



Issue Date: 20 August 2018

Case No.: 2018-SOX-00007

In the Matter of:

PETER YAREMA,
Complainant,

v.

CARRIER ENTERPRISE LLC,
Respondent,

DECISION AND ORDER DISMISSING COMPLAINT AS UNTIMELY FILED

The above-captioned matter arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (“SOX” or “Act”), P.L. No. 107-204, as amended by the Consumer Financial Protection Act of 2010, Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act and implementing regulations at 29 C.F.R. Part 1980.

On February 21, 2017, Peter Yarema (“Complainant”), through then retained counsel, filed a complaint with the Department of Labor’s Occupational Safety & Health Administration (“OSHA”) alleging Carrier Enterprise LLC (“Respondent” or “Carrier”) retaliated against him in violation of SOX after he reported compliance problems. OSHA dismissed the complaint on November 30, 2017, concluding, in part, that “there is no reasonable cause to believe that a violation of [SOX] occurred.” On December 21, 2017, Complainant’s counsel filed a letter with the Office of Administrative Law Judges, objecting to the findings.¹ By Order issued July 9, 2018, I denied Respondent’s *Motion to Dismiss Complaint as Untimely and For Summary Decision*. A preliminary hearing, limited to the issue of whether the instant complaint in this case was timely filed, was held on July 10, 2018 in New York, New York. At the hearing, Complainant offered and the court admitted, without objection, two exhibits, CX 1 and 2.² (TR 8). Respondent offered and the court admitted, without objection, RX 1-3. (TR 9, 26). I also submitted ALJ Exhibits 1-4. (TR 7). One witness, the Complainant, testified. (TR 10-38).

¹ By Order issued April 16, 2018, I approved a motion to withdraw filed by then counsel for Complainant. Complainant is now proceeding to hearing representing himself in this matter.

² I will use the following abbreviations: “CX” for Complainant’s exhibits; “TR” for the hearing transcript; and “RX” for Respondent’s exhibits.

Discussion

Complainant began working for Respondent in 1976. Respondent is a distributor of heavy heating and air conditioning equipment. While the business underwent several ownership changes, Complainant remained with the company, eventually rising to Senior VP for Sales, until his termination on July 22, 2016. Complainant filed for unemployment on August 1, 2016, listing his date of termination as July 22, 2016. Complainant had an accident on or about August 26, 2016 and was hospitalized for five days in September 2016.

Subsequent to his termination, Complainant believed the reason he was fired was for reporting compliance problems and he started looking for a lawyer in October 2016 to represent him. Complainant eventually hired the law firm of Borrelli and Associates on or about November 12, 2016. Complainant paid Borrelli and Associates a \$5,000 retainer and Attorney Dong Nguyen of Borrelli and Associates met with Complainant on that day. Complainant told her he was terminated from Carrier on July 22, 2016. Complainant also gave his attorney a copy of his unemployment insurance application, again showing a termination date of July 22, 2016.

Attorney Nguyen issued demand letters on Complainant's behalf to Respondent on December 28, 2016 and January 30, 2017. The December 28, 2016 demand letter reflected Complainant's termination date as August 26 of 2016, which Complainant knew was incorrect. Respondent did not respond to either demand letter. After Complainant paid an additional \$2,500, Attorney Nguyen filed a complaint with OSHA on February 21, 2017, alleging Complainant was dismissed on August 26, 2016 for engaging in activity protected under SOX.

In a March 21, 2017 phone conference with OSHA, Complainant tried to correct the mistaken termination date but was advised by his attorney not to do so. OSHA subsequently dismissed the complaint on November 30, 2017, finding no violation of the Act. Complainant then requested a hearing before the Office of Administrative Law Judges on December 20, 2017. On March 20, 2018, attorney Nguyen moved to withdraw, which I approved on April 16, 2018.

The February 21, 2017 OSHA complaint is the only complaint filed by Complainant in this matter; no other complaints were filed with any other government agency. Neither Complainant nor his counsel were suffering from a mental impairment preventing them from filing the complaint before February 21, 2017. While Attorney Nguyen was out of the United States in December 2016 and January 2017, it did not prevent her engaging in the practice of law, as she directed the filing of two demand letters during this period. In other words, Complainant's counsel did not abandon him. Additionally, no physical injury, debilitating illness, lengthy period of hospitalization, or natural disaster prevented Complainant or his attorney from filing a complaint within the statutory filing period.

Complainant's attorney was not ignorant of Complainant's termination date. Complainant had told her several times that he was terminated on July 22, 2016, to include the first meeting on or about November 12, 2016. It appears counsel may have confused the July 22, 2016 termination date with the accident that occurred on August 26, 2016. Regardless, Complainant's counsel failed to exercise due diligence by not confirming the actual termination date with Complainant at least before the initial demand letter was sent on December 28, 2016. She then

compounded the problem when presented with the correct termination date during the March 2018 phone conference by advising Complainant not to change it.

Under the statute and applicable regulations, a SOX complaint must be filed no later than 180 days after the date that an alleged violation of the Act occurs, or after the date on which the employee became aware of the violation. 18 U.S.C. § 1514A(b)(2); 29 C.F.R. § 1980.103(d). Thus, an employer potentially violates SOX on the day that it communicates to the employee its intent to take an adverse employment action, rather than the date on which the employee experiences the adverse consequences of the employer's action. *Overall v. Tennessee Valley Authority*, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001). Respondent terminated Complainant's employment on July 22, 2016 and Complainant filed his complaint with OSHA on February 21, 2017, more than 180 days after he was terminated.

However, SOX's 180-day filing period may be equitably tolled for extenuating circumstances, including concealment by the employer of the existence of the adverse action, or inability of the plaintiff to file within the statutory time period due to extraordinary events, such as a debilitating illness, injury, natural disaster, or mistakenly filing an otherwise timely complaint regarding the same statutory claim with another agency. *See School Dist. of City of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981).

While none of these circumstances apply to this case, the list is not exhaustive and Complainant submits the filing deadline should be tolled for attorney incompetence. I disagree.

Attorney incompetence does not generally warrant equitable tolling. *See, e.g., Whalen v. Randle*, 37 F. App'x. 113, 120 (6th Cir. 2002); *Patino v. Birken Mfg. Co.*, ARB No. 09-054, ALJ No. 2005-AIR-023, pdf at 4 (ARB Nov. 24, 2009). Ineffective assistance of counsel could warrant equitable tolling under some extraordinary circumstances, such as attorney fraud, illness, or abandonment. *See Cantrell v. Knoxville Comm. Dev. Corp.*, 60 F.3d 1177, 1180-81 (6th Cir. 1995) (abandoning client due to counsel's mental illness); *Burton v. U.S. Postal Serv.*, 612 F. Supp. 1057 (N.D. Ohio 1985) (abandoning client and skipping town).³

I find Complainant has not established a basis for equitable tolling of the filing period. *See Flener v. H.K. Cupp Inc.*, 90-STA-42 (Oct. 10, 1991). As he was terminated on July 22, 2016, he had until January 18, 2017 to file a complaint. While Complainant's former attorney may have been negligent in not confirming the date of termination, that negligence does not justify equitable tolling of the filing deadline in this case.⁴

³ Additionally, where a petitioner consults legal counsel and claims that petitioner's mental illness prevented filing, the petitioner must establish that he was unable to pursue his claim as a result of his mental illness and in spite of having counsel. *See Nunnally v. MacCausland*, 996 F.2d 1, 5 (1st Cir. 1993) (stating that the plaintiff was entitled to equitable tolling if he could demonstrate that he was "unable to engage in rational thought and deliberate decision making sufficient to pursue [his] claim alone or through counsel"); *Lopez v. Citibank, N.A.*, 808 F.2d 905, 907 (1st Cir. 1987) (commenting that plaintiff would have to demonstrate why his mental illness presented a strong reason why he was unable to file suit despite the assistance of legal counsel). Here, Complainant does not allege, and there is no evidence to support, a finding that he was unable to pursue his claim because of mental illness.

⁴ As the complaining party, it is Mr. Yarema's burden to demonstrate why equitable principles should be applied to toll the limitations period. *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995). As a self-

Conclusion

Mr. Yarema filed his complaint on February 21, 2017. For the complaint to be timely, some retaliatory act must have occurred on or after August 25, 2016. The only act alleged in the OSHA complaint is, again, Complainant's termination, which occurred on July 22, 2016. Since I have found no basis for tolling the limitations period, Mr. Yarema's SOX complaint is untimely, and his complaint alleging a violation of the Sarbanes-Oxley Act's employee protection provisions must be dismissed.

ORDER

The complaint for whistleblower protection under the Sarbanes-Oxley Act filed by Peter Yarema with the Occupational Safety and Health Administration on February 21, 2017 is hereby **DISMISSED**.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

represented complainant apparently lacking legal expertise, this Court has provided Mr. Yarema "with a degree of adjudicative latitude." *Hyman v. KD Resources, Inc, et al.*, ARB No. 09-076, ALJ No. 2009-SOX-20, slip. op. at 8 (ARB March 28, 2010) (citing *Ubinger v. CAE Int'l*, ARB No. 07-083, ALJ No. 2007-SOX-36, slip op. at 6 (ARB Aug. 27, 2008)). However, while a self-represented litigant may be held to a lesser standard than that of legal counsel in procedural matters, the burden of proving the elements necessary to sustain a claim of discrimination, or establish the basis for equitable tolling of a filing period, is no less. See *Flener v. H.K. Cupp Inc.*, 90-STA-42 (Oct. 10, 1991).

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).