

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 22 March 2019**

Case Number: **2019-SOX-00008**

In the Matter of:

**APOSTOLOS XANTHOPOULOS**  
Complainant

v.

**MARSH & MCLENNAN COMPANIES, INC.**  
**d/b/a MERCER INVESTMENT CONSULTING**  
Respondent

**ORDER DISMISSING COMPLAINT**

This matter arises under the employee protection provisions of the Sarbanes-Oxley Act (“SOX” or “the Act”), 18 U.S.C. §1514A, 29 C.F.R. §1980, as amended.

**Background**

Apostolos Xanthopoulos (“Complainant”) filed a complaint under the Act with the U.S. Department of Labor, Occupational Safety and Health Administration (“OSHA”). The complaint alleged the Complainant was terminated, laid off, demoted, reduced hours, negative performance evaluation, harassed, and intimidated by his employer, Mercer Investment Consulting (“Respondent”) for conducting statistical studies which showed that the ratings assigned to portfolio management strategies could have resulted in immediate and substantial losses to plan sponsors and other clients.

On October 22, 2018, the OSHA Regional Administrator issued findings in which the complaint was dismissed as untimely. The findings state that the Complainant’s employment was terminated on October 3, 2017 and the instant complaint was filed on September 18, 2018 – not within the 180-day statutory filing period. The findings further stated that no reason or evidence to support equitable tolling was provided.

The Complainant submitted an “Objection to Findings ...Request for Hearing by Administrative Law Judge”, dated November 15, 2018 and received, on November 26, 2018. He objects to the dismissal of the complaint.

On January 18, 2019, I issued an *Order to Show Cause* (“Order”), explaining that to be timely, a SOX retaliation claim must be filed within 180 days after an alleged violation occurs or after the date on which the employee (complainant) became aware of the alleged violation. 29 C.F.R. §1980.103(d). In addition, I explained that the Complainant has the burden of showing that his complaint was timely filed or, in the absence of timely filing, that equitable tolling of the applicable time limitation provision should occur. The Order instructed the Complainant to submit a written response within twenty days addressing why the equitable tolling principles should apply and the matter not be dismissed.

On February 14, 2019, the Complainant’s Response to Order to Show Cause was received.<sup>1</sup> The response asserts that the Complainant believed that: (1) “his SEC claims included wrongful termination” and (2) his “attempts to exercise his rights warrant a tolling of the statute.” Attached was a copy of the whistleblower complaint submitted to OSHA on September 18, 2018, as well as copies of six Form TCR - Tip, Complaint or Referral submitted to the Securities and Exchange Commission (“SEC”).

## **Discussion**

To be timely, a SOX retaliation claim must be filed within 180 days after an alleged violation occurs or after the date on which the employee (complainant) became aware of the alleged violation. 29 C.F.R. §1980.103(d). In determining whether a statute of limitations for whistleblower claims should be tolled, the Administrative Review Board (“ARB”) has recognized four principal and nonexclusive “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 rights. *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-00010, slip op. at 3-4 (ARB Jan. 28, 2011). The ARB has not found these situations to be exclusive, and an inability to satisfy one or more of the four prongs is not necessarily fatal. *Id.* at 4. Furthermore, when the Complainant is *pro se*, the ARB has stated that Administrative Law Judges must “construe complaints and papers filed by *pro se* complainants ‘liberally in deference of their lack of training in the law’ with a degree of adjudicative latitude.”<sup>2</sup>

The Complainant’s argument and documentation of filings with the SEC have been considered in their entirety and even construing the record “liberally in deference” to an unrepresented status, I still find them insufficient to avoid dismissal. There is no showing that

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<sup>1</sup> The Response to Order to Show Cause, dated February 13, 2019, was submitted by Bellas & Wachowski, Attorneys at Law, and digitally signed by Jillian Tattersall. Neither Ms. Tattersall nor Bellas & Wachowski have entered their appearance as Attorney for Complainant. Moreover, no service sheet is attached to the response, indicating service on parties.

<sup>2</sup> *Wyatt v. Hunt Transport*, ARB No. 11-039, ALJ No. 2010-STA-69, slip op. at 2 (ARB Sept. 21, 2012), quoting *Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-3, slip op. at 6 (ARB Apr. 25, 2003).

the Complainant raised his claim in a wrong forum, was misled, prevented from, or was lulled into foregoing his rights

**ORDER**

In light of the foregoing discussion, I find that the Complainant has failed to timely file a complaint alleging retaliation in violation of the Sarbanes-Oxley Act, and has failed to show cause as to why the case should not be dismissed. Accordingly, this case is hereby **DISMISSED** as untimely pursuant to 18 U.S.C. §1514A, 29 C.F.R. §1980, as amended.

**SO ORDERED:**

**FRANCINE L. APPLEWHITE**  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this 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)

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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 a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.