



**Issue Date: 23 January 2019**

**Case No.: 2018-SOX-00033**

**In the Matter of:**

**HAMID RIZVI**

Complainant

v.

**U.S. NATIONAL BANK ASSOCIATION**

Respondent

**DECISION AND ORDER DISMISSING CLAIM FOR LACK OF TIMELINESS**

**1. Nature of Motion.** This case arises from a complaint filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (the “Act” or “SOX”). Pursuant to 29 C.F.R. § 18.70(c), Respondent filed a Motion to Dismiss on the grounds Complainant did not timely file his complaint with the Occupational Safety and Health Administration (OSHA). In response, Complainant argues he timely filed a complaint with the U.S. Securities and Exchange Commission (SEC) within the regulatory filing deadline and the principles of equitable tolling should be applied to allow the matter to proceed.

**2. Procedural History.**

a. On April 30, 2018, Complainant filed an online Whistleblower Complaint Form with OSHA. OSHA conducted a preliminary investigation of the complaint and sent Complainant correspondence on May 25, 2018, informing him that the Secretary of Labor found no cause to believe Respondent violated the Act. The letter also informed Complainant that he failed to file his complaint within the required 180 days of the alleged adverse action thereby making the complaint untimely. It noted the concept of equitable tolling for the filing had been considered and ultimately denied.

b. On June, 7, 2018, Complainant filed an objection to the OSHA findings with the Department of Labor, Office of Administrative Law Judges (OALJ), and requested a hearing on this matter.

c. On August 22, 2018, the undersigned issued a Notice of Case Assignment and

Prehearing Order. The undersigned subsequently issued an order scheduling this matter for hearing on April 29, 2019 in Kansas City, Missouri.

d. On October 19, 2018, Respondent filed the “Motion to Dismiss Claim for Lack of Timeliness” addressed in this order.<sup>1</sup> Complainant, proceeding pro se in this matter, filed a reply in opposition to Respondent’s motion on October 25, 2018.<sup>2</sup>

e. On November 7, 2018, the undersigned ordered both parties to file additional briefs addressing the specific issue of whether the concept of equitable tolling should apply based on the facts of this case.<sup>3</sup> In compliance with that order, both parties filed additional briefs in support of their positions.<sup>4</sup>

**3. Findings of Facts.** The undersigned considered all the documentary evidence submitted by both parties either in support or opposition of Respondent’s motion. Based on the evidence in this matter, the undersigned makes the following specific findings of fact:<sup>5</sup>

a. On September 7, 2015, Complainant was hired by Respondent as a Business Banking Sales Manager.

b. During the course of his employment, Complainant formed the opinion that Respondent was engaging in some business practices that included “incentive fraud” and other violations of federal laws and regulations. Complainant asserts he shared his concerns with Respondent’s Human Resources department and two individuals who supervised him at different times during his employment. He also maintains that he filed a complaint with Respondent’s Fraud Unit.

c. On September 22, 2017, Complainant resigned from his employment with Respondent. Complainant believes this resignation was “forced” by Respondent and was the culmination of a series of adverse actions that he suffered as a result of his reports of financial violations to Respondent.

d. During October 2017, Complainant consulted with a law firm that originally agreed to represent him but later withdrew. The evidence does not establish how long Complainant received advice from the law firm. However, he was specifically informed by the firm that it withdrew from representing him because it was “not experienced with the regulations and laws governing the banking industry, including Dodd-Frank Act and Sarbanes-Oxley Act.”

e. While employed by Respondent, Complainant received medical treatment in 2015 and 2016 related to the following health conditions: Behcet’s Disease, congenital cataracts, hidradenitis suppurativa, Raynaud’s Disease, cervical spondylosis, and foraminal stenosis.

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<sup>1</sup> Respondent’s motion is marked as Appellate Exhibit (AX) 1.

<sup>2</sup> Complainant’s response to Respondent’s motion is AX 2

<sup>3</sup> The undersigned’s order is AX 3.

<sup>4</sup> Complainant’s brief is AX 4 and Respondent’s brief is AX 5.

<sup>5</sup> All the evidence considered by the undersigned was either provided by the parties as marked or unmarked attachments to the appellate exhibits or contained within the administrative documents in the case file.

f. On November 30, 2017, 69 days after his employment with Respondent ended, Complainant filed a charge of discrimination against Respondent with the Equal Employment Opportunity Commission (EEOC) and the Kansas Human Rights Commission (KHRC).

g. In the charge he filed with EEOC and KHRC, Complainant alleged Respondent committed the following specific forms of discrimination against him: 1) race, 2) religion, 3) color, 4) national origin, 5) disability, and 6) retaliation. He did not identify any conduct that he asserted was protected whistleblower activity, nor did he specifically allege that he suffered adverse employment actions as a consequence of engaging in protected whistleblower activity related to SOX.

h. On February 18, 2018, 149 days after his employment with Respondent ended, Complainant filed a complaint with the SEC by submitting a report form through the Tips, Complaints, and Referrals (TCR) website. In the process of filing his complaint by use of an electronic form, Complainant specifically indicated he was submitting the complaint under the SEC Whistleblower Program.

i. In his TCR report submission to the SEC, Complainant indicated that “the option that best described his complaint” was “[m]anipulation of a security.” The TCR report form directed Complainant to “[i]n your own words, describe the conduct or situation you are complaining about.” In response, Complainant wrote:

U.S. Bancorp has created a false impression regarding their asset quality. – I worked at U.S. Bank from 2015 till (sic) 2018 as a Vice President, Business Banking Market Manager. – Small business loan files include false & manipulated information (qualitative & quantitative). – The purpose of this behavior from top-down, was to approve more loans. – After I made formal complaints to ethics, I was told that I am “over protecting” the bank, and I was forced to resign.

Complainant’s TCR submission contained no additional substantive or detailed description of either the alleged actions by Respondent or any specific relief he sought. In the TCR submission, Complainant answered yes to the questions: “Are you filing this tip under the SEC’s whistleblower program?” and “Does the whistleblower want to be eligible to apply for a whistleblower award?” Additionally, Complainant’s TCR submission made no reference to SOX; it did not assert that Respondent had violated the legal or regulatory requirements of SOX; and, it did not contain any request for whistleblower relief based on retaliatory action by Respondent in violation of the whistleblower protections in SOX. Complainant, however, indicated that he intended to take additional action on his complaint; he specifically stated, “My attorney and I, are preparing a Legal Action in an effort to take U.S. Bank to Trial for forcing me to resign.”

j. In its motion, Respondent noted the SEC uses a government website to provide detailed information regarding the process of reporting alleged securities law violations to the SEC. The

website outlines the whistleblower protections related to such reporting. One section of the SEC website is specifically labeled “Retaliation.” It clearly explains that a person submitting a TCR form to the SEC “may also be able to file a retaliation complaint in federal court under Section 806 of the Sarbanes-Oxley Act of 2002 (“SOX”). You can find information about your rights and protections under SOX on the Department of Labor’s whistleblower website.” (AX-5, p. 5) Anyone filing a TCR form with the SEC through their website is clearly advised that DOL has a distinct remedy and reporting procedure for allegations of SOX violations.

k. On April 30, 2018, 220 days after his employment with Respondent ended, Complainant submitted an OSHA Online Whistleblower Complaint form.

l. In Complainant’s OSHA whistleblower claim form, he selected a number of adverse actions listed on the form. He also attached to his form submission a two-page document titled “OSHA Complaint – Hamid S Rizvi.” The first page of the document identifies Complainant as “an individual with disability” who has a “physical impairment that substantially limits one or more major life activities.” The document notes Respondent “forced me to submit my resignation based on the following pretext.” Complainant then enumerated 10 distinct subparagraphs of alleged professional conduct that he believed Respondent used as the basis for his forced resignation. In each subparagraph he includes his answer to the identified basis for his forced resignation. In the first two subparagraphs, Complainant asserts that he “was making Whistleblower Complaint(s) to protect the bank” and that he “was training my team to submit complete and accurate loan packages.” The remaining seven enumerated subparagraphs address issues of a leadership, discrimination, or personal ethics subjects.

m. The second page of the document titled “OSHA Complaint – Hamid S Rizvi” notes that Complainant “witnessed multiple acts of employees defrauding the bank, customers, employees and shareholders, including but not limited to the following.” Complainant then enumerated six distinct areas of financial misconduct he believes Respondent committed. These include allegations of “unfair acts/practices,” “false incentive referrals,” “pressuring retail branch to sell widgets (sic),” “delaying or preventing loan officers from receiving proper credit training,” “use false information in ACH & Loans credit applications,” and “use creative ways to ignore client’s business problem and sell the deal.”

#### **4. Applicable Law and Analysis.**

a. *Motions to Dismiss.* The proceedings in SOX cases are conducted in accordance with the “Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges,” (the Rules of Practice and Procedure) codified at part 18 of title 29 of the Code of Federal Regulations. 29 C.F.R. § 1980.107(a). Section 18.10(a) of the Rules of Practice and Procedure notes: “If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation. The Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules, or a governing statute, regulation, or executive order.” 29 C.F.R. § 18.10.

Section 18.70 of the Rules of Practice and Procedure covers motions for dispositive action. Subsection (c) specifically directs that: “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). This specific provision in the Rules of Practice and Procedure makes FRCP 9(a) and 12(b)(6) directly inapplicable to Respondent’s motion.

b. *Timelines for Filing Allegations of Violations under SOX.* Title 29 C.F.R. § 1908.103(d) and 18 U.S.C. § 1514A(b)(2)(D) require an employee who has been subjected to retaliation to file a complaint for relief within 180 days of the alleged retaliation. This statute of limitations period begins to run from the time a complainant “knows or reasonably should know that the challenged act has occurred.” *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 692 (11th Cir. 1982); *see also Ross V. Florida Power & Light Co.*, ARB No. 98-044, ALJ No. 1996-ERA-036, slip op. at 4 (ARB Mar. 31, 1999) (statute of limitations begins to run “on the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person with a reasonably prudent regard for his rights.”). The regulations clarify that the alleged violation occurs “when the discriminatory decision has been both made and communicated to the Complainant.” 29 C.F.R. § 1980.103(d)

c. *Equitable Tolling.* In general, “[s]trict adherence to the procedural requirement specified by the legislature is the best guarantee of evenhanded administration of the law.” *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980); *Prybys v. Seminole Tribe of Florida*, 95-CAA-15 (ARB Nov. 27, 1996). However, the filing deadline limitation in SOX is not a jurisdictional defect and can be subject to equitable tolling. *Moldauer v. Canadaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-00026 (ARB Dec. 30, 2005); *Halpern v. XL Capital Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3 (ARB Aug. 31, 2005).

When considering whether application of the equitable tolling doctrine is appropriate in a case, the Administrative Review Board (“the Board”) has routinely held that “[e]quitable tolling is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious claim.” *Brady v. Direct Mail Mgmt. Inc.*, ARB No. 06-044, ALJ No. 2006-SOX-16, slip op. at 5 (ARB Mar. 26, 2008). “Equitable tolling may be applied only in ‘exceptional circumstances.’” *Reid v. The Boeing Co.*, ARB No. 10-110, ALJ No. 2009-SOX-0027 (ARB Mar. 30, 2012); *see also Tardy v. Delta Airlines*, ARB No. 16-077, ALJ No. 2015-AIR-026 (ARB Oct. 5, 2017) (noting that the Supreme Court has held that “[e]quitable tolling is an extraordinary remedy which is typically applied sparingly.”).

Specifically, the concept of equitable tolling has been applied to past cases by the Board in four distinct situations:

- 1) When the respondent has actively misled the complainant regarding the cause of action;
- 2) When the complainant has in some extraordinary way been prevented from filing his action;
- 3) The respondent’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights; and,

4) When the complainant has raised the precise statutory claim in issue, but he has done so in the wrong forum.

*Komatsu v. NTT Data Inc.*, ARB No. 16-069, ALJ No. 2016-SOX-024 (ARB Mar. 13, 2018); *see also Jones v. First Horizon Nat'l Corp.*, ARB No. 09-005, ALJ No. 2008-SOX-60 (ARB Sept. 30, 2010).

A complainant bears the burden of establishing grounds for applying equitable tolling of a statutory time limitation. *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984); *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995); *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-23, (ARB Sept. 29, 2006). Consequently, Complainant must present evidence demonstrating that his failure to timely file an OSHA complaint meets one of the four situations recognized by the Board.

d. *Parties' Positions.* Respondent maintains Complainant failed to timely assert allegations for a claim under the Act by failing to file a claim with OSHA within 180 days after the alleged violation in this case. Respondent also argues that Complainant cannot satisfy any of four qualifying conditions necessary to apply equitable tolling to the filing deadline for this matter.

Complainant presents two main arguments in support of his position that equitable tolling should be applied to the statutorily required filing deadline in this case. First, he argues that a combination of his limited legal knowledge as a pro se party and medical illnesses amount to extraordinary conditions that prevented him from filing his action. Second, he contends the report he filed with the SEC qualifies as raising the precise statutory claim in issue, but doing so in the wrong forum.

e. *Analysis of Applicable Law to Facts in this Matter.*

The facts in this case clearly illustrate that Complainant believes Respondent “forced” him to resign his employment as retaliation for his reports of ethical misconduct by Respondent’s managers that he believed violated federal law and regulation. As such, for the purposes of determining the filing time limitation under SOX, Complainant was reasonably aware that on September 22, 2017 he suffered action by Respondent that could be the basis for a claim. The facts are also equally clear that he did not file a complaint for relief with OSHA until April 30, 2018, which was 220 days after what he believed was his “forced” resignation. Consequently, Complainant’s application was not submitted within the required 180 days. Thus, it is untimely and must be dismissed unless some other provision of law provides an exemption.

As noted above, courts and the Board recognize the principle of equitable tolling as an exemption to a strict computation of the 180-day deadline for filing a SOX claim. In determining whether Complainant should be entitled to have the 180-day filing deadline equitably tolled in this matter, the undersigned considered each of the four basis upon which the exemption could be applied.

1) First, Complainant does not argue - nor did he present any evidence suggesting - that Respondent made any misleading or inaccurate representations in this matter. In fact, there is no evidence at all showing that Complainant and Respondent had any material communications about Complainant's legal options regarding this or any legal claim related to his employment. As such, the undersigned concludes Respondent did not actively mislead Complainant regarding this cause of action.

2) Secondly, the evidence fails to establish that Complainant has in some extraordinary way been prevented from filing his action. To the contrary, after Complainant resigned from employment with Respondent, he filed two distinct causes of action against Respondent based on his work environment and employment with Respondent; one was a highly comprehensive combined discrimination charge filed with the EEOC and KHRC, and the other was a complaint with the SEC. Both claims were submitted by Complainant within 149 days of leaving employment with Respondent. Neither his pro se status and absence of formal legal training or his ongoing health issues prevented him from filing either of those claims. Complainant's actions in regard to his EEOC and KHRC and SEC claims clearly illustrate he was fully capable of also submitting a complaint to OSHA regarding this matter within the 180-day timeline. The undersigned recognizes and appreciates that Complainant suffers symptoms from several distinct medical conditions. However, Complainant presented no evidence illustrating that the requirements for submitting the required OSHA claim in this matter are significantly more physically or mentally arduous, onerous, or time consuming than the prior claims he submitted to EEOC and KHRC and the SEC. Nothing in the evidence suggests Complainant's medical condition deteriorated to the point he became incapable of also submitting a claim to OSHA. Additionally, the Board has routinely rejected prior complainant arguments that pro se litigant status and ignorance about the filing deadlines amounts to extraordinary circumstances that justify equitable tolling of an untimely filed claim. *Jones v. First Horizon Nat'l Corp.*, ARB No. 09-005, ALJ No. 2008-SOX-00060 (ARB Sept. 30, 2010); *see also Moldauer v. Canadaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-00026 (ARB Dec. 30, 2005) ("Even for unrepresented claimants, there is no authority for tolling the statute of limitations based on ignorance of the law.") Accordingly, the undersigned concludes Complainant's illnesses and his pro se status did not in some extraordinary way prevent him from filing a timely OSHA claim.

3) Third, Complainant presented no persuasive evidence to establish that Respondent's own acts or omissions lulled him into foregoing prompt attempts to vindicate his rights. Again, Complainant did, in fact, file two separate, detailed claims with state and federal agencies. Clearly, Respondent took no action that caused Complainant to forego attempts to pursue relief based on his employment with Respondent.

4) Fourth, Complainant may be entitled to equitable tolling if he demonstrates that he raised the precise statutory claim in issue, but did so in the wrong forum. Resolving that legal question requires the undersigned to first evaluate the foundational requirements for a sufficient SOX claim. Second, the nature, substance, and details of the claims Complainant filed with other state and government agencies must be compared against his OSHA claim. If the legal basis, factual detail, and relief sought in either of the two claims complies with SOX and raises the same precise statutory claim that Complainant asserts in his OSHA claim, the principle of equitable tolling may apply to the calculation of his filing date.

(A) To sufficiently allege a claim under SOX, a complainant must assert that: 1) he engaged in a protected activity by providing information regarding conduct by a covered financial entity that he reasonably believed constituted a violation of: (1) 18 U.S.C. § 1341 (mail fraud); (2) 18 U.S.C. § 1343 (wire fraud); (3) 18 U.S.C. § 1344 (bank fraud); (4) 18 U.S.C. § 1348 (securities fraud); (5) any rule or regulation of the SEC; or (6) any provision of federal law relating to fraud against shareholders; 2) he suffered some adverse action by the covered financial entity; and, 3) the complainant's protected activity was a contributing factor in the adverse action taken against him. 18 U.S.C. § 1514A(a).

(B) The facts demonstrate that in his OSHA claim Complainant asserted what could be best described as a number of broad, expansive allegations of misconduct committed by Respondent. In that regard, there is some general similarity between all three of the claims Complainant has filed against Respondent. However, a general similarity in the nature of Complainant's claims does not satisfy the stringent requirement of raising the precise statutory claim in issue but having done so in the wrong forum. *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114 & 04-115, ALJ Nos. 2004-SOX-20 & 2004-SOX-36 (ARB June 2, 2006).

(C) Complainant's EEOC and KHRC claim predominantly assert specific forms of personal discrimination. In no part of this claim does Complainant allege that Respondent was defrauding shareholders or violating security regulations, nor does it cite any listed category of conduct addressed in SOX. The claim contains no reference to SOX, nor does it allege that Complainant suffered retaliation from Respondent for engaging in a protected activity contained in the Act. Instead, Complainant's EEOC and KHRC claim is a clear and unmistakable pursuit of relief based directly and solely on discriminatory treatment committed by Respondent. As such, the claim is substantively and legally distinct from Complainant's OSHA claim in this matter, which asserts retaliation by Respondent based on protected activity under SOX. Thus, the undersigned concludes that Complainant's EEOC and KHRC claim does "not precisely state a SOX whistleblower claim because they solely concern discrimination" based on circumstances unrelated to SOX whistleblower activity and prohibited retaliation. *See Jones v. First Horizon Nat'l Corp.*, ARB No. 09-005, ALJ No. 2008-SOX-00060 (ARB Sept. 30, 2010).

(D) Complainant's TCR report to the SEC is of a considerably different nature than his EEOC and KHRC claim. His SEC report addresses Respondent's actions as they relate to what is best described as asset management, financial reporting, and accuracy in loan application processing. However, in his report form, Complainant specifically described the primary nature of his complaint as "[m]anipulation of a security." Notably, the TCR report does not directly cite SOX; and, while it generally alleges that Respondent created a "false impression regarding their asset quality" and "loan files include false & manipulated information," the undersigned finds this information exceptionally broad and unspecific. It also fails to clearly cite specific conduct Complainant reasonably believed showed that Respondent had violated SOX by committing mail, wire, radio, TV, bank, or securities fraud or violated any rule or regulation of the SEC or any provision of federal law relating to fraud against shareholders.<sup>6</sup> The absence of such clarity in the TCR report to the SEC is critical in this analysis. This is particularly true in light of the evidence that indicates Complainant was previously put on notice that a claim under SOX was an

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<sup>6</sup> 18 U.S.C. § 1514A(a)(enumerating the specific areas of conduct subject to whistleblower protection under SOX).

option in his case. He was informed by the law firm that initially agreed to handle his case that they would not proceed because they lacked experience interpreting SOX laws and regulations. Also, the SEC website specifically provides information about “retaliation” claims and addresses the separate process for pursuing a SOX claim through OSHA. Although the evidence is unclear as to whether Complainant viewed the SOX information on the SEC website while submitting his claim to the SEC, he unequivocally declared on his TCR report that “[m]y attorney and I, are preparing a Legal Action in an effort to take U.S. Bank to Trial for forcing me to resign.” This demonstrates a specific intent on his part to obtain relief for his forced resignation in a separate and distinct legal action from the TCR report he submitted to the SEC. As such, it is reasonable to conclude that Complainant either understood or was reasonably put on notice that SOX was a distinct legal authority upon which he could make a claim against Respondent. This conclusion is also consistent with the general nature and primary focus of his written description in the TCR report regarding the conduct and situation about which he was complaining. His mention about being “forced to resign” are the last three words in his complaint description, and the narrative does not request any relief for this alleged retaliation. Consequently, viewed in context with his prior EEOC and KHRC claim and this matter, it is reasonable for the undersigned to further conclude that Complainant’s conduct demonstrates a clear intent to file three distinct, separate and individual claims: one with EEOC and KHRC to address a personal discrimination claim against Respondent; a second with SEC to lodge an alleged federal securities law violation committed by Respondent; and a third to pursue relief for a SOX whistleblower retaliation violation by Respondent.

Even if the undersigned’s conclusion about Complainant’s motivation for filing three separate claim is inaccurate, the distinct differences in the claims clearly demonstrate that their form and content are notably different. Most importantly, as it applies to an analysis of whether equitable tolling should be applied, it shows that the allegations against Respondent in Complainant’s TCR report to the SEC were extremely broad in nature and far from anything that could be legally classified as a “precise statutory claim.” Of particular importance in considering whether the doctrine of equitable tolling should be applied in this matter, Complainant’s TCR report contains no distinct reference to SOX nor does it request any relief for retaliation in the form of reinstatement or damages. In past cases that raised the issue of equitable tolling, the Board held that an absence of a specific request for a form of relief authorized under SOX precluded a determination that the precise statutory claim in issue had been raised in the wrong forum. *Butler v. Anadarko Petroleum Corp.*, ARB No. 09-047, ALJ No. 2009-SOX-001, slip op. at 4 (ARB Feb. 17, 2011). Additionally, in comparison to his TCR report to the SEC, Complainant’s OSHA report provides significantly more detail - although it too lacks any specific citation to alleged SOX violations. Nonetheless, the dramatic factual differences in the two claims are legally significant. Although a written SOX complaint can fall short of establishing a prima facie case, it must clearly identify that it is a claim under the Act. Furthermore, “the wrongly filed claim must be the same claim as the OSHA complaint ultimately filed.” *Id.* at 5. Complainant’s TCR report to SEC and the OSHA complaint in this matter are dramatically different in focus, detail, substance, and length. The mere fact that Complainant alleged in both documents that he reported general business and finance related misconduct to Respondent and was fired also is insufficient to meet the required precise statutory claim standard for equitable tolling. Quite simply, in his SEC filing, Complainant does not clearly and directly assert that he suffered retaliatory action in the form of being “forced to

resign” his employment because he engaged in one or more of the enumerated protected activities under SOX. His filing also lacks any request for relief that could even be broadly interpreted as one authorized by SOX.

Based on the findings of facts and above analysis, the undersigned concludes that Complainant has not raised the precise statutory claim in issue but done so in the wrong forum. After fully considering the totality of the evidence relevant to Respondent’s motion and Complainant’s response, the undersigned determines that Complainant tailored his claim with EEOC and KHRC to specifically assert allegations of several different forms of discrimination. The claim Complainant later filed with the SEC addressed assertions of securities law violations. None of these claims raise the precise statutory claim in issue in this matter. The circumstances of this case warrant a strict adherence to the procedural requirements of SOX to guarantee evenhanded administration of the law. Consequently, the undersigned concludes Complainant failed to carry his burden to establish a basis that justifies applying the “extraordinary remedy” of equitable tolling to his claim in this matter. Complainant’s claim in this matter was filed 220 days after he should have reasonably known that he had been subjected to retaliation upon which relief under SOX could be pursued. As such, his claim is untimely under the Act.

**5. Ruling and Specific Orders.** Respondent’s Motion to Dismiss is GRANTED.

- a. The hearing scheduled for Monday, April 29, 2019 in Kansas City, MO is cancelled.
- b. The claim in this matter is dismissed with prejudice.

**SO ORDERED** this day at Covington, Louisiana.

**TRACY A. DALY**  
**ADMINISTRATIVE LAW JUDGE**

**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](mailto: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).