



Issue Date: 28 September 2020

Case No.: 2019SOX00034

*In the Matter of:*

LAURA NEZWISKY,  
Complainant,

v.

BORG WARNER, INC.,  
Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S  
MOTION TO DISMISS THE INSTANT CLAIM**

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"). The SOX provisions, in part, prohibit an employer with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 and companies required to file reports under Section 15(d) of the Securities Exchange Act of 1934 from discharging, or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government, information relating to alleged violations of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 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.<sup>1</sup>

Pursuant to 29 C.F.R. § 18.70(c), Respondent filed a Motion to Dismiss on the grounds Complainant did not timely file her complaint with the Occupational Safety and Health Administration (OSHA). In response, Complainant argues she timely filed a complaint with the Oakland County, Michigan Circuit Court, within the regulatory filing deadline and the principles of equitable tolling should be applied to allow the matter to proceed. For the reasons set forth below, Respondent's Motion to Dismiss is hereby granted.

---

<sup>1</sup> 18 U.S.C. §1514A(a).

## I. PROCEDURAL HISTORY

On February 21, 2019, Complainant Laura Nezwisky (“Complainant”) filed a complaint (“the Complaint”) with the Department of Labor, Occupational Safety and Health Administration (OSHA), alleging that Borg Warner, Inc. (“Respondent”), violated SOX when it informed her on January 18, 2018 that her employment as an auditor was to be terminated on February 9, 2018, in retaliation for her reporting adverse conclusions resulting from a required SOX audit.

On March 25, 2019, OSHA advised Complainant in writing that its initial investigation indicated that: 1) Respondent is a company within the meaning of 18 U.S.C. §1514A in that it is a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. §781) and is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §780(d)); 2) Complainant is an employee within the meaning of 18 U.S.C. §1514A; 3) Complainant was fired on February 9, 2018; 4) On June 4, 2018 Complainant filed a complaint of retaliation under Section 806 of SOX in Oakland County Circuit Court, in Pontiac, Michigan; 5) Complainant alleged within this filing and further correspondence that she was required by employment contract to bring all employment related complaints through this specific court; 6) After receiving a tentative decision that the above court could not hear a complaint under SOX, on February 21, 2019 Complainant filed a complaint with the Secretary of Labor alleging that Respondent retaliated against her in violation of the Sarbanes-Oxley Act (SOX), 18 U.S.C. §1514A; 7) While Complainant did file a timely complaint in the incorrect forum, after further review it does not appear that equitable tolling applies; and 8) As this complaint was untimely filed, OSHA hereby dismisses the complaint.

By letter dated April 18, 2019, Complainant objected to OSHA’s findings and requested a hearing before the Office of Administrative Law Judges. The case was assigned to me on June 20, 2019, and a conference call was held on August 19, 2019, to set deadlines and discovery parameters. A Prehearing Order was issued on September 12, 2019, which began a discovery period lasting until May 31, 2020. Additionally, the parties were able to file dispositive Motions from the date of the Order until June 30, 2020. Further, the opposing party was given 14 days after the filing of the Motion to respond.

On September 12, 2019, the Respondent filed a Motion to Dismiss the instant claim. On November 1, 2019, the Complainant filed her answer to this Motion.<sup>2</sup> As the Discovery period has now closed, I will rule on the Respondent’s Motion.<sup>3</sup>

---

<sup>2</sup> The Complainant’s counsel indicated that his filing was beyond the 14 day response window set out in my Order due to a family illness and the lack of discovery this early into the case. I find good cause shown and will accept and consider the Complainant’s Answer to Respondent’s Motion to Dismiss.

<sup>3</sup> On August 29, 2019, Maurice Jenkins, Esq., of the firm Jackson Lewis entered his appearance on behalf of Respondent. On November 18, 2019, Edward Bardelli, Esq. of Warner, Norcross and Judd, withdrew as Respondents Counsel.

## II. APPLICABLE STANDARDS

### Employee protection provisions of Sarbanes-Oxley Act of 2002

Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 provides whistleblower protection for employees of publicly traded companies so that “[n]o company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 . . . may discharge . . . or in any other manner discriminate against an employee . . . because of any lawful act done by the employee to provide information . . . which the employee reasonably believes constitutes a violation of . . . any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.”<sup>4</sup> An “employee” is an individual presently or formerly working for a company . . . an individual applying to work for a company . . . or an individual whose employment could be affected by a company or company representative.”<sup>5</sup>

Section 806 complaints are governed by the procedures and burdens of proof under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).<sup>6</sup> To prevail under AIR 21, an employee must prove by a preponderance of the evidence that: (1) she engaged in a protected activity as statutorily defined; (2) she suffered an unfavorable personnel action; (3) the employer knew that the employee engaged in protected activity; and (4) the protected activity was a contributing factor in the adverse personnel action.<sup>7</sup> If the employee meets her burden of proof, the employer may avoid liability only by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected behavior.<sup>8</sup>

### 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.

---

<sup>4</sup> 18 U.S.C. §1514A(a).

<sup>5</sup> 29 C.F.R. §1980.101.

<sup>6</sup> 49 U.S.C.A. § 42121 (West Supp. 2010); see 18 U.S.C.A. § 1514A(b)(2)(C).

<sup>7</sup> See 18 U.S.C.A. § 1514A(b)(2). See also, *Feldman v. Law Enforcement Associates Corp.*, No 12-1849, 2014 WL 1876546 (4th Cir. May 12, 2014).

<sup>8</sup> *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, slip op. at 8; (ARB July 29, 2005); cf. 29 C.F.R. § 1980.104(c).

Section 18.70 of the Rules of Practice and Procedure applies to 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) (emphasis added). This specific provision in the Rules of Practice and Procedure makes FRCP 9(a) and 12(b)(6) inapplicable to Respondent’s motion.

#### *Timelines for filing a Complaint Pursuant to SOX*

Title 29 C.F.R. § 1980.103(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)

#### *Equitable Tolling of the time to file a SOX Complaint*

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. Canadaiagua 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 her failure to timely file an OSHA complaint meets one of the four situations recognized by the Board.

### III. PARTIES' ARGUMENTS

#### Respondent's Argument

Respondent's Brief has four attachments. "**Exhibit A**" is a copy of the Complainant's February 21, 2019 SOX Complaint filed with OSHA. However, included with this document are a copy the June 4, 2018 lawsuit filed in the Oakland County, Michigan Circuit Court and a copy of the an employment agreement between the Complainant and the Respondent. "**Exhibit B**" is a copy of Complainant's (Appellant's) Brief to the Michigan Court of Appeals. "**Exhibit C**" is a copy of Respondent's Motion for Summary Decision before the Oakland County, Michigan Circuit Court. "**Exhibit D**" is a copy of Complainant's Answer to Respondent's Motion for Summary Decision before the Oakland County, Michigan Circuit Court.

Respondent asserts that Complainant's SOX claim is untimely as it was "filed approximately 399 days after Respondent notified Complainant of her termination - or, 219 days after the statute of limitation expired." (Respondent's Brief at 1). It asserts that the undisputed facts of the case indicate that:

- Complainant was employed by Respondent "as an internal auditor from October 2006 until she was advised on January 18, 2018, that her employment would be terminated effective on February 9, 2018. (Respondent's Brief at 2-3, Exhibit A).
- Complainant had 180 days from the January 18, 2018 notice of termination to file her complaint with OSHA. This would be July 17, 2018. (Respondent's Brief at 3).
- On June 4, 2018, Complainant, through her counsel, filed the lawsuit in Oakland County, Michigan Circuit Court alleging wrongful discharge in violation of public policy. This Complaint explicitly referenced SOX. (*Id.*).
- Respondent asserts that the inclusion of the reference to SOX demonstrates that the Complainant did not inadvertently file her complaint in the wrong forum. Respondent states that:

[t]o the contrary, Complainant did not intend to assert a SOX claim in her state court complaint. Complainant Nezwisky has even admitted in court pleadings that her state claims did "not fall under SOX" and that

“SOX...is not analogous to [a wrongful discharge claim] under Michigan law, her stated claim.

(Respondent’s Brief at 3, Exhibit B).

- Respondent moved for summary disposition in Complainant’s Michigan suit, asserting that Complainant “had failed to state a claim upon which relief could be granted for public policy retaliatory discharge because the law upon which the claim was based (SOX) provided rights and protections against unlawful retaliation. (Respondent’s Brief at 3, Exhibit C). Respondent argued that Complainant had to pursue any purported SOX Claims by filing a SOX claim with OSHA pursuant to 18 U.S.C. 1514A(b)(1)(A) and 18 U.S.C. 1514A(b)(2)(D). (Respondent’s Brief at 4, Exhibit C).
- Respondent asserts that “[Complainant] and her attorney remained steadfast in their contention that they need not file a SOX complaint because of a separate and distinct right of action law under Michigan law. Consistent with this view, Complainant ... and her legal counsel opposed Respondent...’s motion for summary disposition and persisted in their pursuit of their state law claims -- to the knowing exclusion of any rights or remedies that may have been available to her pursuant to SOX. (Respondent’s Brief at 4, Exhibit D).
- Respondent notes that the Oakland County, Michigan Circuit Court dismissed Complainant’s state court complaint on September 26, 2018. Further, it states that Complainant appealed this dismissal to the Michigan Court of Appeals on November 13, 2018. Subsequently, on February 21, 2019, Complainant filed the instant SOX complaint with OSHA.
- Respondent specifies that, as a part of the appeal of the state court dismissal, the Complaint argued to the Michigan Court of Appeals that:

While it is undisputed that the legislative enactment proscribing the [Respondent] at bar’s activities is the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1541, the issue for the Oakland Court was whether the statute provides the sole remedy for Plaintiff. It does not.

(Respondent’s Brief at 5, Exhibit B).

- Finally, Respondent observes the following language in the Complainant’s appellate brief to the Michigan Court of Appeals:

While [Complainant] qualified for protection under SOX by complaining to a “person with supervisory authority over the employee,” 18 U.S.C. § 1514A(a)(1)(A)-(C), she did not choose that route. She also could have pursued relief under Dodd-Frank which authorizes reinstatement and compensation for litigation costs, expert witness fees, and reasonable attorneys’ fees, but requires reporting to the Securities and Exchange Commission. Compare 15 U.S.C. § 78u-6(h)(1)(C)(I), (iii), with 18 U.S.C. § 1514A(c)(2)(A),(C). **She opted not to pursue that labyrinth because**

**she already had relief via a claim for wrongful termination.** (Footnote omitted, emphasis in Respondent's brief).

(Respondent's Brief at 5, Exhibit B).

### Complainant's Argument

Complainant's answer to the Respondent's Motion to Dismiss focuses primarily on the merit of the Complainant's underlying claim and the asserted improper actions of the Respondent by requiring her to sign an employment contract that purportedly compelled the Complainant to initially file suit regarding her SOX allegations in the state court in Michigan.

- Complainant's brief states that:

“In the case at bar, equitable tolling should apply because [Complainant] complied with the terms of her contract, a condition not created by [Complainant], but by the [Respondent]. [Respondent] at bar argues merely that the pendency of her case in Oakland County Circuit Court is insufficient to warrant tolling of the limitations period. But that is not [Complainant's] argument. [Complainant] filed in state court initially, because her employment contract required that she do so. It was only after the motion was heard and the Honorable state court judge determined that [Complainant's] remedy was not pursuant to her employment contract that she could proceed via through (sic) other avenues.

(Complainant's Brief at 5).

- Complainant's arguments additionally briefly refer to (but do not elaborate upon the specific application to this case) other precedent which applies equitable tolling to:
  - cases of fraud perpetrated by an Employer (Complainant's Brief at 5);
  - circumstances where “the defendant takes active steps to prevent the plaintiff suing on time” (Complainant's Brief at 6);
  - instances when an Employer has committed “fraudulent concealment” to prevent an Employee about knowing the facts necessary for their discrimination claim; (Id.); and
  - cases where limitations are tolled because “principles of equity render their rigid application unfair. (Complainant's Brief at 7).

Complainant does not challenge the authenticity of the Respondents Exhibits or the terms contained therein. There are no attachments to the Complainant's Brief.

### The Employment Agreement (Attachment to Respondent's Exhibit A)

An Employment Agreement between the Complainant and Respondent (attached to the Complainant's Michigan State Lawsuit) has been designated by Respondent as Exhibit A. The Complainant signed this agreement on October 27, 2006, and an Agent for the Respondent signed on November 2, 2006. The headed sections of this agreement are: Confidential Information; Conflicts of Interest; Non-competition; Inventions; Employment; and Miscellaneous.

The "Employment" section of this agreement provides that:

A. EMPLOYEE and EMPLOYER each reserve the right to terminate the employment relationship at any time, unless otherwise specifically prohibited by federal, state, or local statute.

B. EMPLOYEE agrees that neither this Agreement nor any of EMPLOYER's policies, practices, or procedures that may be applicable to EMPLOYEE during EMPLOYEE's term of employment, nor any representation that is made to EMPLOYEE, shall:

1. confer upon EMPLOYEE any express or implied contractual right to continue in the employ of the EMPLOYER for any definite period of time; or

2. in any way affect the right and power of EMPLOYER to dismiss or otherwise terminate the compensation of EMPLOYEE at any time for any reason, with or without notice or cause.

Upon termination

C. Upon termination of EMPLOYEE'S employment for any reason, EMPLOYEE agrees to promptly deliver to EMPLOYER all computer disks, drawings, blueprints, specifications, manuals, letters, cost and pricing lists, customer lists (including telephone numbers and electronic mail addresses) notes, notebooks, reports and all other materials which have not been made public relating to EMPLOYER's business and which are in EMPLOYEE's possession of control.

D. If EMPLOYEE transfers to any parent, division, subsidiary corporation or affiliated corporation of EMPLOYER, EMPLOYEE agrees that this Agreement shall be assignable, without notice to EMPLOYEE, to said parent, division, subsidiary corporation or affiliated corporation, and that 1) this Agreement shall be deemed automatically assigned thereto as of the date of such transfer and 2) there terms hereof shall remain in full force and effect unless and until expressly superseded by another agreement covering essentially the same subject matter.

Additionally, in pertinent part, the "Miscellaneous" portion of this agreement states:

E. This Agreement shall be interpreted and governed by the laws of the State of Michigan.

F. In the event a breach or threatened breach by the EMPLOYEE of the provisions of this Agreement, Employee understands and agrees that money

damages would be inadequate and that EMPLOYER shall be entitled to an injunction issued by a court of competent jurisdiction restraining EMPLOYEE from such breach. In the event of such a breach, in addition to any other remedies, EMPLOYER shall be entitled to receive from EMPLOYEE payment of, or reimbursement for, its reasonable attorneys' fees and disbursements incurred in enforcing any such provision.

Nothing contained herein shall be construed as prohibiting EMPLOYER or its successor or assign from pursuing any other remedy or right of action available under the law.

The parties agree that any dispute, matter, or controversy involving claims of monetary damages and/or employment related matters arising out of, or related to this Agreement shall be initiated in the Oakland County Circuit Court, at Pontiac, Michigan.

(Exhibit A).

#### **IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

- A. The Complaint in this case was not filed with the Secretary of Labor within the time limits specified by 18 U.S.C. § 1514A(b)(2)(D) and 29 C.F.R. § 1980.103(d).

In pertinent part, 18 U.S.C. § 1514A(b)(1)(A) and 18 U.S.C. § 1514A(b)(2)(D) provide that:

A person who alleges discharge...by any person in violation of subsection (a) may seek relief ...by...filing a complaint with the Secretary of Labor. An action under paragraph (1) 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)(1)(A); 18 U.S.C. § 1514A(b)(2)(D)).

Further, the related regulations clarify that:

Within 180 days after an alleged violation of the Act occurs or after the date on which the employee became aware of the alleged violation of the Act, any employee who believes that he or she has been retaliated against in violation of the Act may file... a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing.

(29 C.F.R. § 1980.103(d)).

The 180-day statute of limitations for the Complainant's claim began to run on the date that the Complainant was provided with final, definitive, and unequivocal notice of her termination. It is undisputed that Complainant was advised by Respondent on January 18, 2018, that her employment would be terminated. I calculate 180 days from January 18, 2018 to be Wednesday, July 17, 2018. However, OSHA dates receipt of the Complainant's claim on February 21, 2019, some 399 days later.<sup>9</sup> As I find that well over 180 days had passed before she filed her SOX claim with OSHA, I find that her claim is untimely.

B. Equitable estoppel does not excuse the Complainant's untimely claim.

Notwithstanding my finding that the Complainant's claim was not timely filed, equitable estoppel or equitable tolling may prevent the application of this bar. For the application of equitable estoppel, the moving party's assertion of the lack of timeliness is disallowed based on that party's own prohibited actions. As set out above, the Complainant has noted case law where Respondent was equitably estopped from asserting the statute of limitations due to: fraud perpetrated by an Employer; circumstances where "the [Respondent] takes active steps to prevent the [Complainant] suing on time;" and instances when an Employer has committed "fraudulent concealment" to prevent an Employee knowing about the facts necessary for their discrimination claim. I find that none of these are applicable to the case at bar.

Despite these broad references, Complainant only avers one actual basis for claiming equitable estoppel against Respondent; that she was required to execute an employment contract at the beginning of her employment. Further, the Complainant has pointed to no provision in this employment agreement which perpetuates any type of inappropriate, fraudulent or deceptive conduct on behalf of the Respondent. In *Coppinger-Martin v. Solis, Sec. of U.S. Dep't of Labor*, 627 F.3d 745 (9th Cir. Nov. 30, 2010), the Ninth Circuit has persuasively clarified that "the plaintiff must point to some fraudulent concealment, some active conduct by the defendant 'above and beyond the wrong upon which the plaintiff's claim is filed, to prevent the plaintiff from suing on time.'" *Coppinger-Martin* at 751. In the instant claim, no evidence was presented to show that Respondent actively misled Complainant, that Complainant was prevented from asserting her rights in some extraordinary way or (as detailed below) that Complainant raised her specific SOX claim in the wrong forum. I find that Complainant has failed to establish a valid premise for asserting that Respondent's conduct is sufficient to equitably estop the application of the limitations period for filing her claim. Further, as set out below, I find no evidence that the language of this contract would have misled this represented Complainant to misfile her SOX claim sufficiently for the application of equitable tolling.

C. Complainant was not required to initially file her SOX Complaint in the Michigan Courts under the terms of her employment agreement.

---

<sup>9</sup> I note that neither party has included the original envelope, facsimile or delivery package for the OSHA Complaint and that the Complaint itself is undated, however, as OSHA notes the receipt of the Complaint on February 21, 2019, the undersigned finds that even under the most liberal of interpretations it not reasonable to conclude that the mailing process took 220 days. Should either party present evidence that this process took this long, the undersigned will reconsider the determination that the Complaint was not timely filed with OSHA.

As set out above, the key language in this contract is that “[t]he parties agree that any dispute, matter, or controversy involving claims of monetary damages and/or employment related matters *arising out of, or related to this Agreement* shall be initiated in the Oakland County Circuit Court, at Pontiac, Michigan. (emphasis added). The Agreement itself deals with issues of Confidential Information; Conflicts of Interest; Non-competition; Inventions; Employment; and Miscellaneous. The Employment section is the only one which appears to hold a pertinent provision to Complainant’s termination. Subsection A does include a general termination clause, but even that clause notes that the terms of the agreement are excepted by federal law. Further, Subsection A provides that “EMPLOYEE and EMPLOYER each reserve the right to terminate the employment relationship at any time, *unless otherwise specifically prohibited by federal, state or local statute.*” Based on the plain language of the agreement, I find that there was no reasonable basis for the Complainant to conclude that she was required to file her SOX complaint initially before the Michigan Courts. Additionally, there is nothing in this agreement which would have deprived the Department of Labor of initial jurisdiction over this matter. Further, as discussed below, the Complainant has elaborated in her filings with the Michigan courts that it was not a misunderstanding of the requirements of the contract that compelled her to file suit in Michigan, but instead a choice of laws based on her perceptions of the difficulties of filing a SOX claim with the Department of Labor.

Finally, I find that there is no provision in this agreement, or even in Complainant’s own arguments which credibly assert that the Respondent or the Employment Agreement actively misled the complainant regarding the cause of action; prevented her from filing her SOX action or lulled her into foregoing prompt attempts to vindicate her rights;

D. The Complainant’s Michigan lawsuit, while containing some elements of a SOX Complaint, seeks relief under Michigan state law and not under the provisions of SOX and is therefore not a basis for equitable tolling.

The Complainant’s June 4, 2018 Michigan lawsuit seeks relief in four counts; Violation of Public Policy, Wrongful termination, Defamation and Breach of Contract.<sup>10</sup>

In pertinent part Count One states that:

The Sarbanes-Oxley Act defines whistleblowing as providing information, and causing information, and causing information to be provided as to conduct which the employee reasonably believes to constitute a violation of any provision of Federal law relating to fraud against shareholders, or fraud or violation of an SEC regulation, even if it does not impact shareholders, when the information is provided to a person with supervisory authority over the employee, or such other

---

<sup>10</sup> I note that, when a 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.” *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). However, I note that this premise is not applicable to the current case as the Complainant has been continuously represented since well before the time of her filing with the Michigan Circuit Court.

person working for the employer who has authority to investigate, discover, or terminate misconduct. As such, Sarbanes-Oxley constitutes public policy.

*(Michigan State Complaint at 5-6).*

As such, while this Court describes a protected activity under SOX, the basis of this portion of the suit frames the SOX provisions as establishing a recognized “public policy” sufficient for recovery under Michigan state law.

The Second Count is entitled Wrongful Termination. It lists the general elements of a whistleblower suit as the “Plaintiff...(a) engaged in a protected activity; (b) that was known by the defendant; (c) the defendant took an employment action adverse to the plaintiff; and (d) there was a causal connection between the protected activity and the adverse employment action. *(Michigan State Complaint at 6).* However, this Court again seeks relief as these actions “constitute[] a violation of Michigan Public Policy.” *(Id.)*.

Count Three is captioned as a Defamation Claim and asserts that the Respondent circulated false statements about the Complainant regarding her conduct at the workplace, and, in fact used these allegations as one of the reasons she was told she was being terminated. The Count also includes an undetailed “attempted physical assault” at the workplace. This Count does not allege any of the elements of a SOX action, or assert that relief is being sought under federal law. *(Michigan State Complaint at 7).*

Finally, Count Four asserts a Breach of Contract and alleges that, as a result of her wrongful termination she did not receive a bonus earned in 2017. She states that the bonus is “enforceable in contract, as a custom and practice of [Respondent].” *(Michigan State Complaint at 8).*

None of these Counts state a complete cause of action pursuant to SOX, and instead attempt to use the allegations regarding the violation of the federal law as a rationale for the assertion of a breach of state defamation, wrongful termination and contracts action. Further, as set out below, Complainant has admitted that her filing in the Michigan Courts was not a result of a jurisdictional mistake, but instead was based on her belief that the process in Michigan would be more favorable and expedited than filing a SOX claim with OSHA.

Complainant’s own averments to the Michigan Appellate Court make it clear that her Michigan Employment action was an election of alternative remedies pursuant to state law because of Complainant’s perceived difficulties with the statutory and procedural requirements of filing a SOX proceeding with the Department of Labor. Complainant’s Michigan appellate brief states in pertinent part: “This case was not brought under SOX, but is properly brought under state law and premised on it. In addition to violation of public policy relying on SOX, the lawsuit alleges wrongful termination in retaliation for reporting employer misconduct, defamation, and breach of contract for failure to pay her a bonus already earned, pursuant to defendant’s bonus plan.” (Exhibit B at 1).

Further, the Complainant specified the reason her Michigan lawsuit actually referenced SOX, stating that “Plaintiff-Appellant therefore filed her claim in Oakland County Circuit Court alleging wrongful termination. There was never an issue of whether her lawsuit was timely filed. The lawsuit at bar *referenced the Sarbanes Oxley Act of 2002...as the public policy source of her wrongful termination claim.* (Exhibit B at 2). (emphasis added). Complainant has made clear that she is not seeking relief from the wrong court based on the statutory provisions of SOX, but is instead seeking State Court relief and using SOX allegations as the public policy basis. This is, in its essence, different then actually pursuing relief pursuant to the provisions of SOX from the wrong Court. As Complainant stated to the Michigan Court of Appeals:

It is undisputed that a Michigan public policy violation can be premised on a violation of a federal statute...Therefore, Nezwisky’s reliance on SOX as a basis of her public policy claim could not be faulted on this basis, nor used as a rationale to substitute SOX for her public policy claim.

(Exhibit B at 2-3) (citations omitted).

...SOX, however, is not analogous to Michigan law, either that of wrongful discharge or the Whistleblower protection Act [WPA] SOX created new protections for employees at risk of retaliation for reporting corporate misconduct, but required exhaustion of administrative remedies, a significant difference from Michigan law...Unlike Michigan law, to recover under SOX, an aggrieved employee must first file a complaint with the United States Secretary of Labor...Congress also prescribed a 180-day limitation period for filing SOX complaints.

(Exhibit B at 4).

In explaining the difference between the Michigan action filed and the, then unfiled, SOX action, Counsel for Complainant has shown that both the SOX filing process and the relevant limitations period were known to the Complainant.

In *McCloskey v. Ameriquest Mortgage Co.*, ARB No. 08-123, ALJ No. 2005-SOX-93 (ARB Aug. 31, 2010), the Complainant similarly argued that his SOX whistleblower complaint should be equitably found timely on the ground that he timely filed a precise statutory claim in the wrong forum when he sent an e-mail to the SEC and a letter to a state banking authority. The ARB agreed with the ALJ, however, that these communications were not the precise statutory claim in issue filed in the wrong forum and thus do not justify equitable tolling of the SOX 90-day filing deadline. Moreover, the ARB held that even if equitable tolling applied, the SEC's reply had informed the Complainant of the short filing deadlines for SOX whistleblower complaints, but the Complainant had still not acted promptly to file with OSHA. The ARB cited *Hillis v. Knochel Bros. Inc.*, ARB Nos. 03-136, 04-081, -148, ALJ No. 2002-STA-50, slip op. at 8-9 (ARB Mar. 31, 2006) (noting that the tolling of the statute's deadline was only tolled while the complainants were unaware that they had filed in the wrong forum). Therefore, even if I were to determine that the Complainant’s allegations were sufficient to constitute a misfiled SOX action in Michigan state court, pursuit to Board precedent equitable tolling would not apply as it

only extends to the point the Complainant becomes aware they have filed in the wrong forum. As set out herein, the Complainant's Michigan State filings make it obvious that, from the time she filed her Michigan State Complaint, she was aware she was not filing her SOX suit in the proper location.

Further, the Complainant has made it clear that the action she has filed and relief sought are *not* pursuant to the provisions of SOX. In *Corbett v. Energy East Corp.*, ARB No. 07-044, ALJ No. 2006-SOX-65 (ARB Dec. 31, 2008), the Complainant argued that his filing of a claim with the National Labor Relations Board (NLRB) on April 29, 2005 tolled SOX's limitations period. The ARB, however, agreed with the ALJ's finding that the Complainant was not entitled to equitable tolling because his filing with the NLRB "was not the precise statutory claim filed in the wrong forum because it was not a request for SOX relief based on accounting irregularities, but instead a request specifically directed to the NLRB based on negotiation and execution of a labor agreement, and requesting a remedy from the NLRB." (USDOL/OALJ Reporter at 6).

As the Complainant argued to the Michigan Court of Appeals:

"Requiring reliance on SOX for more than a definition or reference to the type of illegality of the actions complained by Plaintiff-Appellant Nezwisky should be inappropriate and accordingly an erroneous holding below. While Nezwisky qualified for protection under SOX by complaining to a 'person with supervisory authority over the employee,' she did not choose that route. She also could have pursued relief under Dodd-Frank which authorizes reinstatement and compensation for litigation costs, expert witness fees, and reasonable attorney's fees, but requires reporting to the Securities and Exchange Commission...*She opted not to pursue that labyrinth because she already had relief via a claim for wrongful termination.* (Exhibit B at 5-6) (citations omitted) (emphasis added).

This final sentence demonstrates in its own words that there was no misfiling of a SOX Complaint in this case, merely an election of the Complainant to forgo her possible relief pursuant to SOX, and to instead seek redress through the laws of Michigan. While this is entirely within her rights, it does not provide a creditable argument that equitable tolling should apply now that she has shifted to a pursuit of a SOX federal action.

Finally, although the a determination of the underlying applicability of Complainant's reports to SOX need not be reached in this Decision and Order, it appears that Complainant has conceded to the Michigan Courts that that, at least she believes, her complaints falls outside of SOXs scope. Complainant's Counsel states in his Michigan appellate brief:

Further, although Nezwisky's complaint referenced SOX, she did not file under that statute because Section 806 protects against retaliation for reports implicating the enumerated federal fraud statutes (mail, wire, bank or securities fraud), SEC rules, or federal law 'relating to fraud against shareholders.'"

(Exhibit B at 12).

In *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-23 (ARB Sept. 29, 2006), the Complainant alleged that his EEOC complaint and a filing with the Michigan Department of Civil Rights entitled him to equitable tolling for the filing of his SOX whistleblower complaint. The ARB held that "[t]o be considered the 'precise complaint in the wrong forum,' the EEOC complaint must demonstrate that Carter engaged in SOX-protected activity prior to his discharge. His complaints to Champion management must have provided information regarding Champion's conduct that Carter reasonably believed constituted 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." Reviewing the EEOC complaint, the ARB found that it did not contain an allegation of retaliation under SOX. The Michigan complaint contained a notation from the Complainant that he had been advised that the complaint would be more appropriate "under whistle blower protection laws." The ARB found, however, that the reference to whistleblower laws did not remedy the absence in the filing of an expression of a reasonable belief that the Respondent was defrauding shareholders or violating security regulations.

### CONCLUSION

As I have determined that Respondent did not prevent the Complainant from filing her petition with OSHA due to: (1) fraud; (2) active steps preventing her from filing; or (3) fraudulent concealment of facts necessary for Complainant to file her claim, I find that equitable estoppel does not apply to this claim. Further, as I have found that Complainant did not inadvertently file her precise SOX statutory claim in the wrong forum I cannot find that the SOX filing deadline is equitably tolled. Therefore, I find that Complainant's claim was untimely filed and is time-barred under 18 U.S.C. § 1514A(b)(2)(D), and therefore that her Complaint is DISMISSED.

### ORDER

**IT IS HEREBY ORDERED** that the Motion to Dismiss filed by Respondent is **GRANTED**, and the Complainant's claim against Respondent is **DISMISSED**.

PETER B. SILVAIN, JR.  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within 14 business 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 D.C. 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 <http://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, D.C. 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 with the Board, together with one copy of this Decision. In addition, within 30 calendar days of filing the Petition you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed 30 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. If you e-File your Petition and opening brief, only one copy need be uploaded.

Any response in opposition to a Petition 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 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 30 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, 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. § 1980.110(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 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).