U.S. Department of Labor

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Issue Date: 08 November 2005

CASE NOS.: 2005-SOX-00055
2005-SOX-00056

In the Matters of

G. PAT PILES,
LARRY D'ANGELO,
Complainants,

v.

LEE HECHT HARRISON, LLC.,
Respondent.

ORDER GRANTING RESPONDENT'S MOTION AND DISMISSING COMPLAINANTS' COMPLAINTS

These cases arise out of complaints of discrimination filed pursuant to the employee protection provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A et seq. ("the Sarbanes-Oxley Act" or "the Act") enacted on July 30, 2002. The Sarbanes-Oxley Act provides the right to bring a "civil action to protect against retaliation in fraud cases" under section 806 to employees who "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 [certain provisions of the Sarbanes-Oxley Act], 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. § 1514A(a)(1). The Sarbanes-Oxley Act extends such protection to employees of companies "with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781)["SEA of 1934"] or that is required to file reports under Section 15 (d) of the Securities Exchange Act of 1934 (15 U.S.C. § 780(d))." 18 U.S.C. § 1514A(a).

I. INTRODUCTION

Procedural History

G. Patton Piles and Larry D'Angelo ("Complainants") were employed as Certified Associates by Lee Hecht Harrison ("LHH", "Respondent", "Employer") until their employment was terminated on May 24, 2004. On January 18, 2005, Complainant Piles filed a complaint with the Secretary of the United States Department of Labor, through the Occupational Safety and Health Administration ("OSHA") alleging that his termination constituted discriminatory retaliation under the Sarbanes-Oxley Act. Complainant D'Angelo filed his complaint with

OSHA eight days later, citing the same allegations. On April 4, 2005, OSHA dismissed both complaints. Complainants then requested a hearing.

A hearing on this matter was scheduled for May 31, 2005, in Rochester, New York. On May 6, 2005, I issued a Pre-Hearing Order to both parties requesting, among other things, a statement of jurisdiction that would answer the following inquiries:

1. Whether the instant complaint was timely filed;
2. Whether the Respondent is a company that registers securities under Section 12 of the SEA of 1934, or that is required to file reports under Section 15(d) of the SEA of 1934; and
3. The discreet acts performed by Respondent for which the employee asserts subject matter jurisdiction under the Sarbanes-Oxley Act.

On June 10, 2005, in response to my order, Respondent moved to dismiss, or alternatively, for summary decision, on two grounds: 1) that LHH is not a proper respondent under the Sarbanes-Oxley Act; and 2) that the Complainants filed their complaints after the statute of limitations period had elapsed.[1]

On July 18, 2005, the Complainants submitted an opposition to Respondent's motion to dismiss and filed a cross-motion to amend their complaint to replace LHH with Adecco S.A. as respondent.[2] On July 25, 2005, Respondent filed an unopposed motion to extend the time in which to file a reply memorandum, which was filed on August 8, 2003.

Respondent also subsequently filed supplementary authorities, to which Complainants objected. As these submissions were submitted after the deadline for filing briefs, without agreement of the parties, I have not relied upon them in my Decision and Order.

This Decision and Order addresses the merits of Respondent's motion to dismiss or for summary judgment, and I have confined my discussion of the facts to those pertinent to that motion.

II. ISSUES

1. Whether Complainants' complaints were timely filed under Section 806 of the Sarbanes-Oxley Act, codified at 18 U.S.C § 1514A(b)(2)(D);
2. Whether Complainants should be allowed to amend their complaints to include Adecco S.A. as a respondent; and
3. Whether LHH or Adecco S.A. are companies with a class of securities

[1] Respondent's brief in support of their motion shall be cited as "RB1. at -." Attached to that brief were six exhibits which will be cited as "RX.-A" through "RX.-F." Respondent's reply brief dated August 5, 2005, shall be cited as "RB2. at -."

[2] Complainants' brief in support of their cross-motion shall be cited as "CB. at -." Attached to the brief were nine exhibits which will be cited as "CBX.-A" through "CBX.-I." In addition, in a separate document, Complainants submitted eight other exhibits, which will be cited as "COX.-A" through "COX.-H," as well as their own affidavits, which will be cited as "Piles Affidavit at ¶ -" and "D'Angelo Affidavit at ¶ -", respectively.

registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. section 78l) or that are required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. section 780(d), thereby subjecting them to jurisdiction under Section 806 of the Act, codified at 18 U.S.C. section 1514A(a).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

I find it appropriate to address first whether the complaints were timely filed. 18 U.S.C § 1514A(b)(2)(D) establishes a statute of limitations of 90 days within which claims under the Sarbanes-Oxley Act must be filed. The filing of a complaint beyond that time limitation bars its adjudication. Both parties have set forth arguments on this issue, which can be resolved as a matter of law.

Summary decision may be granted to either party if the pleadings, affidavits, or materials obtained through discovery show that there is no genuine issue of material fact that remains to be resolved. 29 C.F.R. §§ 18.40-41. The moving party bears the initial burden of demonstrating that there is no disputed issue of material fact, which may be demonstrated by "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Hall v. Newport News Shipbuilding and Dry Dock Co., 24 BRBS 1,4 (1990). Upon such a showing, the burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact. Celotex, 477 U.S. at 322; Hall, 24 BRBS at 4. All evidence must be viewed in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 261 (1986); Hall, 24 BRBS at 4. Where a genuine issue of material fact does exist, an evidentiary hearing must be held. 29 C.F.R. §18.41(b).

I find that there is no genuine issue of material fact regarding the issue of timeliness.[3] Accordingly, I find it appropriate to issue a Decision and Order without a hearing.

A. Positions of the Parties

1. Complainants

Complainants do not challenge that their complaints were filed after the 90-day filing period of the Sarbanes-Oxley Act. It is undisputed that their complaints were filed nearly eight (8) months after Complainants were terminated from their positions. Complainants also expressly disavow the theory of "continuing violation" as a means to establish the timeliness of their complaints. Rather, Complainants assert that they refrained from taking legal action after their terminations due to the conduct of the Respondent. As a result, they maintain that Respondent should be estopped from raising the statute of limitations as an affirmative defense.

[3] Because I find that Complainants' complaints were not filed timely under the Act, I have confined my discussion of the facts to that issue, and have not addressed the facts pertinent to resolution of the other two issues.

2. Respondent

Respondent observes that Complainants filed their complaints well after the 90-day filing period of the Sarbanes-Oxley Act and contends that equitable estoppel is not appropriate in this matter because 1) the Complainants have failed to allege affirmative misrepresentations on the part of the employer; and 2) the acts of the employer alleged by Complainants do not justify equitable estoppel as a matter of law.

B. Factual Background

1. Evidence of Record

Complainants' submitted evidence summarized as follows:

CB.	Complainants' brief in opposition to Respondent's motion to dismiss and in support of Complainants' cross-motion to amend complaint dated 07/15/05
CBX.-A	Speech by SEC Chairman
CBX.-B	Adecco Annual Report 2004 - Introduction
CBX.-C	Adecco Annual Report 2004 – Structure and Shareholders
CBX.-D	Adecco Annual Report 2004 – Major Consolidated Subsidiaries
CBX.-E	Adecco Home Web Page – www.adecco.com
CBX.-F	Lee Hecht Harrison Home Web Page – www.lhh.com
CBX.-G	Web Page – The Official Website for the State of Delaware
CBX.-H	Adecco Annual Report 2004 – Members of Senior Management
CBX.-I	Report – About Lee Hecht Harrison Career Services

Affidavit of G. Patton Piles dated 07/14/05
Affidavit of Larry D'Angelo dated 07/14/05

COX.-A	Email from Courtney Cain to Compliance/Whistleblower dated 07/29/04 consisting of a letter from Steve Harrison to all LHH employees
COX.-B	First Special Newsletter on US Sarbanes-Oxley Act by Jim Fredholm
COX.-C	Email from Pat Piles to Vernon Broderick dated 09/20/04 and response email from Vernon Broderick to Pat Piles dated 09/20/04
COX.-D	Letter by Tunde Johnson undated
COX.-E	Letter from Maurice Miller to Pat Piles dated 09/24/04
COX.-F	Letter from Pat Piles to Maurice Miller dated 10/14/04
COX.-G	Letter from Stephanie Caffera to Pat Piles dated 03/08/05
COX.-H	Marked as an exhibit but consists of nothing

Respondent submitted evidence summarized as follows:

RB1.	Respondent's brief in support of motion to dismiss or, in the alternative, for summary decision dated 06/09/05
RB2.	Respondent's reply memorandum in support of Respondent's motion to dismiss or, in the alternative, for summary judgment dated 08/05/05

RX.-A Letter from OSHA to counsel for Complainants dated 04/04/05
RX.-B Declaration of Daniel Schlotterbeck dated 06/03/05
RX.-C Email from Pat Piles dated 09/20/04
RX.-D Letter from Pat Piles to Maurice Miller dated 10/14/04
RX.-E Complainant Pat Piles' complaint dated 01/18/05
RX.-F Complainant Larry D'Angelo's complaint dated 01/26/05

2. Statement of the Relevant Facts

Because I am issuing a summary decision without hearing, I accept all of Complainants' factual allegations as true.

Complainants were actively employed by LHH in its Rochester, New York office until May 26, 2004, at which time they were told that their respective positions as Senior Consultant and Consultant were being eliminated. Piles Affidavit at ¶ 2; D'Angelo Affidavit at ¶ 3. Both Complainants Piles and D'Angelo considered their employment at LHH "terminated" at that point in time. *See* COX.-C at 2; RX.-C at 2 (email from Piles to Vernon Broderick). Both Complainants were notified that although they would no longer have positions in the Rochester office, they would be eligible to work in other offices if work arose. Piles Affidavit at ¶ 10; D'Angelo Affidavit at ¶ 7.

It is the belief of the Complainants that their jobs were terminated in retaliation for making too many inquiries of management about billing issues concerning a certain account. Piles Affidavit at ¶ 10; D'Angelo Affidavit at ¶ 7. In June, 2004, Complainant Piles continued to communicate his concerns to management that the company may have engaged in ethics violations. Piles Affidavit at ¶ 18. Piles verbally and in writing advised management at LHH about his concerns and asked to discuss those concerns with the appropriate company personnel. Id. Complainants were under the impression from information provided on the Sydney Desktop[4] that their complaints fell under "Whistleblowing" and were subject to the provisions of the Sarbanes-Oxley Act. Piles Affidavit at ¶ 18; D'Angelo Affidavit at ¶ 11.

Piles was told by company officials that his concerns would be investigated, and that he would be contacted by investigators who would review the matter. Piles Affidavit at ¶ 18. Presuming that his complaints were being processed through the appropriate channels, Piles waited to be contacted. Piles Affidavit at ¶ 18. In August 2004, Piles was contacted by Vernon Broderick, an attorney for Adecco[5], who wanted to speak with Piles about his concerns of ethical misconduct within LHH. Piles Affidavit at ¶ 19. Broderick also contacted Complainant D'Angelo for the same purpose in September, 2004. D'Angelo Affidavit at ¶ 14. Piles met with Broderick on August 6, 2004, and told him about the business and accounting practices that he had witnessed at LHH and found questionable. Piles Affidavit at ¶ 19. At that time, Broderick informed Piles that he would contact other parties that Piles had implicated in the matter. To Piles' knowledge, Broderick never contacted those parties. Piles Affidavit at ¶ 19.

[4] The "Sydney Desktop" is LHH and Adecco's intranet communications system that allows Adecco and LHH employees and corporate officials to exchange corporate information. Piles Affidavit at ¶ 13.
[5] Adecco S.A. is LHH's publicly-held corporate parent.

On September 20, 2004, Piles sent an email to Broderick to inquire about the status of his investigation. Piles Affidavit at ¶ 20. Broderick then notified Piles that he was forwarding Piles' email to three members of Adecco's Compliance and Business Ethics Department. Piles Affidavit at ¶ 20. This further led Piles to believe that his complaint was being seriously considered by Adecco and LHH. On September 24, 2004, Maurice Miller, compliance attorney for Adecco, sent a letter to Piles assuring him that his complaint was being processed through the appropriate Sarbanes-Oxley channels at Adecco. Piles Affidavit at ¶ 21. This letter from Miller prompted Piles to wait even further for an adequate response into his complaint from Adecco. Piles Affidavit at ¶ 22.

On October 14, 2004, Piles sent a follow-up letter to Miller inquiring into the status of the investigation. Piles was then contacted by a local Rochester attorney named Stephanie Caffera of the Nixon Peabody Firm. Piles Affidavit at ¶ 23. Piles and D'Angelo met with Caffera on three separate occasions in late October to mid November, 2004, to discuss the circumstances of their claims. Piles Affidavit at ¶ 23; D'Angelo Affidavit at ¶ 15.

When Complainants did not hear from Caffera after their last meeting in mid-November, in December, 2004, they consulted counsel regarding their legal rights. Piles Affidavit at ¶ 23; D'Angelo Affidavit at ¶ 15. Their attorney recommended that they file complaints under the Sarbanes-Oxley Act with OSHA. It was at this point that Complainants first learned of the filing deadlines imposed by the Sarbanes-Oxley Act. Piles Affidavit at ¶ 23; D'Angelo Affidavit at ¶ 15. Complainants did not receive word about the company's investigation into their complaints until Piles received Caffera's letter dated March 8, 2005, in which she informed the Complainants that investigation into their complaints did not disclose corporate misconduct or retaliation against them. COX.-G; D'Angelo Affidavit at ¶ 17.

During the time that the company pursued its investigation into Complainants' whistleblower complaints, Complainants were under the impression that they remained "project eligible" with LHH. In June 2004, Ric McLellan, Senior Vice President of Training and Certification, and Tom McFarland, Vice President of Project Services for LHH, asked Piles if he wanted to continue working with LHH. Piles Affidavit at ¶ 11. After Piles assured them that he did, he was directed to update his biographical information with the LHH Project Services Department. Piles was also told that his status with LHH was "cleared to work" and that he was considered "assignment eligible." Piles Affidavit at ¶ 11. Piles and D'Angelo believed that from that time on they were on standby with LHH to be assigned to any available project; however, no appointments were ever made. Piles Affidavit at ¶ 12; D'Angelo Affidavit at ¶ 8.

In addition to relying upon his communications with McLellan and McFarland, Piles also believed that he could receive possible future assignments from LHH due to the circumstances surrounding the Sydney Desktop. Piles Affidavit at ¶ 13, 14. D'Angelo was of the same view. D'Angelo Affidavit at ¶ 9, 10. A password was required for employees to access the Sydney Desktop, and Complainants' passwords remained active through at least the date of their respective affidavits. Piles Affidavit at ¶ 13; D'Angelo Affidavit at ¶ 9. Complainants believed that their access to the system remained active so that they could monitor possible future project assignments and information. Piles Affidavit at ¶ 14; D'Angelo Affidavit at ¶ 10.

C. Analysis

The Sarbanes-Oxley Act establishes a statute of limitations for filing a complaint relating to employment discrimination against individuals who participate in activity protected under the Act. 18 U.S.C § 1514A(b)(2)(D). Non-compliance with the time limitation bars the adjudication of a complaint under the Act. An individual alleging status as a "whistleblower" under the Sarbanes-Oxley Act must commence administrative action within 90 days of the alleged adverse employment action. Id. This 90-day filing period begins to run when the employer makes and reasonably communicates the discriminatory adverse employment decision to the employee. 29 C.F.R. § 1980.103(d). Thus, the limitations period commences once the employee is aware of or reasonably should be aware of the employer's decision. Equal Employment Opportunity Commission v. United Parcel Service, 249 F.3d 557, 561-62 (6th Cir. 2001).

Respondent contends that Complainants' complaints are barred by the Act's statute of limitations because they each filed their complaints with OSHA approximately eight months after they learned of their terminations. Respondent's assertion is supported by the record. The Complainants acknowledge in their respective complaints to OSHA that each was informed of his termination by an LHH supervisor on May 26, 2004. RX.-E at 1; RX.-F at 1. Complainant Piles' complaint with OSHA is dated January 18, 2005. RX.-E at 1. Complainant D'Angelo's complaint with OSHA is dated January 26, 2005. RX.-F at 1. Each of those complaints was filed after the 90-day Sarbanes-Oxley filing deadline. It is undisputed that Complainants filed their respective complaints well beyond the period mandated by the statute.[6]

Complainants have expressly disavowed that their complaints were timely filed because of allegations of "continuing violations". Nor does the evidence of record support such a finding. Without expressly stating so, Complainants rely upon the theory of "equitable estoppel" for relief from the statute of limitations. Complainants argue that the factual circumstances merit construction of their complaints as timely filed because they were misled into refraining from legal action. Consequently, equity would mandate that their claims be adjudicated despite the Act's time restrictions. CB. at 15.

In its reply brief, Respondent addressed the issue of "equitable tolling." Equitable estoppel and equitable tolling are distinct, albeit related, doctrines. Moldauer v. Canandaigua Wine Co., 2003-SOX-00026 (ALJ Nov. 14, 2003). Equitable tolling may be appropriate when the complainant demonstrates that extraordinary circumstances prevented him from "managing his affairs and thus from understanding his legal rights and acting upon them." Id., c*iting* Hall v. EG&G Defense Materials, Inc., ARB Case No. 98-076 (ARB Sept. 30, 1998). Equitable estoppel focuses on actions taken by a respondent that prevent a complainant from filing a claim. Santa Maria v. Pacific Bell, 202 F.3d 1170, 1176 (9th Cir. 2000). Most importantly, the doctrine requires the complainant to reasonably rely on respondent's conduct. Id. at 1177.

After thorough review of Complainants' brief, I am satisfied that Complainants invoke only the theory of equitable estoppel as a "defense" to the statute of limitations. They have not presented facts that could be considered extraordinary circumstances for equitable tolling purposes, nor do they cite or reference any case addressing equitable tolling. Rather,

[6] Nearly 5 months after the 90-day filing period.

Complainants' arguments are based solely on Respondent's purported conduct, specifically two "ploys" that Complainants contend were used to lull them into a "wait and see" posture. CB. at 14. Thus, I am satisfied that the only issue to be addressed is whether equitable estoppel merits construction of Complainants' complaints as timely filed.

In support of their position, Complainants submitted a single case, Price v. Litton Systems, Inc., 694 F.2d 963 (4th Cir. 1987). In Price, the Fourth Circuit Court of Appeals affirmed the grant of summary judgment in favor of an employer that alleged that the plaintiff employee failed to file his age discrimination charge within the 180-day time period prescribed by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. Id. In Price, the plaintiff advanced two theories supporting his contention that his complaint was not barred by the ADEA's statute of limitations, including the theory that defendant employer's actions[7] prohibited the employer from asserting the statute of limitations defense. Id. at 965. In rejecting the plaintiff's argument, the Fourth Circuit held:

> The statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in timely fashion is the consequence either of a *deliberate design by the employer* or of actions that the employer should *unmistakably have understood would cause the employee to delay filing his charge*. An employee's hope for rehire, transfer, promotion, or a continuing employment relationship – which is all that [plaintiff] asserts here – cannot toll the statute absent some *employer conduct likely to mislead an employee into sleeping on his rights*.

Id. at 965-6 (emphasis added) (*Referencing* Wilkerson v. Siegfried Insurance Agency, Inc., 621 F.2d 1042, 1045 (10th Cir. 1980); Coke v. General Adjustment Bureau, Inc., 616 F.2d 785, 790 (5th Cir. 1980)). The Price court also went on to state, "the attempt to mitigate the harshness of a decision terminating an employee, without more, cannot give rise to an equitable estoppel." Id. at 965 (*Referencing* Lawson v. Burlington Industries, Inc., 683 F.2d 862, 864 (4th Cir.), *cert.*

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[7] The plaintiff in Price argued the equitable estoppel theory based on the following set of facts:

> Plaintiff Price was informed that he would be removed as branch manager at defendant's place of business on February 5, 1980. Plaintiff performed no duties as branch manager after February 9, 1980, and the position was filled by a new branch manager on March 3, 1980. Price was retained in a sales position for the balance of February, and then was placed on a three-month personal leave of absence during which he performed no work for the company and received no compensation other than accrued benefits and back pay. By affidavit, plaintiff indicated he did not consider his relationship with defendant terminated until May 30, 1980, when his personal leave ended.
>
> There were also a series of conversations between plaintiff and defendant including: 1) on February 5, plaintiff was told that other opportunities within the company would be investigated for him; 2) On February 12, plaintiff was informed by letter that his supervisors wanted him to stay; 3) On February 19, plaintiff received a letter that defendant was making every effort to find another opportunity within the company for him; 4) On February 26, plaintiff received a letter from defendant setting forth three possible opportunities for plaintiff's consideration; and 5) On April 14, plaintiff received another letter from defendant detailing more job prospects.

Price, 694 F.2d at 964-5.

denied, 459 U.S. 944, (1982).

The crux of Complainants' argument that equitable estoppel is appropriate is their contention that Respondent conducted two ploys "in unison and bad faith…designed to discourage the Complainants from taking legal action" by "creat[ing] hope [Complainants] would get their jobs back…" CB. at 15. Complainants maintain that the late filing of their complaints was due to smoke screens and delay tactics employed by Respondent. Specifically, Complainants cite to continuous communication with them about an ongoing "investigation" into their allegations as one ploy, and their continued access to the Sydney Desktop computer system and ability to monitor it for future work opportunities as another ploy. CB. at 14.

Presuming that all of Complainants' allegations and contentions are true, I am not persuaded that they have stated sufficient legal grounds to equitably estop the running of the Sarbanes-Oxley statute of limitations against them. Complainants' first argument for the application of equitable estoppel is that they were "lulled into a wait and see posture" by a pending investigation into their whistleblower complaints. The Supreme Court of the United States rejected that proposition as establishing grounds for equitable estoppel. Delaware State College v. Ricks, 449 U.S. 250 (1980).[8] The Supreme Court held that where a decision to terminate an employee is communicated to the individual, the pendency of the employer's internal grievance procedure does not mean (1) that the termination decision was not final or (2) that the statute of limitations is tolled. Ricks, 449 U.S. at 260-61. In Ricks, the Supreme Court noted that it reached a similar conclusion previously in Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976), when it held that "the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods" Ricks, supra. at 261.

Complainants have not produced any evidence that demonstrates that the investigation by Respondent was performed in bad faith. Although Complainants allege that Respondent acted in "bad faith" by using the investigation process as a stall tactic, there is no evidence of record to support that conclusion. I find that Complainants' use of the term "bad faith" is no more than an unsubstantiated accusation. There is no indication in the record that LHH even suggested that Complainants wait for the results of its investigation before voicing their complaints in another arena. The Complainants chose to rely upon Respondent's purported investigation and refrained from exploring other avenues of relief. Had the Respondent found merit to Complainants' complaints and reinstated their positions, I am not persuaded that they would have filed complaints with OSHA. Accordingly, I find that Complainants cannot use their hope that Respondent's investigation would be timely completed in a manner favorable to their complaints as grounds for equitable relief from the Act's complaint filing deadline.

Complainants contend that Respondent contrived to mislead them to believe that they would continue to secure work from LHH because the company designated them as "project

[8] Although Ricks and Price did not involve claims under the Sarbanes-Oxley Act, the analysis is similar to that employed in deciding complaints of discrimination under the Act, and the decisions in those cases have been heavily relied upon in the Sarbanes-Oxley context. *See* McClendon v. Hewlett-Packard Co., 2004 WL 1421395 (D. Idaho June 9, 2005)(case below ALJ No. 2005-SOX-00003); Carter v. Champion Bus, Inc., 2005-SOX-00023 (ALJ, March 17, 2005); Halpern v. XL Capital. Ltd., 2004-SOX-00054 (ALJ, June 14, 2004).

eligible" and allowed them to access its Sydney Desktop computer system. Complainants assert that they therefore were delayed from filing their complaints. Complainants have submitted no evidence that demonstrates that Respondent's conduct was designed as a tactic to delay them from timely filing their complaints. The record is completely barren of any evidence showing that the circumstances of Complainants' terminations (i.e. the post-employment benefits afforded them and the post-termination investigation) were any different or distinguishable from terminations of other LHH employees. Complainants' accusations that Respondent acted in bad faith and created a smoke screen to prevent them from timely filing complaints is not borne out by evidence of affirmative misrepresentations by LHH, or any evidence of a deliberate plan by Respondent to mislead Complainants. The evidence does not establish bad faith on Respondent's part, nor does it demonstrate the "deliberate design" that would trigger the application of equitable estoppel. See, Price, supra. at 965-966. I find that Respondent's actions were an "attempt to mitigate the harshness of a decision terminating an employee…", and as such, do not provide the necessary underpinnings for equitable estoppel. Price., supra. at 965 (r*eferencing* Lawson v. Burlington Industries, Inc., 683 F.2d 862, 864 (4th Cir.), *cert. denied*, 459 U.S. 944, (1982)). Moreover, this contention conflicts with Complainants' acknowledgment that their positions were terminated in May, 2004.

The facts of Complainants' case are analogous to those in Price, supra. In Price, the plaintiff was removed from his position as branch manager on February 5, 1980, but was retained in a sales position for the balance of a month, after which he was placed in "personal leave of absence" status for three months. Price, supra. at 964. Price did not consider his relationship with his employer terminated until his personal leave ended in May, 1980. Id. Further, subsequent to his removal from the position of branch manager, Price engaged in conversations with supervisors who offered to investigate other job opportunities for him within the company. Id. at 964-5. The Court rejected Price's argument that the statute of limitations should not begin to run until May 30, 1980, the day his personal leave ended, and held that "the filing period runs from the time at which the employee is informed of the allegedly discriminatory employment decision, regardless of when the effects of that decision come into fruition." Id. at 965 (*citing,* Accord Chardon v. Fernandez, 454 U.S. 6 (1981).

In the case before me, Complainants were informed that their positions were being eliminated from the Rochester office on May 26, 2004, and that they would remain "project eligible" after that. They were also allowed to maintain their password access to the Sydney Desktop to search for other job opportunities. It was not until December, 2004, that Complainants perceived that they would not get relief from their internal complaints, and they suggest that the statute of limitations should run from that time. They do not dispute that they were aware of their terminations in May, 2004.

Complainants' situations are almost indistinguishable from the facts present in Price, or Ricks, supra. Consistent with the Court's determination in Price, I find that Complainants have failed to demonstrate that equitable estoppel is appropriate under the circumstances in this case. Nor do I place great weight upon the contention of the Complainants that they were unaware until December, 2004 of the time obligations for filing whistleblowing complaints under the Act. Complainants admitted that they believed they were whistleblowers from information they had gleaned from Respondent's intranet system, and then initiated discussions regarding an

investigation by LHH management shortly after their termination. Piles Affidavit at ¶ 18; D'Angelo Affidavit at ¶ 11. Complainants were therefore on notice to exercise due diligence to protect their potential claims under the Act long before they consulted counsel in December, 2004.

Accordingly, I find that the Complainants' complaints were not timely filed.

3. Issues of Subject Matter Jurisdiction

As I have concluded Complainants' complaints were untimely filed under the statute of limitations established by the Act, I decline to address the issue of whether there is subject matter jurisdiction in this case. That issue is at the heart of Respondent's motion to dismiss for lack of a proper respondent, and Complainants' cross-motion to amend their complaints, which need not be addressed because their complaints are dismissed.

IV. CONCLUSION

Based on the foregoing, I find that the complaints of Complainants G. Patton Piles and Larry D'Angelo, filed on January 18, and 26, 2005, respectively, are barred because they were not timely filed within the 90-day statute of limitations period imposed by 18 U.S.C. § 1514A(b)(2)(D). The statutory period began to run on May 26, 2004, when Complainants were informed that their positions within the Rochester office of LHH were being eliminated. I am satisfied that the record in this case reveals that as a matter of law, equitable estoppel does not apply in the instant matter, and, consequently, summary decision on this issue is appropriate. Accordingly, I grant Respondent's motion to dismiss Complainants' Sarbanes-Oxley claims as untimely.

V. ORDER

For the reasons stated herein, RESPONDENT'S motion for summary decision is GRANTED. The complaints of G. PATTON PILES and LARRY D'ANGELO are DISMISSED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its

postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it