In the Matter of:

SANDRA D. BRADY, **ARB CASE NO. 06-044**

COMPLAINANT, **ALJ CASE NO. 2006-SOX-016**

v. **DATE: March 26, 2008**

DIRECT MAIL MANAGEMENT, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Rex L. Fuller, III, Esq., *The Fuller Law Firm,* Chesapeake Beach, Maryland

For the Respondent:
Jay P. Holland, Esq., Lawrence R. Holzman, Esq., Jason L. Levine, Esq., *Joseph, Greenwald & Laake, P.A.,* Greenbelt, Maryland

FINAL DECISION AND ORDER DISMISSING COMPLAINT

The Complainant, Sandra D. Brady (Brady), has filed a complaint alleging that the Respondent, Direct Mail Management, Inc., (DMM) terminated her 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 (ALJ) found that Brady's complaint was untimely filed. The ALJ also determined

[1] 18 U.S.C.A. § 1514A (West 2002).

[2] 29 C.F.R. Part 1980 (2007).

that there was no basis in law or fact to toll the limitations period for the filing of a complaint. Alternatively, the ALJ found that the Respondent was not a publicly-traded company and was not subject to the provisions of the SOX. Therefore, the ALJ issued a recommended order granting the Respondent's Motion for Summary Decision. As discussed herein, Brady did not timely file her complaint and has not proven her entitlement to equitable tolling of the limitations period. Therefore, we agree with the ALJ's recommended decision and dismiss Brady'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

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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-008 (ARB July 29, 2005). *Cf.* 29 C.F.R. §§ 1980.104(b), 1980.109(a). *See* AIR 21, § 42121(a)-

demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.[9]

An employee alleging retaliation in violation of the SOX should file his complaint with the Department of Labor's Occupational Safety and Health Administration (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, "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]

The facts are not in dispute. At all relevant times, DMM performed direct mail services on a contract basis. It was not a publicly-traded company. DMM employed Brady as a bookkeeper. On or about January 7, 2005, Brady informed DMM's officers that she intended to file a "grievance" with "the Department of Labor" concerning DMM's alleged practice of keeping its customers' overpayments. DMM terminated Brady's employment on January 24, 2005.

On or about February 22, 2005, Brady retained counsel to represent her in her alleged wrongful termination case. On August 20, 2005, Brady retained her present counsel, Mr. Fuller. On Brady's behalf, counsel filed a complaint with OSHA dated September 15, 2005. The Respondent was served with the complaint but did not answer it. OSHA received the complaint on September 20, 2005, 239 days after DMM terminated Brady's employment. Eight days later, OSHA dismissed the complaint on

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(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-003, 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.

[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.").

September 28, 2005, because it was untimely. Brady objected to OSHA's dismissal and requested a hearing before a Department of Labor Administrative Law Judge.[13]

After notice to the parties, the ALJ scheduled the hearing for January 23, 2006. On December 13, 2005, the Respondent filed a Motion for Summary Decision. The Respondent argued that it was undisputed that Brady's complaint is time-barred under 18 U.S.C.A. § 1514A(b)(2)(D). The Respondent contended that Brady's sole argument as to why the limitations period should be relaxed, namely that she should not suffer dismissal where she relied on counsel to timely file a complaint but he did not do so, is inadequate to afford Brady relief from the time bar. Alternatively, the Respondent argued that it was not subject to the provisions of the SOX. Brady responded, and argued that the Respondent had waived its right to defend against the complaint where it had not answered the complaint or Brady's request for a hearing. Therefore, Brady urged the ALJ to deny the Respondent's motion and enter a default judgment in her favor.

The ALJ found that it was undisputed that Brady's complaint was not timely filed.[14] The ALJ also determined that Brady was not entitled to have the limitations period tolled based on either the doctrine of equitable estoppel or the doctrine of equitable tolling. The ALJ found that equitable estoppel did not apply because the Respondent had engaged in no conduct that prevented Brady from timely filing a complaint.[15] The ALJ found that the doctrine of equitable tolling was likewise not applicable where: (1) the Respondent did not mislead Brady respecting the cause of action; (2) Brady had not in some extraordinary way been prevented from asserting her rights, and (3) Brady had not raised the precise statutory claim at issue but had done so in the wrong forum.[16] The ALJ concluded that Brady's claim was time-barred and Brady was entitled to no equitable relief from the time bar of the limitations period. Alternatively, the ALJ found that the Respondent is not a publicly-traded company and is not otherwise subject to the SOX.[17]

The ALJ next rejected Brady's argument that the Respondent had waived its right to contest any allegation asserted in the complaint. In support of her argument, Brady had contended that waiver was a consequence of the fact that Respondent had not filed an answer to the complaint while it was pending with OSHA and had not responded to Brady's request for a hearing filed with the Office of Administrative Law Judges (OALJ). The ALJ found that there was no requirement under the SOX or its implementing

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13 *See* 29 C.F.R. § 1980.107.

14 Recommended Decision and Order (R. D. & O.) at 4.

15 *Id.* at 5.

16 *Id.* at 5-7.

17 *Id.* at 8-9.

regulations at 29 C.F.R. Part 1980, that a respondent answer a complaint filed with OSHA or respond to a complainant's request for a hearing filed with the OALJ.[18] Therefore, the ALJ concluded that DMM had not waived its right to defend against the complaint or to seek summary judgment.[19]

The ALJ recommended that the Respondent's Motion for Summary Decision be granted and that Brady's complaint be dismissed. Brady petitioned the Administrative Review Board to review the ALJ's Recommended Order Granting Respondent's Motion for Summary Judgment.[20]

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.[21] We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies, also governs our review.[22] The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.[23] 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.[24] 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."[25]

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ

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18 *Id.* at 7-8.

19 *Id.* at 8.

20 *See* 29 C.F.R. § 1980.110(a).

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

22 29 C.F.R. § 18.40 (2006).

23 Fed. R. Civ. P. 56.

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

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

correctly applied the relevant law.[26] "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.'"[27] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[28]

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."[29] We agree that Brady has failed to establish that there is a genuine issue of fact for hearing on the timeliness of her complaint or the applicability of the equitable tolling doctrine.

DISCUSSION

We have exercised de novo review of the ALJ's recommended decision granting the Respondent's Motion for Summary Decision and dismissing the time-barred complaint and we find no reason to depart from it. We affirm the ALJ's conclusions as he correctly applied the relevant statutes, regulations, and case precedent.

We do, however, clarify our disposition on the waiver issue. Brady contended that DMM waived its right to defend against the complaint where it: (1) did not answer the complaint filed with OSHA, and (2) did not respond to Brady's objections/request for a hearing filed with the Office of Administrative Law Judges (OALJ).[30] We first address Brady's assertion that DMM waived its rights by not responding to her objections/request for a hearing. The ALJ properly determined that where the *general* rules of practice and procedure for administrative hearings before the OALJ contained at 29 C.F.R. Part 18, including 29 C.F.R. § 18.5, are inconsistent with the *specific* provisions of the SOX and its regulations at 29 C.F.R. Part 1980, the latter applies. Under the SOX regulations, DMM could, but was not required to, respond to Brady's October 2005 objections/request for a hearing.[31] The ALJ issued a notice of hearing, and DMM

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[26] *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002- STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (Dec. 13, 2002).

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

[28] *Bobreski*, at *3.

[29] 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co*., No. 1993-ERA-042, slip op. at 4-6 (Sec'y July 17, 1995).

[30] DMM has not raised any service of process issue.

[31] *See* 29 C.F.R. § 1980.106(a), (b).

responded by filing a Motion for Summary Decision; there was no regulatory bar to DMM's filing.[32]

We now turn to Brady's assertion that DMM waived its rights when it did not answer her complaint. The ALJ did not address the fact that 29 C.F.R. § 18.5, part of the general rules of practice and procedure for administrative hearings before the OALJ, does not apply to a SOX complaint filed with OSHA. The regulatory provisions applicable to a SOX complaint provide that OSHA must send notice of the filing of the complaint and a respondent *may* file a response to the complaint within twenty days of receiving the notice.[33] We note that a response by the respondent is discretionary, not mandatory. Moreover, in this case, OSHA dismissed Brady's complaint only eight days after it was filed because it was untimely filed. Where OSHA dismissed the complaint before the running of the time (20 days after notice) in which DMM would have had to respond to the complaint, DMM did not waive its right to defend against it. Based on the foregoing discussion, we agree with the ALJ's conclusion that DMM did not waive any right to defend against the complaint.

CONCLUSION

The ALJ properly concluded that Brady's complaint is time-barred. We **AFFIRM** the ALJ's decision to grant the Respondent's Motion for Summary Decision and adopt his recommended decision on the timeliness issue and attach it. Accordingly, we accept the ALJ's recommended decision and we **DISMISS** Brady's complaint.[34]

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge

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[32] *See* 29 C.F.R. § 1980.107.

[33] 29 C.F.R. § 1980.104 (a), (c).

[34] Given our dismissal of Brady's complaint because it is time-barred, we need not reach the ALJ's alternative conclusion that the Respondent is not a publicly-traded company and is not otherwise subject to the SOX.