARB May 27, 2010). A motion for summary decision shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." 29 C.F.R. § 18.72(a). A dispute is genuine if sufficient evidence exists on each side so that a rational trier of fact could resolve

¹ Complainant alleges that this explanation was pretextual; that he was truly fired for his whistleblowing.

the issue either way. Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

The party moving for summary decision carries the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Because the burden is on the moving party, the evidence presented is construed in favor of the party opposing the motion, who is given the benefit of all favorable evidentiary inferences. Id. However, if a proponent of a motion for summary decision properly supports its factual propositions, the opposing party may not rest upon the mere allegations or denials of its pleading. Its response must cite to materials in the record showing that there is a genuine issue of material fact. 29 C.F.R. § 18.72(c); Webb v. Carolina Power & Light Co., No. 1993-ERA-042, slip op. at 4–6 (Sec’y July 14, 1995).

III. Discussion

In its Motion, Respondent alleges two independent grounds for summary decision: (1) Complainant’s complaint is untimely, and (2) the Respondent is not a covered entity under SOX. In his response, Complainant notes that he visited the office of the Equal Employment Opportunity Commission (“EEOC”) within fifteen days of his termination.² He printed his name, signed the visitor sheet, and later discussed his case with an EEOC representative. According to Complainant, the EEOC representative told him that he couldn’t do anything for Complainant, and advised him to file a complaint in the “Civil Court/Supreme Court of New York” for justice. Complainant also cites an article from the website of the National Whistleblower Center for the proposition that SOX whistleblower protection does not apply only to publicly traded companies.

After carefully reviewing the record—and mindful of the fact that Complainant is proceeding pro se—the undersigned finds that both grounds raised in Respondent’s Motion are sufficient to grant Summary Decision.

A. Complainant untimely filed his complaint with OSHA

First, Respondent correctly notes that Complainant untimely filed his complaint with OSHA outside of to the 180-day statute of limitations period applicable to whistleblower claims under 18 U.S.C. § 1514A(b)(2)(D). That Section provides that a whistleblower action “shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.” In his OSHA complaint, Complainant alleged that he became aware that Respondent would take adverse actions against him on April 21, 2016, and that his termination occurred on May 2, 2016. He subsequently filed his claim with OSHA on November 3, 2016. Even assuming that Complainant did not become aware of

² Complainant seemed to misapprehend the Respondent’s statute of limitations argument. He primarily discussed the timing of his appeal of OSHA’s dismissal of his complaint to the Office of Administrative Law Judges, rather than the timing of his initial filing with OSHA in relation to his termination.

Respondent's adverse action until the day of his termination on May 2, 2016, the statute of limitations expired on October 29, 2016. Thus, Complainant untimely filed his complaint on November 3, 2016—five days after the statute of limitations had run.

However, the Board holds that the statute of limitations imposed by 18 U.S.C. § 1514A(b)(2)(D) is not an absolute jurisdictional bar to a whistleblower's claim. In certain circumstances, the filing deadline is subject to equitable modification; *i.e.*, tolling or estoppel. Hyman v. KD Resources, ARB No. 09-076, ALJ No. 2009-SOX-20, slip op. at 5–6 (ARB Mar. 31, 2010). “Equitable tolling and equitable estoppel are different and distinct concepts in equity.” Id. at 6. “Equitable tolling arises where the employee ‘could not by the exercise of reasonable diligence have discovered essential information bearing on his claim.’” Id. (quoting Cada v. Baxter Healthcare Corp., 920 F.2d 446, 452 (7th Cir. 1990)). Equitable estoppel is available where: (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, (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum, or (4) where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights. Hyman, ARB No. 09-076, slip op. at 6–7.

Neither equitable tolling nor equitable estoppel apply here. Respondent informed Complainant of his termination on the same day that termination was executed: May 2, 2016. Thus, Complainant was contemporaneously aware of Respondent's adverse employment action, and therefore lacked no “essential information bearing on his claim” that could have triggered equitable tolling.

Similarly, Complainant cannot demonstrate the applicability of any of the four examples of equitable estoppel recognized by the ARB in Hyman. Besides asserting that Respondent used a pretextual reason for firing him, Complainant does not provide any indication that Respondent “actively misled” him respecting his cause of action. Complainant does not indicate that he has “in some extraordinary way been prevented from asserting his rights,” nor does any such evidence appear in the materials submitted to this tribunal. While Complainant alleges that he attempted to file a complaint with the EEOC within fifteen days of his termination, it appears that he merely visited the office and talked to an EEOC representative. Such informal action is insufficient to constitute “raising the precise statutory claim” at issue “mistakenly in the wrong forum.” Nor is there any indication that he filed a complaint before any other adjudicatory body, despite the fact that the EEOC representative counseled Complainant to do so in state court. Lastly, Complainant does not assert that any of Respondent's actions have “lulled [him] into foregoing prompt attempts to vindicate his rights.” To the contrary, Complainant's EEOC visit within fifteen days of his termination with the intention of filing a complaint demonstrates that he pursued that avenue of remedy almost immediately.

In sum, Complainant untimely filed his complaint outside of the 180-day statute of limitations, and he cannot salvage his claim from dismissal by recourse to equitable tolling or equitable estoppel.

B. Respondent is not a covered entity under SOX

Even if the time for filing his complaint could be equitably estopped, Complainant is without remedy under SOX. Respondent also alleges that Complainant may not invoke SOX protection because SOX's anti-retaliation provision does not govern the bank. This tribunal agrees.

Section 806 limits its anti-retaliatory proscriptions to a specified set of entities: publicly traded companies and their contractors, subcontractors, or agents. 18 U.S.C. § 1514A(a); Spinner v. David Landau & Associates, LLC, ARB Case Nos. 10-111, 10-115, slip op. at 4 (ARB May 31, 2012). Within those covered employers, SOX's whistleblower protections extend to all employees. Lawson v. FMR LLC, 134 S. Ct. 1158, 1161 (2014). The record unequivocally demonstrates that Complainant was an employee of Respondent. Accordingly, to establish SOX coverage, Complainant must demonstrate that Respondent was a publicly traded company or a contractor, subcontractor, or agent of such company.

In connection with its Motion for Summary Decision, Respondent has submitted the affidavit of Nasir Qureshi, Respondent's Executive Vice President/Country Manager for the Americas. Mr. Qureshi stated that he has been employed by Respondent in New York since June 23, 2008, and has served as the Bank's Executive Vice President/Country Manager for the Americas since January 1, 2012. He attested that Respondent "is not a publicly traded company in the United States, nor is the Bank an officer, employee, contractor, subcontractor, or agent of any publicly traded company in the United States." Mr. Qureshi submitted his affidavit based upon his personal knowledge.³

In response, Complainant does not contest Mr. Qureshi's assertion that Respondent is not a publicly traded company or an "officer, employee, contractor, subcontractor, or agent" of any such company. Instead, Complainant argues that "whistleblower protection under SOX is applicable to every employer nationwide." To support this assertion, he directs this tribunal to an article from the website of the National Whistleblower Center.⁴ The article discusses how SOX amended the federal obstruction of justice statute to criminalize retaliation against whistleblowers by any employer—not just publicly traded companies. See 18 U.S.C. § 1513(e). However, as the article itself makes clear, this portion of SOX expanded only *criminal liability* under the federal obstruction of justice statute; it does not extend the scope of *civil liability* in whistleblower retaliation suits. Since Respondent has credibly demonstrated that it is not a covered employer under §1514A, and Complainant has failed to show any genuine dispute on this point, Respondent is entitled to summary decision as a matter of law.

³ This tribunal finds that Mr. Qureshi's affidavit comports with the requirements of 29 C.F.R. § 18.72(c)(4), showing that his testimony is based on personal knowledge and that he is competent to testify on the matters stated.

⁴ See http://www.whistleblowers.org/index.php?option=com_content&task=view&id=27.

IV. Order

For the reasons detailed above, Respondent's Motion for Summary Decision is GRANTED on the grounds of untimeliness and lack of §1514A coverage.

THERESA C. TIMLIN
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).