

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

Issue Date: 03 April 2018

CASE NO.: 2018-SOX-00010

In the Matter of:

THOMAS RIMINI,
Complainant,

v.

J.P. MORGAN CHASE & COMPANY,
Respondent.

ORDER DISMISSING COMPLAINT

This proceeding arises from a complaint of discrimination filed on December 13, 2017 by Thomas Rimini (“Complainant”), under section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (“section 806”), Title VIII of The Sarbanes-Oxley Act of 2002 (“SOX” or “the Act”), 18 U.S.C. § 1514A and the procedural regulations found at 29 C.F.R. Part 1980. On January 11, 2018, the Regional Administrator for the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”), acting as agent for the Secretary of Labor (“Secretary”), issued an order dismissing the complaint because Complainant failed to file within the 180-day statutory filing period. On January 19, 2018, Complainant objected to the Secretary’s findings, and requested a hearing before an Administrative Law Judge pursuant to 29 C.F.R. § 1980.106.

The Chief Administrative Law Judge transferred the matter to the Boston District Office where it was assigned to me on February 8, 2018. On February 14, 2018, I issued an Order to Show Cause Why Case Should Not Be Dismissed for Failure to File a Timely Complaint (“Order”). On March 5, 2018, Complainant filed his response to the Order (“Response”).

I. BACKGROUND

Complainant worked for J.P. Morgan Chase & Co. (“Respondent” or “JPMC”) between 2003 and 2006. OSHA Findings, 1. During his employment, Complainant alleges he engaged in protected activity by providing a co-worker with documents used in a whistleblower complaint filed with the Securities and Exchange Commission. *Id.* At some point later on, Complainant was terminated from Respondent. *Id.*

In support of his December 13, 2017 claim before me, Complainant alleges he was subject to an adverse action in November 2011, but was not made aware of it until Respondent

“produced an email evidencing retaliation well after the discovery cutoff” in a prior administrative proceeding.¹ *See* Complaint, 1. On January 11, 2018, OSHA determined “[e]ven if Complainant alleged a valid adverse action and is correct this complaint should be equitably tolled, Complainant failed to file his complaint within the 180-day statutory filing period from receiving the email in question.” OSHA Findings, 2.

Complainant argues he received “final, definitive, and unequivocal notice of an adverse employment decision” on October 25, 2016—the day Respondent provided him with a copy of the November 8, 2011 email exchange between two JPMC employees. Response, 4. Complainant alleges the November 8, 2011 email confirms a violation of a “non-disparagement section” of an agreement entered into with Respondent to resolve a previous SOX retaliation claim. *See id.* at 6-8. Complainant purports that Respondent withheld the email until October 2016 and therefore he “could not reasonably contend that the reference process could give rise to any specific adverse actions by Respondent on November 8, 2011, until Respondent produced the late-produced documents.”² *Id.* at 5.

II. DISCUSSION

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

Assuming, *arguendo*, the November 8, 2011 email substantiates an adverse employment action, Complainant did not file his complaint within the applicable 180-day statute of limitations required by SOX.³ Complainant argues the email obtained through discovery in a prior proceeding operates as Respondent’s “final, definitive, and unequivocal notice” of the adverse action. Response, 4. It was not until this discovery that Complainant had “reason to reasonably suspect the specific adverse actions arising from the newly-discovered facts.” *Id.*

¹ Claimant’s previous SOX complaint against Respondent before the Office of Administrative Law Judges was dismissed on January 18, 2017. *Rimini v. J.P. Morgan Chase & Co.*, ALJ No. 2015-SOX-00034 (ALJ Jan. 18, 2017) (Decision and Order Granting Respondent’s Motion for Summary Decision).

² The November 8, 2011 email exchange was between two employees at Respondent about Complainant’s job interview in 2011 with JPMC. OSHA Findings, 1. Complainant alleges a previous “non-disparagement” agreement “obligated [Respondent] to respond to any reference inquiry ‘by identifying only the positions held by Rimini and the dates of Rimini’s employment with JPMC, consistent with JPMC’s current policies regarding such communications.’” Response, 6 (emphasis in original). Complainant argues “he could not have reasonably contended or suspected any specific adverse actions in violation of SOX based on Mr. Duzyk’s statements [in the email] on November 8, 2011. Plaintiff simply did not know them.” *Id.* “The discovery on October 25, 2016 of specific facts in Mr. Duzyk’s email exchange on November 8, 2011 make evident multiple specific adverse actions in violation of SOX.” *Id.*

³ In support of his argument, Complainant cites to 28 U.S.C. § 1658(b)(1), which provides the statute of limitations period for private rights of action involving claims of “fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws” *See* Response, 3-4. However, the applicable statute of limitations period for Complainant’s retaliation claim before me is defined at 18 U.S.C. § 1514A(b)(2)(D).

Even if I were to assume the statute of limitations period did not begin to run until October 25, 2016—the date Complainant purports he first learned of the adverse action—Complainant’s December 13, 2017 complaint is still untimely.⁴ Complainant does not allege he was prevented from filing a complaint with OSHA upon discovery of the email on October 25, 2016.⁵ Nevertheless, Complainant did not file his complaint with OSHA until 414 days after receipt of the email. Complaint, 1. This is far beyond the 180-day statute of limitations.

ORDER

After consideration of the evidence and arguments presented, I find that Mr. Rimini’s complaint was untimely filed and therefore the complaint is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

TIMOTHY J. McGRATH
Administrative Law Judge

Boston, Massachusetts

⁴ In his response, Complainant argues: “[T]he additional claims in his December 15, 2017 statement to OSHA were subsumed as an amendment into the extant OSHA investigation, the dismissal of which has risen to this appeal before the Court.” Response, 3. On March 20, 2018, Complainant filed a Notice to Court (“Notice”), with an “OSHA document” attached as Exhibit A. Complainant argues the document reveals the following:

[O]n September 5, 2016, an attorney for J.P. Morgan Chase & Co . . . in securing dismissal of the on appeal regarding issues taken place in 2016 stated to OSHA that the issues raised in the Complaint were the same as the issues in the previous matter before this court, where the court restricted its scope of review to an 180 day period in 2015.

Notice, 1. Complainant has not presented a cogent explanation as to why his December 13, 2017 OSHA complaint is an amendment to his prior SOX claim. Therefore, I find the complaint pending before me now to be a new and separate claim.

⁵ In Complainant’s January 19, 2018 objections to OSHA’s findings (“Objection”), he asserts: “I have a debilitating medical conditions and this fact is within my complaint to OSHA. But this was somehow overlooked in the record.” Objection, 1. However, in his Response, Complainant does not allege that a medical condition hindered his ability to file his complaint once he learned of the alleged adverse action October 25, 2016. While medical conditions which prevent a complainant from “timely pursuing his or her legal rights” may constitute an “extraordinary circumstance” justifying tolling the statute of limitations, a complainant must offer evidence corroborating his assertion or show how the condition prevented his timely filing. *See Prince v. Westinghouse Savannah River Co.*, ARB No. 10-079, slip op. at 4 (ARB Nov. 17, 2010). As Complainant gave no explanation of the condition and presented no corroborating evidence, this justification is inapplicable.