In the Matter of:

DAVID E. CARTER, **ARB CASE NO. 05-076**

COMPLAINANT, **ALJ CASE NO. 2005-SOX-23**

v. **DATE: September 29,2006**

CHAMPION BUS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
David E. Carter, pro se, Philadelphia, Mississippi

For the Respondent:
Jonathan L. Sulds, Esq, Michelle A. Burg, Esq., *Akin Gump Strauss Hauer & Feld LLP,* New York, New York

FINAL DECISION AND ORDER

The Complainant, David E. Carter, has filed a complaint alleging that the Respondent, Champion Bus, Inc., terminated his employment in violation of the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX)[1] and its implementing regulations.[2] A Department of Labor Administrative Law Judge found that Carter had failed to file a timely complaint and had raised no question of fact regarding his entitlement to tolling of the limitations period. The Administrative Review Board must determine whether the time limitations for filing Carter's complaint should be tolled because he filed the precise statutory claim in issue, but has done so in the wrong forum. Finding, as discussed below, that Carter, as a matter of law, has failed to proffer grounds

[1] 18 U.S.C.A. § 1514A (West 2002).

[2] 29 C.F.R. Part 1980 (2006).

sufficient to toll the limitations period, we agree with the ALJ's recommendation that we dismiss Carter's complaint.

BACKGROUND

The SOX's whistleblower provision protects employees against retaliation by companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934[3] and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934[4] or any officer, employee, contractor, subcontractor, or agent of such companies because the employee provided information to the employer, a Federal agency, or Congress relating to alleged violations of 18 U.S.C. sections 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (security fraud), or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.[5] Furthermore, SOX protects employees 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 violation or alleged violation.[6]

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).[7] 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.[8] 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.[9]

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[3] 15 U.S.C.A. § 781(West).

[4] 15 U.S.C.A. § 780(d)(West).

[5] 18 U.S.C.A. § 1514A.

[6] *Id.*

[7] 49 U.S.C.A. § 42121 (West Supp. 2005); 18 U.S.C.A. § 1514A(b)(2)(C).

[8] *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).

[9] *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 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.[10] The SOX's implementing regulations provide that "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."[11] 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.[12]

Champion Bus terminated Carter's employment on June 30, 2004. On August 25, 2004, Carter wrote to the United States Equal Employment Opportunity Commission stating, "I wish to file discrimination charges against my former employer in your jurisdiction for my termination as Director of Engineering on June 30, 2004 for opposing several prohibited practices . . . ."[13] These practices allegedly included failure to obtain proper "Altoona testing" for modified busses, improperly certifying busses as complying with Federal roll-over standards, shipping overweight busses, delivering busses that could not pass standard seat pull tests, a staff meeting to discuss how to discredit a witness in a case in which the company was a defendant, and discussing confidential employee and dependent medical information in an attempt to reduce costs, influence treatment, and discourage use of medical benefits to reduce medical costs.[14] Carter also claimed "additional discrimination for age, pay harassment and intimidation for giving Carter additional duties without a pay raise, replacing him with a younger person for less pay, and because the president of the company used offensive language "on numerous occasions" and often used objectionable hand gestures."[15]

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[10] 29 C.F.R. § 1980.103(c).

[11] 29 C.F.R. § 1980.103(b).

[12] 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.").

[13] EEOC complaint at 1-2.

[14] *Id.* at 2.

[15] *Id.*

On September 9, 2004, the EEOC rejected Carter's claim and advised him that the Michigan Department of Civil Rights "had more appropriate jurisdiction."[16] Carter filed a complaint with that agency on September 10, 2004.[17]

On November 2, 2004, Carter filed a complaint with the United States Department of Labor in Detroit and was informed that the Occupational Safety and Health Administration (OSHA) administered all whistleblower complaints.[18] On November 17, 2004, Carter filed a formal complaint under the SOX with OSHA.[19]

OSHA issued a determination on January 7, 2005, finding that Carter did not timely file his complaint.[20] Carter requested a hearing before a Department of Labor Administrative Law Judge (ALJ).[21]

Champion filed a Motion to Dismiss and Memorandum of Law in support of the motion. Champion argued that the ALJ should dismiss Carter's complaint because although Champion terminated his employment on June 30, 2004, he did not file his complaint with OSHA until November 17, 2004, more than 140 days later. SOX regulations require a complainant to file a SOX complaint within 90 days of the alleged retaliation.[22] Accordingly, Champion alleged that Carter did not timely file his complaint.

Carter responded that because he requested a severance package or reinstatement subsequent to the termination of his employment and this request was not finally denied until December 16, 2004, his complaint, filed with the ALJ on February 26, 2005, was timely.[23]

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16 Complainant's hearing request at 1.

17 *Id.*

18 *Id.* at 2.

19 *Id.*

20 *Id.*

21 *See* 29 C.F.R. § 1980.107.

22 *See* 29 C.F.R. § 1980.103.

23 It appears that Carter confused the complaint required to initiate a claim under the SOX as provided in 29 C.F.R. § 1980.103 (filed by Carter in November 2004) with the "complaint" the ALJ ordered Carter to file in the ALJ's Notice of Hearing and Pre-Hearing Order (filed by Carter on February 26, 2005). Pursuant to the PART 18 – RULES OF PRACTICE AND PROCEDURE FOR ADMINISTRATIVE HEARINGS BEFORE THE

The ALJ found that regardless whether Carter filed his complaint on November 2, or November 17, 2004, it was untimely because the limitations period began to run on June 30, 2004, when Champion informed Carter of its decision to terminate his employment.[24] The ALJ further determined that Carter had alleged no circumstances warranting tolling of the limitations period.[25] Carter petitioned the Administrative Review Board to review the ALJ's Order Dismissing Complaint.[26]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under SOX.[27] We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies, also governs our review.[28] The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.[29] Accordingly, summary decision is appropriate if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based.[30] A genuine issue of material fact is one, the resolution of which, "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[31]

We view the evidence in the light most favorable to the non-moving party and

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OFFICE OF ADMINISTRATIVE LAW JUDGES, 29 C.F.R. § 18.2(d)(2006), a complaint is "any document initiating an adjudicatory proceeding, whether designated a complaint, appeal or an order for proceeding or otherwise." It is the timeliness of the complaint that Carter filed with OSHA pursuant to 29 C.F.R. § 1980.103 that is disputed; the timeliness of Carter's complaint filed in response to the ALJ's Pre-Hearing Order is not contested.

[24] Order Dismissing Complaint at 3.

[25] *Id.*

[26] *See* 29 C.F.R. § 1980.110(a).

[27] Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a).

[28] 29 C.F.R. § 18.40 (2006).

[29] Fed. R. Civ. P. 56.

[30] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[31] *Bobreski v. United States EPA*, No. 02-0732(RMU), 2003 WL 22246796, at *3 (D.D.C. Sept. 30, 2003).

then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.[32] "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'"[33] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[34]

Furthermore, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing."[35] We agree that Carter has failed to establish that there is a genuine issue of fact for hearing on the timeliness of his complaint or the applicability of the equitable tolling doctrine.

DISCUSSION

Before the Board, Carter has abandoned his argument that he timely filed his complaint.[36] Instead he requests review of the ALJ's determination that he alleged no mitigating circumstances warranting tolling of the limitations period.[37]

In determining whether the Board should toll a statute of limitations, the Board is guided by the discussion of equitable modification of statutory time limits in *School Dist. of Allentown v. Marshall*.[38] In that case, which arose under whistleblower provisions of

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[32] *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002- STA-25, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 00-STA-52, slip op. at 2 (Dec. 13, 2002).

[33] *Bobreski*, at *3 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

[34] *Bobreski*, at *3.

[35] 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co*., No. 93-ERA-42, slip op. at 4-6 (Sec'y July 17, 1995).

[36] Carter's Petition for Review at 1-3. Because Carter has not briefed this issue to the Board, we will not consider it. *Accord Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-022, ALJ No. 2004-AIR-32, slip op. at 12 (ARB Jan. 31, 2006); *Pickett v. Tennessee Valley Auth*., ARB No. 00-076, ALJ No. 00-CAA-9, slip op. at 15 (ARB Apr. 23, 2003); *White v. Osage Tribal Council*, ARB No. 00-078, ALJ No. 95-SDW-1, slip op. at 3 (ARB Apr. 8, 2003); *Development Res., Inc*., ARB No. 02-046, slip op. at 5 (Apr. 11, 2002).

[37] *Id.*

[38] 657 F.2d 16, 19-21 (3d Cir. 1981). *See e.g., Harvey v. Home Depot, U. S. A., Inc.*, ARB Nos. 04-114, 115; ALJ Nos. 04-SOX-20, 36 (ARB June 2, 2006); *Ilgenfritz v. United States Coast Guard Acad.*, ARB No. 99-066, ALJ No. 99-WPC-3 (ARB Aug. 28, 2001); *Hall v. E. G. & G. Defense Materials*, ARB No. 98-076, ALJ No. 97-SDW-9 (ARB Sept. 30,

the Toxic Substances Control Act,[39] the court articulated three principal situations in which equitable modification may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when "the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum."[40]

The party requesting tolling bears the burden of justifying the application of equitable modification principles.[41] Furthermore, ignorance of the law will generally not support a finding of entitlement to equitable tolling.[42]

Carter, in his initial brief to the Board, argues that the limitations period should be tolled because he "filed his complaint with government agencies within the statutory period of 90 days that share a common nucleus of operative facts with his complaint under the Sarbanes Oxley Act" and that the complaint he filed with the EEOC on August 25, 2004, was a timely complaint under an "identical statutory scheme" in the wrong forum.[43] Carter did not raise this argument before the ALJ in response to Champion's Motion to Dismiss.[44] Under our well-established precedent, we decline to consider an argument that a party raises for the first time on appeal.[45]

Nevertheless, even if we were inclined to consider his argument, it is not persuasive. The only wrongdoing that Carter alleges in his EEOC complaint that he complained about to Champion prior to the termination of his employment were the violations of the safety protocols (i.e., the Altoona testing and the roll-over protection

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1998).

[39] 15 U.S.C.A. § 2622 (West 2004).

[40] *Allentown*, 657 F.2d at 20 (internal quotations omitted).

[41] *Accord Wilson v. Sec'y, 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).

[42] *Moldauer, v. Canandaigua Wine Co.,* ARB No. 04-022, ALJ No. 03-SOX-026, slip op. at 6 (ARB Dec. 30, 2005).

[43] Initial Brief in Support of Complainant David E. Carter's Appeal (I. B.) at 4.

[44] Complainant's Reply to Champion Bus, Inc.'s Motion to Dismiss at 1.

[45] *Harris v. Allstates Freight Sys.,* ARB No. 05-146, ALJ No. 2004-STA-17, slip op. at 3 (ARB Dec. 29, 2005); *Farmer v. Alaska Dep't of Trans. & Pub. Facilities,* ARB No. 04-002, ALJ No. 2003-ERA-11, slip op. at 6 (ARB Dec. 17, 2004); *Honardoost v. PECO Energy Co.*, ARB No. 01-030, ALJ No. 00-ERA-36, slip op. at 6 n.3 (ARB Mar. 25, 2003).

certification).[46] To 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.[47] As we held in *Harvey:*

> 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.[48]

Accordingly, since Carter's EEOC complaint does not demonstrate that Champion retaliated against him because his complaints to Champion's management provided information regarding Champion's conduct that Carter reasonably believed was defrauding shareholders or violating security regulations, Carter has not established, as a matter of law, that he filed the precise statutory complaint in the wrong forum.

Carter, in his September 10, 2004 letter to the Michigan Department of Civil Rights attached a copy of his EEOC complaint and notes that he was advised that the complaint would be more appropriate "under whistle blower protection laws." Champion objected to the Board's consideration of this Michigan complaint because it was obviously available to Carter prior to the date on which the ALJ issued his decision, but Carter did not submit it to the ALJ in response to Champion's Motion to Dismiss. Instead, Carter attached it to his initial brief to the Board.[49] Carter mistakenly believed that because he submitted the

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46 EEOC complaint at 1-2.

47 *Harvey*, slip op. at 14.

48 *Id.*

49 Reply Brief of Champion Bus, Inc., at 3, 12-16.

Michigan complaint to OSHA, it was part of the ALJ's record.[50] But the ALJ conducts a de novo proceeding and it was Carter's responsibility to submit to the ALJ any documentation that he wished the ALJ to consider in ruling upon Champion's Motion to Dismiss. While OSHA did forward a copy of Carter's complaint dated November 17, 2004, and his supplementary letter dated November 18, 2004, it did not send the ALJ the attachments to the November 18th letter, which included the Michigan complaint. (The EEOC complaint was in the ALJ's record because Champion's counsel attached it to Champion's Memorandum of Law in Support of its Motion to Dismiss.).

In any event, even if Carter was not raising the tolling argument for the first time on appeal and the Michigan complaint had been included in the ALJ's record, these facts would not have changed our opinion that Carter failed to file the precise statutory complaint in the wrong forum. The Michigan complaint suffers from the same deficiencies as the EEOC complaint. The reference to "whistle blower protection laws" does not remedy Carter's failure to "express his reasonable belief that Champion was defrauding shareholders or violating security regulations."

Carter also argued for the first time on appeal, "Consistent with **Doyle v[.] Alabama [Power Co.],** [87-]ERA-43 (Sec'y Sept. 29, 1989), when "there is a complicated administrative procedure, and an unrepresented, unsophisticated complainant receives information from a responsible government agency, a time limit may be tolled'."[51] When Champion pointed out that Carter had misquoted the Secretary's decision by omitting the critical word "misleading," i.e., "when . . . [a] complainant receives **misleading** information from a responsible government agency,"[52] he argued for the first time in his rebuttal brief that we should toll the limitations period because the EEOC and the Michigan Department of Civil Rights had provided him with misleading information concerning the filing of his SOX complaint.[53]

Again, we decline to consider an issue raised for the first time on appeal.[54] Nevertheless even if this argument was properly before us, we would reject it. Neither the EEOC, nor the Michigan Department of Civil Rights was the responsible government agency for the adjudication of SOX whistleblower cases. Furthermore, given the generic allegations in the complaint Carter filed with the EEOC, it is hardly surprising that the EEOC did not recognize it as a SOX complaint. Finally rejecting a similar argument in

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50 Rebuttal brief (R. B.) at 3.

51 I. B. at 5.

52 *Doyle v. Alabama Power Co.*, 87-ERA-43, slip op. at 4. (Sec'y Sept. 29, 1989)(emphasis added).

53 R. B. at 5-6.

54 *See* cases cited s*upra* note 45.

Allentown, the court held:

> The alleged confusion at the EPA is also irrelevant. It is not the agency to whom a complaint is to be addressed, and in any event, when Hanna first contacted it in April, the thirty-day period with respect to all but the ban on access claim had already elapsed. The tolling argument based upon the agency's actions is therefore limited to this one claim. In our view, that argument must be that the limitation period should be tolled because the EPA did not reply to Hanna's inquiries more promptly and more accurately. We disagree. When all the chaff is stripped away, the naked reason for the delay was Hanna's lack of knowledge about the remedy. The statutory language is plain and direct and leaves no basis for reliance upon the EPA in any respect. Hanna's ignorance of the law is not enough to invoke equitable tolling.[55]

Likewise, it appears that Carter was ignorant of the SOX and the procedures for filing a complaint under the statute. Ultimately, this ignorance is not a sufficient basis upon which to invoke equitable tolling. Accordingly, we hold that as a matter of law Carter has failed to establish that he is entitled to equitable tolling of the limitations period.

CONCLUSION

Because Carter failed to establish a genuine issue of fact regarding the applicability of equitable tolling to the limitations period for filing his complaint, the ALJ properly found that Champion was entitled to summary dismissal of Carter's complaint. Accordingly we accept the ALJ's recommended decision, and we **DISMISS** Carter's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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55 *Allentown*, 657 F. 2d at 21.