



In the Matter of:

COLIN M. HARVEY,

ARB CASE NO. 04-114

COMPLAINANT,

ALJ CASE NO. 04-SOX-20

v.

HOME DEPOT U.S.A, INC.,

RESPONDENT,

and

COLIN M. HARVEY,

ARB CASE NO. 04-115

COMPLAINANT,

ALJ CASE NO. 04-SOX-36

v.

DATE: June 2, 2006

HOME DEPOT U.S.A, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Colin M. Harvey, pro se, Silver Spring, Maryland

For the Respondents:

Leslie M. Turner, Esq., Akin Gump Strauss Hauer & Feld L.L.P., Washington, D.C.

ORDER OF CONSOLIDATION AND FINAL DECISION AND ORDER

This case arose originally from a complaint Colin M. Harvey filed alleging that his employer, Home-Depot U.S.A., Incorporated, violated the employee protection (i.e., whistleblower) provisions under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (West Supp. 2005), and its implementing regulations at 29 C.F.R. Part 1980 (2005), when it terminated his employment. A Department of Labor Administrative Law Judge (ALJ) issued an Initial Decision and Order – Dismissal of Untimely Discrimination Complaint (D. & O.), dismissing the complaint (Harvey I) because of Harvey's failure to file a viable complaint within the 90-day time frame mandated under 18 U.S.C.A. § 1514A(b)(2)(D). The ALJ's determinations are generally supported by a review of the record and comply with the applicable law. Thus, as we discuss below, the ALJ did not err in dismissing the complaint because Harvey did not file a timely SOX complaint.

Harvey subsequently filed a second complaint, alleging that Home Depot again violated the employee protection (i.e., whistleblower) provisions of the SOX, and its implementing regulations at 29 C.F.R. Part 1980, when it accused him of engaging in a campaign to harass Home Depot subsequent to his termination. The ALJ issued an Initial Decision and Order – Dismissal of Discrimination Complaint (D. & O.), dismissing the complaint (Harvey II) for failing to state a cause of action upon which relief under the SOX may be granted. *See* Fed. R. Civ. P. 12(b)(6); 29 C.F.R. § 18.1 (a). Because the ALJ's determination is supported by a review of the record and is in accord with the relevant whistleblower provisions, as we also discuss below, the ALJ properly dismissed Harvey's second claim because Harvey did not state a cause of action.

BACKGROUND - HARVEY I

The record consists almost entirely of letters Harvey wrote to the Home Depot Board of Directors and Executives before his termination of his employment, and letters he wrote to the Department of Labor (DOL) and to Federal officials after his termination. The ALJ generally fairly and accurately characterized the contents of this correspondence. D. & O. - Harvey I at 1-6; D. & O. - Harvey II at 1-3. We discuss Harvey's pre-termination correspondence in the background section and his post-termination correspondence in the analysis section, below.

In 2002, Harvey was employed with Home Depot at its Atlanta, Georgia Store Support Center (SSC) as a Loss Prevention Specialist. Complainant's Exhibit (CX) C, J-1. On January 31, 2002, Harvey informed the Executive Vice President for Human Resources of Home Depot, Dennis Donovan, that he found a white managing director's e-mail sent to two other managers that asked, in reference to Harvey, "who does this guy belong to?" to be offensive and racially insensitive, because he is African-American. CX

A. Harvey went on medical leave for depression, anxiety attacks and other problems beginning on February 27, 2002. CX D-1, E-1, L-1.

May 3, 2002 letter to Board of Directors and Executives

While on leave, Harvey wrote a 9-page letter to Home Depot's Board of Directors on May 3, 2002, complaining that he had reported his grievances to Human Resources, but there had been no resolution. CX C. The letter claimed that the January 2002 e-mail was discriminatory and degrading because it referred to him as someone's property. On another occasion, when Harvey voiced a complaint, a white senior manager told him to be "a man" about it, which he took as discriminatory.

As evidence of acts of racial discrimination that Home Depot managers committed against other Home Depot employees, the May 3 letter cited: the phasing out of a loss prevention position; a white female replacing an African-American store manager at a White House ceremony; the company president going directly to corporate security instead of an African-American Executive Vice President; a white female with three months part-time sales experience being promoted to department manager; an African-American associate being discharged because on two previous occasions strips of money she had put into the "tube system" and locked were stolen; and a white security guard throwing a brick at an African-American shoplifter. More broadly, Harvey's letter charged that out of 54 stores in D.C. and Maryland, only 2 had minority store managers; there was only one minority Vice President (VP) at SSC; and minority associates "seemed" to be less compensated than white counterparts.

As evidence of poor business practices, Harvey's May 3 letter to the Board mentioned: a store manager who was discharged for failing 3 inventory shrink performance reviews; a temporary worker who was not made permanent, even though he had discovered fraud and over-billing, including that a security alarm vendor was paid \$750,000 "because they asked for it"; a rumored requirement that sales associates have college degrees; implementation of a program using 50 per cent part time help; and managers' termination of associates who were on sick leave despite the Family Medical Leave Act (FMLA). He labeled these cumulatively "serious violations of the Home Depot Ethics Code and The Home Depot Labor and Employment Policy", called for an investigation of the "bias and prejudice" in the Mid-Atlantic Division SSC, and suggested creation of new Home Depot positions of Senior Vice President of Diversity Affairs and Employment Issues, Director of Associate Referrals, and Advisory Associate to the Board of Directors.

According to Harvey, he returned to work on May 31, 2002, but was suspended while company officials investigated his allegations of employment and racial discrimination. CX D, J-1. Ultimately, company officials prepared a separation agreement for Harvey at his request, but he refused to sign it. CX D, J-1.

July 14, 2002 letter to Board of Directors and Executives

Again Harvey wrote a letter to Home Depot's Board of Directors and Executives on July 14, 2002. CX D. The letter repeated some of the allegations in his May 2002 letter, complained that the investigation of his May 3 complaint to the Board by Human Resources was inadequate, and noted that after reporting violations of the company code of ethics' prohibition on discrimination to the Board and Executives, he found himself with no job potential within the company. The July 14 letter added a concern about Home Depot's 2001 Proxy Statement. Although the Notice of Annual Stockholders meeting said Home Depot treated everyone with respect and promoted diversity, he knew of minority associates in the D.C./Maryland market who were denied promotions, which he characterized as "malfeasance at the highest levels" of the company.

Undated letter to Board and Executives

In an undated letter in the record, which referenced his previous May 2002 letter, Harvey informed Home Depot's Board of Directors and Executives that he was without "job potential with the company" and had been denied \$3,500 moving expenses and a bonus in the proposed separation agreement. CX E. He planned to file "charges" with the "EEOC" (Equal Employment Opportunity Commission), the Department of Labor (DOL), the Justice Department and the Georgia State Attorney General's Office, would take legal action through the court system and use Home Depot stockholders meetings to alter the corporate leadership.

July 17, 2002 letter to Executives

In a letter to Herb Miller, VP of Human Resources – Mid Atlantic Division, and others, Harvey claimed retaliation for the May 3, 2002 letter regarding "detailed misconduct on the part of senior management associates." CX F. The retaliation was that he had no future job potential. He included copies of his May 3, 2002 and July 14, 2002 letters. He said that, under his April 30, 2001 contract, he was entitled to mediation and arbitration.

July 29, 2002 letter to Board of Directors and Executives

A July 29, 2002 letter from Harvey to Home Depot's Board of Directors indicates that Harvey had moved to Maryland. CX G. In the letter, Harvey stated that he had reported ethics violations (i.e., evidence of discrimination by Home Depot) and discrimination and was told that the company would find him a new job through an employment agency in the Maryland area, but instead was offered a separation agreement and release, supposedly signed by Dennis Donovan, Human Resources (HR) Vice President. He claimed retaliation for reporting ethics violations. He said he filed "charges" with the EEOC and the DOL, and would be writing the Secretary of Labor (about how he was treated, how associates were asked to reduce hours by using sick and

vacation time, and how Home Depot had only 4-5 African-American VPs out of hundreds); Deputy Attorney General of the United States Lawrence Thompson (about how Harvey's constitutional rights were violated); the Georgia State Attorney General (to tell him how he was racially "profiled," i.e., stereotyped); and White House Chief of Staff Andy Card (to tell him how an African-American associate was denied the privilege of attending the White House event).

Harvey also stated that he planned to file a complaint with the Securities and Exchange Commission (SEC) regarding his accusation of "bad corporate governance" at Home Depot "because of the decisions or lack thereof that led to the retaliation against me," and because "this ultimately becomes a fiscal matter because in the end it is going to become a substantial financial liability for the company." Harvey pledged to seek the support of Home Depot stockholders to vote in new Board members and then have some associates in senior positions removed. He said he would tell his story to reporters at the Wall Street Journal, New York Times, Los Angeles Times and Washington Post.

August 9, 2002 letter to Harvey

In an August 9, 2002 letter to Harvey, a Home Depot vice president for Loss Prevention (Marvin Ellison) informed Harvey that Home Depot had investigated the allegations Harvey had raised in his various letters, and that the investigation had "concluded that there was no reason to believe that you were subjected to inappropriate treatment." CX M. Furthermore, the vice president noted that, although Harvey had been informed that he could return to his job in Atlanta, because he had moved to Maryland, Home Depot concluded that Harvey had resigned and that Harvey should inform the vice president "by August 14, 2002" if such was not the case. Ultimately, Home Depot issued a separation notice on August 14, 2002, terminating Harvey's employment.¹ CX Y. On August 30, 2002, a different Home Depot manager, a Vice President for Human Resources, sent Harvey a further letter stating that he had received Harvey's July 17, 2002 letter "asking [him] to investigate [Harvey's] allegations against Home Depot" and advising Harvey that "after reviewing your allegations and completing my investigation, I am unable to substantiate your claim of retaliation, or any other inappropriate conduct." CX K-1.

PROCEDURAL HISTORY – HARVEY I

On August 16, 2002, Harvey wrote a letter to Home Depot officials, copies of which he also forwarded to the United States DOL and Georgia DOL, detailing his attempts to contact Home Depot officials on August 14, 2002, to inform them that they

¹ We do not address Harvey's complaints to Home Depot after his termination, because those letters could not have motivated it. *See, e.g.*, August 14, 2002 letter to Board members, CX H, and August 14, 2002 letter to Executives, CX I.

had not addressed and resolved the several issues which he had raised. CX J. Between August 28, 2002, and November 1, 2002, Harvey wrote numerous letters to the Secretary of Labor and other DOL officials, as well as the Justice Department and the SEC, repeating many of the allegations of discrimination contained in his letters to Home Depot's Board of Directors and Executives, attaching his various letters to the Board and Executives, and adding allegations of wage and hour violations and the purchase of \$100,000 BMWs for company executives. CX F-1, G-1, I-1, L-1; Exhibit 1-B.²

Ultimately, on November 21, 2003, Harvey wrote the Department of Labor's Occupational Safety and Health Administration (OSHA), referring to SOX by name and complaining about some specific practices of the Home Depot Board under the umbrella characterization of "poor corporate governance, chicanery and malfeasance." Exhibit 1-B. OSHA treated the letter as a complaint under the SOX, but denied relief because it was not timely filed within 90 days of Harvey's termination. Harvey requested a hearing before the Office of Administrative Law Judges.

In response to a Notice of Hearing that the ALJ issued, Home Depot asserted that Harvey's putative SOX complaint should be dismissed as untimely. On February 5, 2004, the ALJ issued a Show Cause Order, ordering Harvey to show cause whether his November 21, 2003 SOX complaint should be dismissed. Alternatively, the ALJ ordered Harvey to address whether his August 31, 2002 letter to the Secretary of Labor constituted a SOX complaint or whether he possessed any other correspondence or documents which might establish that he filed a timely SOX complaint, albeit in the wrong forum, or whether any other circumstances existed which would justify an equitable tolling of the statutory timeliness requirement for filing a SOX complaint.

After receiving Harvey's response to his Show Cause Order, which included Harvey's letters to various government officials between August 28, 2002 and November 1, 2002, the ALJ concluded that Harvey's purported November 21, 2003 SOX complaint was untimely because it was not filed within 90 days of his termination. The ALJ then analyzed the allegations contained in Harvey's letters that were provided to government officials within the 90 days, and concluded that because none of those allegations "demonstrate that [Harvey] presented issues to Home Depot involving ... [a] SOX violation," none of the correspondence could be considered to be a SOX complaint. D. & O. – Harvey I at 13. Finally, the ALJ determined that Harvey had not presented facts that would warrant an equitable tolling of the statutory timeliness requirement for filing a SOX complaint. Accordingly, the ALJ dismissed Harvey's original complaint (Harvey I).

Harvey appeals the ALJ's decision in Harvey I without counsel. Although both Harvey and Home Depot have filed briefs, and Home Depot is represented by counsel, neither brief adequately addresses the complex issues in this case.

² We have followed Harvey's numbering system for the exhibits he submitted. Some, like Exhibit 1-B, contain multiple documents.

BACKGROUND AND PROCEDURAL HISTORY – HARVEY II

On August 8, 2003, Harvey filed grievances with the State Bar of Georgia against a Home Depot attorney. In the September 10, 2003 response to the grievances, the counsel representing the Home Depot attorney asserted that the grievances had been "filed as part of an on-going campaign by Mr. Harvey to harass Home Depot and its employees." As a result, Harvey filed a complaint with OSHA on January 30, 2004. In his complaint, Harvey stated that he was filing a complaint "against my former employee [sic] the Home Depot" for stating that he had been harassing them by exercising his rights under the SOX. OSHA denied the complaint because Harvey did not allege facts to meet all the required elements of a prima facie case of discrimination under the "STAA" [sic] and Harvey requested a hearing before the Office of Administrative Law Judges.

On March 19, 2004, the ALJ issued a Show Cause Order, ordering Harvey to show cause whether his SOX complaint should be dismissed for failing to state a cause of action under the SOX. Specifically, the ALJ ordered Harvey to address whether Home Depot's counsel's assertion that Harvey had been harassing Home Depot represented an unfavorable "personnel" action under the SOX against him as an "employee" or whether it adversely affected his subsequent conditions of employment.

After neither party responded to his show cause order, the ALJ concluded that because Harvey was not an employee of Home Depot at the time that it allegedly harassed Harvey in September 2003, the alleged harassment was not an adverse employment action that impacted on the terms and conditions of his employment with Home Depot. Furthermore, the ALJ determined that Harvey did not present evidence of blacklisting resulting from the alleged harassment that had adversely affected the terms or conditions of Harvey's subsequent employment. Consequently, the ALJ concluded that Harvey did not meet the required element under the SOX that he suffered an unfavorable personnel action. Accordingly, the ALJ dismissed Harvey's second complaint for failing to state a cause of action upon which relief could be granted under the SOX (Harvey II). Harvey also appealed the ALJ's decision in Harvey II without the aid of counsel.

ISSUES

1. Whether the ALJ erred in dismissing Harvey's original complaint (Harvey I) as untimely filed.
2. Whether the ALJ erred in dismissing Harvey's second complaint (Harvey II) for failing to state a cause of action under the SOX.

CONSOLIDATION OF ARB CASE NOS. 04-114 AND 04-115

In view of the substantial identity of the legal issues and the commonality of much of the evidence, and in the interest of judicial and administrative economy, Harvey's appeals of the dismissals of his two complaints (Harvey I and II) are hereby consolidated for the purpose of review and decision. *See Agosto v. Consol. Edison Co. Inc.*, ARB Nos. 98-007, 152, ALJ Nos. 96-ERA-2, 97-ERA-54 (ARB July 27, 1999); *Bonanno v. Stone & Webster Eng'g*, ARB Nos. 96-110, 165, ALJ Nos. 95-ERA-54, 96-ERA-7 (ARB Dec. 12, 1996).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002); 29 C.F.R. § 1980.110.

Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 1980.110(b). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). However, the Board reviews an ALJ's conclusions of law de novo. *Cf. Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993) (analogous provision of Surface Transportation Assistance Act); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991) (same).

We review an ALJ's determinations on procedural issues and evidentiary rulings under an abuse of discretion standard, i.e., whether, in ruling as he did, the administrative law judge abused the discretion vested in him to preside over the proceedings. *Canterbury v. Administrator, Wage & Hour Div.*, ARB No. 03-135, ALJ No. 2002-SCA-11, slip op. at 3 (ARB Sept. 2003); *Dickson v. Butler Motor Transit/Coach USA*, ARB No. 02-098, ALJ No. 2001-STA-39, slip op. at 4 (ARB July 25, 2003); *Supervan, Inc.*, ARB No. 00-008, ALJ No. 1994-SCA-47, slip op. at 4-5 (ARB Sept. 30, 2002); *Khandelwal v. Southern Calif. Edison*, ARB No. 98-159, ALJ No. 1997-ERA-6, slip op. at 2 (ARB Nov. 30, 2000).

DISCUSSION

A. Governing Law

The employee protection provision of the SOX prohibits covered employers from retaliating against employees for providing information or assisting in investigations related to listed categories of fraud or securities violations:

(a) Whistleblower Protection For Employees Of Publicly Traded Companies.– No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee–

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by–

(A) a Federal regulatory or law enforcement agency;
(B) any Member of Congress or any committee of Congress; or
(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct);
or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. § 1514A. Specifically, Section 806 of the SOX protects employees who provide information to a covered employer or a Federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission (*see, e.g.*, 17 C.F.R. Part 210 (2005), Form and Content of the Requirements for Financial Statements), or any provision of Federal law relating to fraud against shareholders. In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such alleged violation. 68 Fed. Reg. 31864 (May 28, 2003). *See* 18 U.S.C.A. § 1514A(a).

Actions brought pursuant to the SOX are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2005). 18 U.S.C.A. § 1514A(b)(2)(C). Accordingly, to prevail, a SOX complainant must prove by a preponderance of the evidence that: (1) he engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the respondent knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB July 29, 2005). *Cf.* 29 C.F.R. §§ 1980.104(b), 1980.109(a). *See* AIR 21, § 42121(a)-(b)(2)(B)(iii)-(iv). *See also* *Peck v. Safe Air Int'l, Inc. d/b/a Island Express*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6-10 (ARB Jan. 30, 2004). The respondent can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. *Getman*, slip op. at 8. *Cf.* § 1980.104(c). *See* § 42121(a)-(b)(2)(B)(iv). *See also* *Peck*, slip op. at 10.

An employee alleging retaliation in violation of the SOX should file his or her complaint with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may file with any OSHA officer or employee. 29 C.F.R. § 1980.103(c). "No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations." 29 C.F.R. § 1980.103(b). The complaint alleging retaliation must be filed within 90 days of the alleged violation; i.e., when the discriminatory act has been both made and communicated to the complainant. 18 U.S.C.A. § 1514A(b)(2)(D) ("An action ... shall be commenced not later than 90 days after the date on which the violation occurs."); 29 C.F.R. § 1980.103(d) ("Time for filing. Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.").

B. Harvey I

The ALJ treated Home Depot's assertion that Harvey's SOX complaint should be dismissed as untimely as a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, *see* Rule 12(b)(1), Fed. R. Civ. P.; 29 C.F.R. § 18.1(a) (2005). D. & O – Harvey I at 8-9. We agree with the ALJ's conclusion that Harvey's complaint could also be dismissed under a Fed. R. Civ. P. 12(b)(6) analysis. D. & O – Harvey I at 10 n.11 ("Significantly, since Mr. Harvey also failed to present any adverse employment action in retaliation for alleged protected activity under SOX, the complaint also facially fails to state a cause of action and is subject to dismissal under Fed. R. Civ. P. 12(b)(6).").

In response to Home Depot's motion, the ALJ issued a Show Cause Order and reviewed the contents of letters that Harvey submitted in response to determine whether any of them, individually, sufficiently stated a cause of action to constitute a timely SOX complaint. In other words, utilizing the rubric of the Show Cause Order, the ALJ determined whether Harvey proffered evidence that indicated that the DOL (or some other federal government agency under equitable tolling principles) had been put on notice within 90 days of his termination of his allegations that he had engaged in SOX protected activities before this termination and that those activities were a contributing factor in his termination.

The ALJ's choice of the Show Cause Order procedure to resolve the issue of whether Harvey had filed a timely complaint was within his discretion and neither party has contested it. However, because Harvey argues on appeal that the letters should have been considered collectively rather than individually, we have also considered their combined effect, but reach the same conclusion as the ALJ, namely that they do not constitute a timely SOX complaint.

Also, the ALJ's use of the word "complaint" requires some clarification that is not fully appreciated in the D. & O. – Harvey I. To succeed, Harvey must have made a SOX protected "complaint" prior to the termination of his employment on August 14, 2002. His letters to the Board of Directors and Executives must have "provide[d] information" regarding Home Depot's conduct that the Harvey "reasonably believe[d]" constituted a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), "or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C.A. § 1514A. Then after his termination, he must have filed a "complaint" with the DOL (or another agency under tolling theory) that establishes his right to recover against Home Depot for the company's violation of the SOX, i.e., his protected activities (e.g., "complaints" of fraud or securities violations) were a

contributing factor in the unfavorable personnel action (discharge) the Home Depot took against him. Only then does he state a claim that entitles him to relief.³

After reviewing the record and making all reasonable inferences in Harvey's favor, we conclude that ALJ correctly held that Harvey did not timely file a SOX complaint.

November 21, 2003 letter to OSHA

Harvey sent a letter to the Regional Administrator, Department of Labor – OSHA, dated November 21, 2003, which he said was to file a complaint, as a former employee and current stockholder, against Home Depot under the Corporate Accountability Act of 2002 (Sarbanes-Oxley). Exhibit 1-B. The letter notes that the company's proxy statement discloses that it pays for the travel of members of the Board of Directors, as well as their spouses. Harvey described the practice of paying for spouses as "poor corporate governance, chicanery and malfeasance." He enclosed a copy of the grievance he filed against Home Depot attorneys with the State Bar of Georgia, saying the attorneys' response contained false statements. Harvey also complained (for the first time) that there were "discrepancies, variations and differences" with company signatures on an SEC form.

The November letter disputed the statement on Home Depot's website that the "Board of Directors is dedicated to continuing the Company's leadership position in matters of corporate governance" on the ground that the Board itself was supposed to govern the corporation. Finally, Harvey contended (also for the first time) that the charter for the Board's Audit Committee contained a conflicting statement: Although the purpose was to provide oversight of the integrity of Home Depot's financial statements, Harvey quoted the charter as saying, "it is not the duty or responsibility of the [Audit] Committee or its members . . . to determine that the Company's financial statements are complete and accurate and are in accordance with generally accepted accounting principles." Regardless, Harvey did not allege that Home Depot's financial statements were incomplete, inaccurate, or not in accordance with generally accepted accounting principles.

³ Some of what Harvey claims as protected activities took place before the SOX was enacted on July 30, 2002, 18 U.S.C.A. § 1514A; *see also* 2002 U.S.C.C.A.N. 543, 2002 WL 31046071. However, the alleged retaliatory action, his discharge, occurred on August 14, 2002, after the SOX was in effect. The Board has implicitly held that SOX whistleblower protections apply so long as the complainant proves that the protected activity was a contributing factor and the adverse action occurred after the effective date of the SOX. *See Halloum v. Intel Corp.*, ARB No. 04-068, ALJ No. 03-SOX-7 (Jan. 31, 2006); *Getman v. Southwest Secs., Inc.*, ARB No. 04-059, ALJ No. 03-SOX-8 (July 29, 2005); *Lerbs v. Buca Di Beppo, Inc.*, ALJ No. 04-SOX-8, slip op. at 10-11 (June 15, 2004); *see also* 18 U.S.C.A. § 1514A(a); *Fiduciary Trust Co. Int'l*, 417 F. Supp. 2d 310, 321-324 (S.D.N.Y. 2005); *Gallagher v. Granada Entm't USA, ITV*, ALJ No. 04-SOX-74, slip op. at 10 (Apr. 1, 2005).

Notably, the November 21, 2003 letter does not charge that Home Depot was engaged in fraud on its stockholders or securities violations. Even if the letter could be read to make such allegations, it does not say that Harvey made those complaints before Home Depot decided to terminate him. The letter does not assert that Home Depot retaliated against him for engaging in SOX-protected activity. Nor does it request any specific relief on his behalf. Accordingly, we agree with the ALJ's conclusion that the letter "facially fails to state a cause of action and is subject to dismissal under Fed. R. Civ. P. 12(b)(6)." D. & O. – Harvey I at 10 n.11.

However, even if the letter were read to state a SOX claim under which relief could be granted, it was untimely. Under the SOX, a complaint must be brought within 90 days of the alleged violation. 18 U.S.C.A. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d). Home Depot issued a separation notice terminating Harvey on August 14, 2002. CX Y. A complaint would have been timely if filed by November 13, 2002, but Harvey did not file the November 21, 2003 letter with OSHA until a year later. Clearly, if this were the only complaint filed, then Harvey would be outside the 90-day period, rendering the complaint time barred as a matter of law. Harvey argues, however, that this complaint was actually an addition to a timely filed earlier complaint consisting of one or more of the letters he filed within 90 days of his termination. Thus, in the course of affirming the ALJ's determination that Harvey's November 2003 complaint is untimely, we also scrutinize the letters Harvey timely filed with the Secretary of Labor within 90 days of his termination to see if any of them alleges a cause of action or violation under the SOX.⁴

Harvey's Letters to the Secretary of Labor

August 31, 2002 letter

On August 31, 2002, Harvey wrote a letter to the Secretary of Labor to inform her of "violations of Federal Labor Laws as well as constitutional, first amendment, civil rights and Title VII abuses that have been occurring at the Home Depot" Exhibit 1 - B. He did not mention the SOX, but contended that, after voicing concerns about racial and employment discrimination to the Board of Directors and Executives, he was

⁴ Under the Sox, a complaint must be filed with the Secretary of Labor ("Secretary") within ninety days of the alleged violation. 18 U.S.C.A. § 1514A(b)(1). The regulations implementing the SOX specify, however, that a complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the complainant employee resides or was employed or with any OSHA officer or employee. 29 C.F.R. § 1980.103(c). But a complainant's omission or failure to comply with the procedures outlined in the regulations and, instead, filing a complaint directly with the Secretary of Labor does not by itself indicate bad faith on the part of the complainant and satisfies the filing requirements under the SOX. *Murray v. TXU Corp.*, 279 F. Supp. 2d 799, 804 (N.D. Tex. 2003).

suspended and then terminated. Harvey attached copies of the internal Home Depot e-mails in which he complained about a managing director's e-mail sent to two other managers that asked, in reference to Harvey, "who does this guy belong to?," which he found to be offensive and racially insensitive. CX A. He enclosed and incorporated by reference his May 3, 2002 letter, complaining that no action was taken on his allegations of discrimination. CX C.

Harvey reiterated various prior concerns: Donovan's signature on his Separation Agreement might not have been genuine; he would have had to release a Title VII claim for \$7,000 consideration; his FMLA request was denied; when he was called back to the company for the July 10, 2006 meeting, he had to wait outside in 100-degree heat; and sales associates were required to use leave to reduce overtime. He had tried to inform the company by August 14, 2002, that he did not intend to resign, even though he had moved to Maryland, but he was terminated anyway.

Harvey ended by saying he hoped his letter provided the Secretary with "some insight into how minority associates like myself are treated for voicing concerns" and requested that she take "whatever action [is] permissible" under "Federal Labor Laws" against Home Depot's Board of Directors and Executives.

After reviewing the August 31, 2002 letter to DOL and its attachments, including the May 3, 2002 letter to the Board, the ALJ concluded that Harvey's factual allegations in those various letters did not fall "within the six SOX specified categories of protected activities." D. & O. – Harvey I at 13. "In that regard, clearly none of Mr. Harvey's specific allegations relate to mail fraud, wire fraud, bank fraud or securities fraud. Likewise, his allegations do not point to violations of SEC rules and regulations, which regulate the issuance of, and transactions involving, the securities of publicly traded corporations." *Id.* For example, although a company that tolerates discriminatory practices may not be acting in the best interests of its shareholders, "a SOX protected activity must involve an alleged violation of a federal law directly related to fraud against shareholders." *Id.* at 14. While Title VII protects individuals against discrimination, SOX protects shareholders from inaccurate reporting of a publicly held corporation's financial condition. *Id.* at 14-15.

We agree that the August 31, 2002 letter to the Secretary fails to state a claim for relief under the SOX. The letter and its enclosures must demonstrate that Harvey engaged in SOX-protected activity prior to his discharge. His letters to the Board of Directors and Executives must have provided information regarding Home Depot's conduct that Harvey 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. Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or corporate expenditures with which the employee disagrees, or even possible violations of other federal laws such as the Fair Labor Standards Act or Family Medical Leave Act, standing alone, is not protected conduct under the SOX. To bring himself under the

protection of the act, an employee's complaint must be directly related to the listed categories of fraud or securities violations. 18 U.S.C.A. § 1514A(a); 29 C.F.R. §§ 1980.104(b), 1980.109(a). *See Getman*, slip op. at 9-10 (requiring that the employee articulate the nature of her concern). A mere possibility that a challenged practice could adversely affect the financial condition of a corporation, and that the effect on the financial condition could in turn be intentionally withheld from investors, is not enough. Accordingly, Harvey's August 31, 2002 letter does not express his reasonable belief that Home Depot was defrauding shareholders or violating security regulations. Hence, we affirm the ALJ's determination that it is not a timely claim for relief under the SOX. D. & O. - Harvey I at 16.

September 20, 2002

Harvey wrote to the Secretary of Labor on September 20, 2002 with "more information of Federal Labor Law violations" against Home Depot. CX L-1. During his first 8 years, hourly paid associates in D.C./Maryland were asked to work overtime, past 8 hours, with the promise that they would keep the overtime hours, but a day or two later would be told to cut the overtime. This "illegal practice is still occurring in the DC/MD market," although "we had always complained" about it. He requested that DOL investigate and take action against Home Depot "for these violations of Federal Labor Laws."

Harvey's claim of overtime violations is not protected under the SOX, because it does not involve the listed categories of fraud or securities violations. Nor does he state that Home Depot retaliated against him for raising this concern while he was a Home Depot employee. Harvey's letter does not state a claim for relief under the SOX. Thus, we affirm the ALJ's determination. D. & O. - Harvey I at 16.

October 6, 2002 letter to Assistant Secretary

On October 6, 2002, Harvey sent the same letter to Victoria Lipnic, Assistant Secretary of Labor, Employment Standards Administration, as he had sent to the Secretary of Labor, dated August 31, 2002. CX L-1. This letter fails to state a claim under the SOX for the reasons we stated with respect to the August 31, 2002 letter.

November 1, 2002

Harvey sent a third letter to the Secretary of Labor on November 1, 2002. CX L-1. He wrote that the DOL Wage and Hour Administrator told him to contact the DOL Baltimore Regional Office about his FMLA complaint. The November 1 letter asked the Secretary of Labor to investigate why his FMLA request was denied and why his Home Depot employment was "terminated for complaining about this and other violations of Federal Law." He "wanted the DOL to know the kind of racially discriminatory activity and employment discriminatory practices the Home Depot's Board of Directors and Executive level are condoning," which activity and practices he believed constituted

"violations of a number of Federal Laws." He hoped DOL would investigate and take action against Home Depot leadership.

Harvey's claim of a FMLA violation is not protected under the SOX, since it does not implicate the listed categories of fraud or securities violations. Consequently, even assuming that Home Depot retaliated against him for raising FMLA concerns, Harvey's November 1, 2002 letter does not state a cause of action under the SOX. D. & O. - Harvey I at 16-17.

Read collectively, Harvey's letters to the Secretary fail to state a SOX whistleblower violation, because Harvey does not allege that he raised specific concerns about corporate fraud or securities violations with Home Depot or that those complaints were a contributing factor in his termination.

Equitable Tolling

Although Harvey did not timely file a SOX complaint with OSHA or the Secretary of Labor, the SOX's limitations period is not jurisdictional and therefore is subject to equitable tolling. *Moldauer v. Canadaiga Wine Co.*, ARB No. 04-022, ALJ No. 03-SOX-026, slip op. at 4 (ARB Dec. 30, 2005); *Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-50, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. Tennessee Valley Auth.*, ARB No. 98-11, ALJ No. 98-128, slip op. at 40-43 (ARB Apr. 30, 2001). Thus, we next determine whether Harvey has carried his burden of establishing that he is entitled to equitable tolling of the limitations period. Specifically, we consider whether any of the other correspondence Harvey filed with the Justice Department and the SEC within 90 days of his termination, or any other existing circumstances, would warrant equitable tolling of the deadline for filing a SOX complaint.

When deciding whether to relax the limitations period in a particular case, the Board is guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines. *Moldauer*, slip op. at 5 (ARB Dec. 30, 2005); *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4 (ARB Aug. 31, 2000); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 2 (ARB Nov. 8, 1999). The Board has been guided by the discussion of equitable tolling of statutory time limits in *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981). The Third Circuit recognized three situations in which tolling is proper:

- (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or

(3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

657 F.2d 16, 18-20 (1981) (citation omitted).

Harvey bears the burden of justifying the application of equitable tolling principles. *Wilson v. Secretary, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995) (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling). Though Harvey's inability to satisfy one of these elements is not necessarily fatal to his claim, courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Herchak v. America West Airlines, Inc.*, ARB No. 03-057, ALJ No. 02-AIR-12, slip op. at 4-5 (ARB May 14, 2003), *citing Wilson*, 65 F.3d at 404, quoting *Irvin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). *See also Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984) (pro se party who was informed of due date, but nevertheless filed six days late was not entitled to equitable tolling because she failed to exercise due diligence). Furthermore, an absence of prejudice to the other party "is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Baldwin County Welcome Ctr.*, 446 U.S. at 152.

Harvey does not argue that Home Depot actively misled him or that he was prevented in some extraordinary way from asserting his rights. *See also D. & O. – Harvey I* at 20. The relevant circumstance here is whether Harvey "has raised the precise statutory claim in issue, but has mistakenly done so in the wrong forum." Although Harvey submitted correspondence to the Justice Department and the SEC within 90 days of his termination, to suspend the limitations period for filing a SOX claim, he must have filed "the precise statutory claim in issue," but merely done so in the wrong forum. We conclude, as the ALJ did, that Harvey has not made that showing.

August 28, 2002 letter to Deputy Attorney General

On August 28, 2002, Harvey wrote the Deputy Attorney General at the Justice Department about "corporate malfeasance, [and] bad and negligent corporate governance" against Home Depot. CX I-1. These issues were violations of his constitutional, civil, first amendment and Title VII rights and were condoned by the Board of Directors, he said.

Harvey enclosed a copy of his May 3, 2002 letter to the Board complaining about racial and employment discrimination. He repeated the litany of complaints from his other correspondence: He complained about mistreatment by white supervisors. His doctor placed him on medical leave on February 27, 2002. When he returned to work on May 31, 2002, HR Directors Linda Givens and Steve Hooper suspended him. Home Depot called him in on June 28, 2002 and HR director Steve Hooper and LP VP Marvin

Ellison told him he was going to be terminated. Called in for two more meetings on July 10, 2002, he had to enter the building through a side door.

Harvey provided a copy of his July 14, 2002 letter to the Board, in which he complained about his treatment and being racially profiled. The company told him at the June 28 meeting that he was going to be terminated. Home Depot offered \$7,000. At the July 10, 2002 meeting, the company gave him a Separation Agreement and Release. Dennis Donovan's signature did not match his signature on other company documents, thereby making the document appear to be fraudulent.

Harvey enclosed the August 9, 2002 letter from Marvin Ellison purporting to respond to his letters to the Board and Executive level. He also enclosed his August 14, 2002 response. He added a copy of his July 29, 2002 letter to the Board and Executives, saying he was going to vote the Board out at the next stockholders' meeting, and then petition the new board to replace the executives. He would approach institutional stockholders first. He told the Deputy Attorney General that his plan could have "serious effects on Home Depot's market value when this information becomes public knowledge." He was writing to Thompson to ask the Department of Justice (DOJ) to take action under any "applicable federal, corporate fraud and civil rights laws" against the Home Depot Board and Executives for "issuing fraudulent legal documents and permitting and condoning racial and employment discrimination." Only the Donovan signature was mentioned in the letter as an example of a fraudulent legal document.

The question presented is whether this letter to DOJ constitutes a SOX complaint filed in the wrong forum. It does not. The letter and its enclosures repeat prior complaints to Home Depot management that we have previously determined do not involve SOX-protected activity, because they do not relate, for example, to instances of misrepresentation of Home Depot's financial condition or fraud against its shareholders. We affirm the ALJ's determination that Harvey did not file the "precise statutory claim" (i.e., a SOX complaint) in the wrong forum (the DOJ). D. & O. - Harvey I at 19.

September 16, 2002 letter to SEC Chairman

Harvey's September 16, 2002 letter to the Chairman of the SEC said he would like to file a complaint of "corporate malfeasance, bad, negligent and incompetent corporate governance" against the Home Depot Board and Executives. CX F-1. He enclosed a highlighted version of his May 3, 2002 letter to the Board raising concerns of racial and employment discrimination. Harvey alleged to the SEC that he was suspended and then terminated for writing the May 3 letter. He was given a separation agreement but the signature of Dennis Donovan did not match his signature on other company documents, making it appear fraudulent. Home Depot associates were asked to use personal, vacation and sick time to save the company money. HR VP for Mid Atlantic, Herb Miller, sent Harvey a letter saying he was unable to verify his allegations. Someone else signed the letter with Miller's permission. According to Harvey, that showed "negligence and incompetence" that could have severe liability for the company.

A Fortune Magazine article explained why Bob Nardelli, the Chairman and CEO, did not get a job with GE. It came out 18 months later that he had been looking for a job and (therefore to Harvey) not concentrating on running Home Depot. Harvey contended that it was not made public, calls into question the ethics of the Board, and "this kind of behavior" could have a "negative effect" "on the stock price." This is an example of "poor and negligent corporate governance" at Home Depot, Harvey wrote.

Harvey enclosed a copy of a letter from Loss Prevention VP Marvin Ellison, who had been with Home Depot only two months. His letter recommends that the SEC reduce the number of boards people can serve on. Home Depot members could serve on multiple boards, which to Harvey brought into question the issue of good corporate governance.

Next, he claimed the Home Depot Board issued false information to stockholders and the general public in its 2001 Proxy Statement, which said the company implemented programs that promoted diversity. Harvey said that was false. He never heard of such a program. The only program was Job Performance Process which was introduced in the 90s to settle a gender discrimination suit. He disputed the company's promotion practices because there was a severe shortage of minority representatives in the mid and senior levels.

Harvey told SEC Chairman Pitt he planned to introduce proposals to vote out the board at the next stockholders meeting and replace senior executives. But this could be detrimental once the activities the board and executives have been condoning become public knowledge. "Therefore, I am filing this complaint with you Mr. Pitt and the SEC Commission [sic] first asking the SEC to take whatever action [is] permissible under new and existing corporate governance rules and laws of the SEC."

Because Harvey's September 16, 2002 letter to the SEC does not raise any issues not already discussed in the analysis of the letters to the DOL, for the same reasons explained above, it does not constitute a SOX complaint that was merely filed in the wrong forum. Thus, we affirm the ALJ's determination that Harvey's September 16, 2002 letter to the SEC did not constitute a SOX complaint. D. & O. - Harvey I at 18-19.

September 23, 2002 letter to SEC District Office

Harvey sent a letter to the SEC district office on September 23, 2002, which consisted of a complaint against Home Depot for "corporate malfeasance." CX G-1. He alleged that he was terminated for complaining about racial and employment discrimination. He asserted that the Chairman and CEO recently purchased \$100,000 BMWs for executives with company funds. As a stockholder, he asked the SEC to investigate whether company funds were involved and whether the Board approved. He asked that he not be revealed as the source of the information. He sent identical letters to Deputy Attorney General Larry Thompson on September 23, 2002, CX I-1, and the SEC

Complaint Center on September 25, 2002, CX G-1. These letters do not complain of retaliation for engaging in SOX-protected activity, and therefore do not qualify as SOX complaints, i.e., filing the "precise statutory claim in the wrong forum."

Although the ALJ's D. & O. suggests that Harvey's numerous letters "also asserted Home Depot was inaccurately accounting for large losses in 'unaccounted inventory' in its financial disclosures" and "claimed to have disclosed the co-mingling of company and personal funds when a company executive purchased real estate and associated securities," D. & O. – Harvey I at 2, these two allegations were not in fact contained in timely-filed letters.⁵ Rather, Harvey first reported the unaccounted inventory claim in a May 20, 2003 letter to Richard Soltan, Regional Administrator of OSHA, CX D-1, and first reported the co-mingling claim in an April 28, 2003 letter to John Henshaw, Assistant Secretary of Labor, CX B-1.⁶

Thus, although Harvey made general, conclusive accusations of "corporate malfeasance" and "bad and negligent corporate governance" against Home Depot, the specific context he provided for his accusations related only to the unprotected allegations discussed extensively above, so again Harvey failed to state a cause of action under the SOX. Consequently, we conclude that the ALJ did not err in dismissing Harvey's original complaint. We affirm, therefore, the ALJ's D. & O. in Harvey I and dismiss the complaint.

C. Harvey II

Next, we address Harvey's formal SOX complaint filed with OSHA on January 30, 2004. In his January 30, 2004 letter, Harvey stated that his complaint is against his "former" employer for representing in a September 2003 response to grievances he had filed with the State Bar of Georgia that Harvey had been conducting "an on-going campaign . . . to harass Home Depot and its employees," whereas Harvey asserted that he has merely been exercising his rights under the SOX.

⁵ In Harvey's January 6, 2004 letter to the Office of Administrative Law Judges, however, Harvey asserts, without presenting any supporting evidence, that these two claims were reported in timely-filed letters. *See* Exhibit 1-B, Jan. 6, 2004 letter at 2-3.

⁶ An identical letter was also sent on April 28, 2003, to John Spear, Director of OSHA's Office of Investigative Assistance. *See* CX C-1. Because the April 28, 2003 and May 20, 2003 letters were not filed within the 90-day period, the allegations made therein are not timely unless construed as additions to a timely-filed complaint. Because we conclude that no timely complaint was filed, however, these and other allegations in these and other letters filed outside the 90-day period are untimely and we do not consider them further.

The ALJ issued a Show Cause Order, ordering Harvey to show cause why his complaint should not be dismissed for failing to state a cause of action under the SOX pursuant to Fed. R. Civ. P. 12(b)(6). *See* 29 C.F.R. § 18.1 (a). Neither party responded to the show cause order. Ultimately, the ALJ concluded that, because Harvey was not an employee of Home Depot at the time that he was allegedly harassed, the alleged harassment was not an adverse personnel action that affected the terms and conditions of his employment with Home Depot. D. & O. – Harvey II at 5. Moreover, the ALJ determined that Harvey did not present any evidence of blacklisting resulting from the alleged harassment; thus there was no support for a conclusion that the alleged harassment had adversely affected the terms or conditions of any of Harvey's subsequent employment. Consequently, the ALJ concluded that Harvey did not allege facts to show that he met the adverse employment action element of a SOX complaint and, therefore, dismissed Harvey's second complaint for failing to state a cause of action upon which relief may be granted under the SOX.

Making all reasonable inferences in Harvey's favor, the ALJ's D. & O. thoroughly and fairly recites the relevant allegations and facts. Having reviewed the entire record, we agree with the ALJ's determination.

Taking all of Harvey's allegations as true and making all reasonable inferences in his favor, Home Depot, as Harvey's admittedly "former" employer, did not exercise control over his employment at the time of its September 2003 response to the grievances Harvey filed with the State Bar of Georgia that was the subject of his complaint. *See Bath v. United States Nuclear Regulatory Comm'n*, ARB No. 02-041, ALJ No. 01-ERA-41, slip op. at 4 (ARB Sep. 29, 2003), *citing Kesterson v. Y-12 Nuclear Weapons Plant*, ALJ No. 95-CAA-0012, slip op. at 10 (Aug. 15, 1996), *affirmed*, ARB No. 96-173 (ARB Apr. 8, 1997) (dismissing complaint under the comparable whistleblower protection provision of the Energy Reorganization Act against employees of employer because the complainant "failed to set forth any allegations that, even if taken as true and construed in the light most favorable to him, establish an employment relationship with these individuals").

Moreover, the ALJ properly found that Harvey did not present any statements in the record alleging that he had suffered actionable adverse employment action or "blacklisting" subsequent to his employment with Home Depot. D. & O. – Harvey II at 5. The ALJ properly found, therefore, that Home Depot's filing of the grievance response did not constitute an adverse employment action. *Id.*

Harvey states for the first time on appeal that Home Depot has been "blacklisting" him in his efforts to seek subsequent employment. Specifically, he argues in two of his briefs before the Board that he had an interview scheduled for some time in April 2004 which the prospective employer cancelled in April 2004 after receiving his "reference" information. Harvey II Rebuttal Brief at 2; Harvey I Rebuttal Brief at 3. When considering whether to consider new evidence, the Board ordinarily relies upon the same standard found in the Rules of Practice and Procedure for Administrative Hearings

Before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (2005), which provides that "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.34(c); *see e.g., Williams*, slip op. at 6-7. Harvey has not made such a showing on appeal. Rather, he says that the evidence he offers was available while the record was open.

Specifically, Harvey contends on appeal that the ALJ failed to serve his Show Cause Order on him, which prejudiced his ability to adequately respond to the ALJ's concern as to whether his complaint should be dismissed for failing to state a cause of action under the SOX. Harvey asserts that he would have provided the information about the cancelled interview, had he but known of the Show Cause Order. On review, we note that attached to the ALJ's Show Cause Order is a Certificate of Service attesting that the ALJ's legal assistant sent a copy of the order to Harvey at his current address on March 19, 2004. Given the certificate of service attached to the order affirming that it was sent to Harvey at his correct address and in the absence of any evidence to the contrary, we reject Harvey's contention. *See e.g., Greene v. Environmental Prot. Agency*, ARB No. 03-094, ALJ No. 02-SWD-1, slip op. at 5 (ARB June 14, 2005).

In any case, even if we permitted this new evidence, it would not support Harvey's attempt to state a claim, because Harvey asserts only that his interview was cancelled after the employer received his "reference" information, and does not provide any information to suggest that the grievance response played any part in causing the cancellation of the interview. Thus, the new information does not support Harvey's contention that the grievance response filing that was the subject of his January letter to OSHA was itself an adverse action. Consequently, we conclude that the ALJ acted within his discretion in dismissing Harvey's second complaint for failing to state a cause of action under the SOX. We, therefore, affirm the ALJ's D. & O. in Harvey II and dismiss the complaint.

CONCLUSION

The record supports the ALJ's recommendation to dismiss Harvey's original complaint (Harvey I) as untimely. Within 90 days of his termination, Harvey failed to complain, either to the DOL or to another forum, that he had engaged in SOX-protected activity before his termination and that he had been terminated as a consequence. We therefore **AFFIRM** the ALJ's D. & O. in Harvey I and **DISMISS** Harvey's original complaint.

In Harvey II, because Harvey has not shown that he suffered any adverse employment action under the SOX, Home Depot is entitled to dismissal as a matter of

law. Therefore, we **AFFIRM** the ALJ's D. & O. in Harvey II and **DISMISS** Harvey's second complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge