U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 February 2007

CASE NO.: 2004-SOX-00026

In the Matter of:

W. MICHAEL RZEPIENNIK,
Complainant,

v.

ARCHSTONE SMITH, INC.,
Respondent.

Appearances:

Thad M. Guyer, Esq.
Stephanie L. Ayers, Esq.
T.M. Guyer and Ayers & Friends, PC
For Complainant

Danuta Bembenista Panich, Esq.
Barry A. White, Esq.
Mayer, Brown, Rowe & Maw LLP
For Respondent

Before: PAMELA LAKES WOOD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING CLAIM

The instant case arises under the employee protection (whistleblower) provisions of the Sarbanes-Oxley Act of 2002, Public Law 107-204, codified at 18 U.S.C. §1514A ("SOX"). The statute and implementing regulations (appearing at 29 C.F.R., Part 1980) generally prohibit retaliatory or discriminatory actions by publicly-traded companies (and their subsidiaries or agents) against employees who either (1) provide information to their supervisors, federal regulatory or law enforcement agencies, or Congress, relating to activities that they reasonably believe to constitute violations of federal criminal statutes relating to fraud, any Securities and Exchange Commission regulations, or federal laws relating to fraud against shareholders, or (2) assist in investigations or proceedings relating to such activities. Twenty-nine C.F.R. §1980.103(d) requires an employee who has been retaliated against to file a complaint within 90

days of the alleged violation. The time limit for filing a claim begins to run when the employee receives notice that a discriminatory action has been taken. *Id*. The complaint must be filed with the employee's Occupational Health and Safety Administration ("OSHA") Area Director. 29 C.F.R. §1980.103(c). As detailed below, Complainant has set forth no adverse action in his First Amended Complaint of Discrimination, apart from the untimely claim based upon his termination. Consequentially, Complainant did not timely file his complaint, so it must be dismissed.

PROCEDURAL HISTORY

Sometime between late November and December 2003, W. Michael Rzepiennik ("Complainant") filed a complaint with the Occupational Health and Safety Administration ("OSHA") under the Sarbanes-Oxley Act alleging that his former employer, Archstone Smith, Inc. ("Respondent") terminated him in retaliation for having raised concerns regarding alleged fraudulent practices conducted by Respondent. On January 7, 2004, OSHA issued a determination letter dismissing his claim because it was not timely filed.

Complainant filed objections to OSHA's determination by letter of February 7, 2004, and requested a hearing before an administrative law judge. On February 20, 2004, a Notice of Hearing and Prehearing Order was issued stating that a hearing was scheduled for April 12, 2002, and setting forth other deadlines. The Notice also directed the parties to be prepared to discuss and develop evidence on the preliminary jurisdictional issues, including the suggestion by Complainant that the statute of limitations should be waived based upon special circumstances or that it should be tolled based upon principles of equitable tolling or estoppel. The date of the hearing was subsequently rescheduled. In a conference call held between the parties before me on June 9, 2004, it was decided that the hearing would be cancelled and scheduled for a later date, barring dismissal beforehand, and a schedule was set for discovery on the statute of limitations issue. By way of order issued August 18, 2004, and on cross-motions to compel discovery, further proceedings were scheduled. Subsequent discovery orders were issued on October 7, 2004 and February 15, 2005.

On April 26, 2005, I issued an order permitting Complainant's counsel, Bravitt Manley, Jr., Esq., to withdraw and allowing Complainant until May 20, 2005, to retain new counsel. Complainant's new counsel, Thad M. Guyer, Esq. and Stephani L. Ayers, Esq., filed a Notice of Appearance on May 20, 2005. Complainant's counsel subsequently filed a Motion to File First Amended Complaint of Discrimination on August 4, 2005. A conference call was held on the same day with all concerned parties. By way of order issued October 27, 2005, I permitted Complainant to file the amended complaint and set forth other scheduling matters. On December 1, 2005, I issued an order based upon a stipulation of the parties in order to extend time in which briefs on the preliminary issues were due.

Thereafter, the parties filed the two motions now before me. On January 1, 2006, Complainant filed a Motion for Partial Summary Decision dealing solely with whether he timely filed his complaint with OSHA; Respondent filed its response on February 1, 2006. On January 3, 2006, Respondent filed a Motion to Dismiss the First Amended Complaint; Complainant filed his response on February 8, 2006, to which Respondent filed a response on March 1, 2006.

Because a novel issue was involved, I issued an Order on November 7, 2006, seeking briefs from the Assistant Secretary of Labor and the Securities and Exchange Commission ("SEC") as *amici curiae*. *See* Order Requesting Amicus Briefs.[1] By way of letter dated January 4, 2007, Counsel for Whistleblower Programs Ellen R. Edmond, Office of the Solicitor, on behalf of the Assistant Secretary for the Occupational Safety and Health Administration ("OSHA"), informed the undersigned that they would not provide an *amicus* brief due to significant budgetary constraints. Similarly, by way of letter dated February 6, 2007 from Assistant General Counsel Thomas J. Karr, the SEC informed this tribunal that its staff was unable to recommend that the Commission file an *amicus* brief. The SEC's Response is discussed further below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTUAL BACKGROUND

Employment with Respondent

Complainant began employment with Respondent at their McLean Office in Virginia on or about May 19, 1998, as a Production Officer.[2] In December 2000, Complainant was promoted to the position of Vice President of Production, a position he held until his termination on or about August 28, 2002. First Amended Complaint of Discrimination, ¶ 2. Complainant was primarily responsible for reviewing and approving all general contractors' payment requisitions and ensuring compliance with contracts made between Respondent and its contractors. *Id*.

Respondent is a publicly traded corporation that deals primarily with apartment investment and operations. *Id*. ¶ 3. Respondent is also a real estate investment trust ("REITs") and operates in Securities and Exchange Commission ("SEC") regulated equity markets with other REITs. *Id*. ¶ 5. In 2002 and 2003, Respondent conducted substantially all property ownership and business operations through an Operating Trust as an Umbrella Partnership Real Estate Investment Trust. *Id*. ¶ 6. Respondent does not actually construct real estate; rather, it enters into contracts with third party contractors to provide construction services. *Id*. ¶ 7. One of these contractors was Clark Realty Builders, LLC ("CRB"). *Id*. CRB employed subcontractors to aid in its real estate construction. Any liens held by the subcontractors had to be satisfied before Respondent could convey title of the developed property. *Id*. at 8. As a cost control method, Respondent utilized guaranteed maximum price ("GMAX") contracts to legally bind contractors to a fixed dollar consideration for materials, services, and a completion date. *Id*. ¶ 10. Under a GMAX, Respondent was required to obtain required financing, architectural and engineering plans, building permits, land use approvals, easements and road accesses, and other municipal services commitments. *Id*. ¶ 11.

[1] The Order was initially issued on October 30, 2006. However, it was reissued on November 7, 2006, due to an omission on the service sheet. This is the only difference between the Orders.

[2] The facts contained herein are based upon allegations raised in the First Amended Complaint, which I have accepted as true for the purpose of resolving the pending motions, except as noted below.

Alleged Fraud Involving Columbia Town Center Lien Waivers

Complainant alleges that at some time prior to March 25, 2002, he was contacted by a subcontractor of CRB who reported that it had not been paid for its services in constructing Columbia Town Center. First Amend. Compl., ¶ 14. However, CRB, in an attempt to receive a draw payment from Respondent, had previously submitted a lien waiver form alleged to be from the same subcontractor. *Id*. Complainant attempted to speak with Chris Hughes, Respondent's Senior Vice President of Production regarding this. Hughes allegedly informed Complainant that it was not necessary to speak with Respondent's counsel and that Hughes would deal with the matter directly. *Id*.

After learning that Columbia Town Center was going to be sold prior to completion, around the spring of 2002, Complainant decided to investigate further into the alleged fraudulent lien waiver. Upon examining the forms, Complainant discovered what he believed to be altered signature areas. *Id*. ¶ 15. Complainant again contacted Hughes and was again told that Hughes would handle the matter personally. *Id*. ¶ 17. Complainant also informed another Senior Vice President of Production, Joe Dominguez, of the alleged fraudulent activities. *Id*. ¶ 18. Despite his protests, the draw payments were made to CRB sometime before August 19, 2002, when Complainant returned from vacation. *Id*. ¶ 19. Columbia Town Center was subsequently sold on August 30, 2002. *Id*.

Termination and Aftermath

Complainant was terminated from his employment on August 28, 2002. *Id*. ¶ 20.

On August 30, 2002, Complainant sent an e-mail to Respondent's Chairman and CEO, Scott Sellars, protesting his termination, detailing the alleged falsified lien waivers, and alluding to other misconduct yet to be addressed. *Id*. ¶ 20. Complainant does not assert further action on his part until the following spring.

In June 2003, Complainant made an email request to Charles Mueller, Respondent's CFO, that he conduct an investigation. Complainant was contacted by counsel retained by Mueller to discuss this matter. *Id*. ¶ 21. In a meeting with counsel that took place on June 17, 2003, Complainant also expressed concerns about financial transactions involving the Cameron Station/Van Dorn and Woodland Park projects. *Id.*

Alleged Fraudulent Accounting on Cameron Station/Van Dorn Projects

According to Complainant, Respondent asked CRB to contribute $500,000.00 to Respondent's project for the purchase of Cameron Station, because the project was $500,000 over the approved budget for the due diligence process. First Amend. Compl., ¶¶ 22, 23. Complainant alleged that, in return, Respondent also entered into a GMAX agreement with CRB over a Van Dorn construction project and that CRB received a 6% fee from the project; traditionally, general contractors only receive a 4% fee on such contracts. *Id*. Complainant believed this constituted fraudulent accounting practices and that the 6% fee was an attempt to cover up a $500,000.00 loan to Respondent. *Id*. ¶ 24.

Alleged Insurance Fraud on Woodland Park Project

Respondent's Woodland Park job suffered a fire loss. First Amend. Compl., ¶ 25. As documents were being submitted to the insurance company, Complainant alleged that he discovered a $60,000.00 draw overpayment made to CRB on the project. *Id*. Although Complainant attempted to deduct this amount from the total amount otherwise due to CRB, Complainant alleges Hughes informed him not to take such action. *Id*. ¶ 26. Complainant alleges that in May 2002, Hughes, without Complainant's knowledge or approval, issued a $46,000.00 check to CRB on the project. *Id*. ¶ 27.

Subsequent Investigation and Outcome

In July of 2003, Complainant, his wife, counsel for Respondent, and Ron Lester, Vice President of Audit, held a telephone conference to discuss Complainant's concerns. First Amend. Compl., ¶ 28. The same parties met in person on July 17, 2003, to discuss the matter and examine documents produced by Complainant allegedly demonstrating Respondent's fraudulent actions. *Id*. On August 20, 2003, Complainant met with the above individuals and several others to discuss the outcome of the investigation. *Id*. ¶ 30. Respondent's investigative officials determined that no fraud had occurred and that Complainant had not been unlawfully terminated. *Id*. ¶ 30.

On August 20, 2003, Complainant also received a letter from Respondent's counsel offering him a severance agreement, which included an offer of a $255,589.00 bonus. *Id*. ¶ 35. Respondent utilized a discretionary program in which it awarded employees with bonuses and other compensation, if it chose to do so, after the successful completion of a project. *Id*. ¶ 32. Although Complainant was no longer employed by Respondent at the time employees could become eligible to receive a bonus, Respondent's investigation determined he should be offered the above bonus in consideration for his good faith efforts to report alleged fraudulent acts.[3] *Id*. ¶ 33. However, acceptance of the bonus was contingent upon Complainant's agreement that he would not communicate the underlying facts of the agreement to any person or agency and that he would turn over any documents associated with those same facts to Respondent. *Id*. ¶ 35. Complainant was allowed 21 days from receipt, or until September 14, 2003, to consider the offer. *Id*. ¶ 36. He met with Respondent's counsel on September 12, 2003 to discuss the offer and negotiate the terms but was advised that Respondent would adhere to them. *Id.*

After deciding not to accept Respondent's severance offer, Complainant filed a complaint alleging a SOX violation with his OSHA Area Director. The original complaint, which this Office obtained from OSHA, is signed by Complainant and dated November 10, 2003. In an affidavit, Complainant stated that he instructed and supervised his wife in mailing his complaint and exhibits to several agencies. Complainant's Motion for Partial Summary Decision, Declaration of W. Michael Rzepiennik, ¶ 2. However, he could not recall the exact date the

[3] As discussed more fully below, Complainant was not entitled to the bonus due to his termination. See Exhibits # 3 and # 4 to Declaration of Stephani L. Ayers, Esq. in Support of Complainant's Motion for Partial Summary Decision on Issue of Timeliness of Commencing Action. See also the Archstone Communities Trust Development Incentive Plan, annexed to Respondent's Opposition to Complainant's Motion for Partial Summary Decision.

materials were mailed, nor did he have any documentation. *Id*. Complainant could only state with any certainty that the complaint and accompanying materials were mailed "near Thanksgiving." *Id*.

According to the OSHA determination letter of January 7, 2004, signed by Regional Administrator Richard D. Soltan, the complaint was received on December 24, 2003.[4] Based upon the termination date of August 28, 2002, OSHA determined that the complaint was not timely filed. The parties were advised that they had 30 days from receipt of the Findings to file objections and request a hearing on the record.

Complainant requested a hearing by letter dated February 7, 2004, mailed on February 11, 2004 (according to the postmark), and received in the Office of Administrative Law Judges on February 13, 2004.

LEGAL BACKGROUND

Section 806 of the Sarbanes-Oxley Act, *Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud*, amended title 18 of the United States Code by adding a new section 1514A, *Civil action to protect against retaliation in fraud cases.*

Subsection (a) of the new section provides whistleblower protection to employees of publicly traded companies and prevents such companies or their agents from discharging or otherwise discriminating against such employees in the terms and conditions of employment because they engaged in certain lawful acts:

> . . . 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 [*fraud and swindles*], 1342 [*fraud by wire, radio, or television*], 1344 [*bank fraud*], or 1348 [*securities fraud*], 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—

[4] A cover sheet indicating recipients, attached to the Declaration of Stephanie L. Ayers, Esq., filed in support of Complainant's Motion for Partial Summary Decision, bears two date stamps: one, at the top, indicating it was "RECEIVED" December 15, 2003 and the other, at the bottom, indicating receipt by OSHA's Philadelphia office on December 24, 2003. Ayers Dec. ¶ 1 and Exhibit # 1. The copy of the cover sheet received by the Securities & Exchange Commission bears only one date stamp of December 4, 2003. Ayers Dec. ¶ 2 and Exhibit # 2.

(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, 1342, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

Paragraph (b) specifies how an enforcement action may be brought by such an aggrieved employee and paragraph (c) provides for remedies.

A statute of limitations provision appears in paragraph (b)(2)(D), which provides:

(D) STATUTE OF LIMITATIONS. – An [enforcement] action . . . shall be commenced not later than 90 days after the date on which the violation occurs.

Under the Act, complaints filed with the Secretary of Labor are to be governed by the rules and procedures set forth in 49 U.S.C. §42121(b) [the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, also known as "AIR 21."] 18 U.S.C. §1514A(b)(2)(A).[5] Congress in turn modeled the AIR 21 employee protection provisions in part on the corresponding "whistleblower" provisions of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, as amended in 1992 (Pub. L. No. 102-486, 106 Stat. 2776). The burdens of production and persuasion in whistleblower cases are based on the framework applied under Title VII of the Civil Rights Act of 1964. *Odom v. Anchor Lithkemko*, ARB No. 96-189, ALJ No. 1996-WPC-1 (ARB Oct. 10, 1997), slip op. at 3. *See also Bartlik v. U.S. Department of Labor*, 73 F.3d 100, 103 n. 6 (6th Cir. 1996) (listing different standards applied by Courts and finding "slight variation," in that "the common thread is that plaintiff must set forth facts which justify an inference of retaliatory discrimination").

Implementing regulations for the Sarbanes-Oxley Act appear at 29 C.F.R Part 1980. These regulations include a provision allowing an administrative law judge, upon notice to the

[5] The section-by-section analysis of Section 806 (Whistleblower protection for employees of publicly traded companies) provides: "This section would provide whistleblower protection to employees of publicly traded companies. It specifically protects them when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud. If the employer does take illegal action in retaliation for lawful and protected conduct, subsection (b) allows the employee to file a complaint with the Department of Labor, to be governed by the same procedures and burdens of proof now applicable in the whistleblower law in the aviation industry. . ." Congressional Record of July 26, 2002 at S7418 (reported on the Office of Administrative Law Judges website, www.oalj.dol.gov.)

parties, to waive any rule or issue orders "that justice or the administration of the Act requires" based upon special circumstances or good cause shown. *See* 29 C.F.R. §1980.115. Under section 1980.103(c) and (d), a discrimination complaint must be filed in writing with the appropriate OSHA Area Director "[w]ithin 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.)" Section 1980.109(a), relating to decisions and orders of administrative law judges, provides that "[a] determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint"; however, relief may not be ordered if the employer establishes by clear and convincing evidence that it would have taken the same adverse personnel action in the absence of the protected behavior or conduct.

DISCUSSION

I. Complainant has not demonstrated a viable claim of post-termination retaliation.

The Sarbanes-Oxley Act provides whistleblower protection for employees of publicly traded companies[6] who provide information or participate in an investigation relating to violations of certain criminal code provisions relating to fraud (including "fraud and swindles"; "fraud by wire, radio, or television"; bank fraud; and securities fraud), rules or regulations of the Securities and Exchange Commission, or any provisions of Federal law relating to fraud against shareholders, when the information is provided to the employee's superior, law enforcement or regulatory personnel, or members of Congress or when the employee has participated in proceedings relating to the violation. Actions brought under the Sarbanes-Oxley Act are governed by the burdens of proof set forth under 49 U.S.C. §42121(b), the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21."). 15 U.S.C. §1514A(b)(2)(C); *Halloum v. Intel Corporation,* ARB No. 04-068, ALJ No. 2003-SOX-7 (ARB Jan. 31, 2006) *appeal filed* No. 06-71902 (9th Cir. 2006), slip op. at 6, *citing* 18 U.S.C. §1514A(b)(2)(C); *see also* 29 C.F.R. §1980.104 (discussing general burdens of proof for SOX claim).

To prevail at the adjudication stage of a SOX claim, a complainant must prove by a preponderance of the evidence that: (1) he engaged in protected activity or conduct; (2) the respondent knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action, i.e., an adverse employment action; and (4) the protected activity was a contributing factor in the unfavorable action. *Halloum*, ARB No. 04-068, slip op. at 6, *citing Getman v. Southwest Securities, Inc.,* ARB No. 04-059, ALJ No. 2003-SOX-8 (ARB July 29, 2005), *recon. denied* (ARB March 7, 2006). *See also Peck v. Safe Air International, Inc.,* ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004) (AIR21 case); *Bauer v. U.S. Enrichment Corp.*, ARB No. 01-056, 2001-ERA-9 (ARB May 30, 2003) (ERA case). If a complainant proves the elements of his case by a preponderance of the evidence, the respondent may still avoid liability by demonstrating by clear and convincing evidence that it would have taken the

[6] The Act applies to companies (and their employees and subcontractors) that have a class of securities registered under section 12 of Securities Exchange Act of 1934 (15 U.S.C. 781) or are required to file reports under section 15(d) of the Securities Exchange Act of 1934.

same unfavorable personnel action in the absence of the protected activity. *Halloum*, ARB No. 04-068, slip op. at 6.

Respondent in this matter filed a Motion to Dismiss First Amended Complaint on several grounds. The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, appearing at Part 18 of Title 29 of the Code of Federal Regulations, require me to apply the Federal Rules of Civil Procedure for situations not addressed by the rules or another regulation or provision of law. 29 C.F.R. §18.1(a). Therefore, I would ordinarily treat this motion under the standard set forth for Fed. R. Civ. Pro. 12(b)(6). However, in the motion and subsequent responses, both parties have made extensive references to facts not set forth in the Amended Complaint, most notably to the text of the severance agreement at issue. Complainant also incorporated his Partial Motion for Summary Decision, which included several exhibits and his declaration, into his response to Respondent's Motion to Dismiss. Complainant's Opposition to Respondent's Motion to Dismiss First Amended Complaint, at 2. Respondent then referenced and disputed facts set forth in Complainant's Summary Decision Motion in support of its Motion to Dismiss. Since the parties have relied upon allegations not set forth in the Amended Complaint, I will treat the motion to dismiss as a motion for summary decision pursuant to 29 C.F.R. §§18.40, 18.41. *See Fullington v. AVSEC Services, L.L.C.*, ARB Case No. 04-019, ALJ Case No. 2003-AIR 30, slip op. at 8 (Oct. 26, 2005); *Rockefeller v. United States Dep't of Energy*, ARB No. 04-048, ALJ No. 2002-CAA-0005, slip op. at 4 (ARB Aug. 31, 2004) (citations omitted).

In deciding whether to grant a party summary decision, I rely upon the same standard promulgated for summary judgment under Fed. R. Civ. Pro. 56(e). If after examining all the materials made available by the parties, no genuine issue exists as to any material fact, the moving party is entitled to summary decision. *Fullington*, ARB Case No. 04-019, slip op. at 8. There is no genuine issue of material fact if a non-moving party, here the Complainant, cannot show an essential element to his case. *Id*; *Reddy v. Medquist, Inc.,* ARB Case No. 04-123, ALJ Case No. 2004-SOX-035, slip op. at 7 (ARB Sep. 30, 2005). The evidence is viewed most favorably to the non-moving party. *Fullington*, ARB Case No. 04-019, slip op. at 8.

Using the above framework, I have determined that the claim brought by the Complainant must be dismissed because, putting aside the untimely complaint premised upon his termination, he has not established an essential element of his claim, i.e., an adverse action. For the reasons set forth below, I find that Complainant has not established that he has suffered an unfavorable personnel action that is actionable under the Sarbanes-Oxley Act.[7]

Protected Activity

In his Amended Complaint, Complainant alleges he informed several of Respondent's officers of violations of federal fraud statutes committed by Respondent. Specifically, Complainant alleges Respondent violated one or more of 18 U.S.C. §§1341, 1343, 1344, or

[7] Neither party has challenged whether or not Complainant may bring this action despite the fact that he was not an employee of Respondent at the time he commenced his action. However, such a challenge would ultimately fail. *See* 29 C.F.R. 1980.101 (defining "Employee" as including former employees); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (holding former employee may bring claim of discrimination).

1348. Complainant contends these actions not only damaged Respondent's company, but also Respondent's shareholders. Complainant argues that by reporting these violations, he engaged in protected activities. Although I have decided that this claim shall be dismissed on other grounds, I will nevertheless briefly analyze this requirement.

Section 806 of the Sarbanes Oxley Act provides protection to employees of publicly traded companies 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 federal provisions criminalizing fraud. 18 U.S.C. §1514A. Those provisions include violations of section 1341 (fraud and swindles), 1342 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (securities fraud), any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. *Id*. The statute further provides that an employee is protected when providing information of such violations to their supervisor or "such other person working for the employer who has the authority to investigate, discover, or terminate misconduct." *Id*.

For purposes of deciding these motions, I find that Complainant engaged in protected activity when he reported the alleged fraudulent behavior to several officials in Respondent's organization. To constitute protected activity, the actions complained of must related to any of the listed categories of fraud or securities violations set forth in the Act. *Platone v. FLYi,* ARB No. 04-154, ALJ No. 2003-SOX-27 (Admin. Rev. Bd. Sept. 29, 2006).[8] Here, Complainant has alleged that he reported violations of one or more of the specified provisions, including alleged mail and wire fraud and violation of SEC rules and regulations requiring accurate reporting and adequate internal controls. First Amend. Compl., ¶ 38 to 45. Although Respondent denies the allegations of fraud, a complainant merely need demonstrate that he has a reasonable good faith belief that he is reporting fraudulent behavior and protecting investors. 18 U.S.C. § 1514A(a)(1); *see also Collins v. Beazer Homes USA, Inc*., 334 F. Supp. 2d 1365, 1377 (N.D. Ga. 2004). Viewing the evidence most favorably to the Complainant, I find that he engaged in protected activity when he informed several of Respondent's officers of what he reasonably believed to be fraudulent activity in violation of the Sarbanes-Oxley Act.

Knowledge of Protected Activity

As discussed in the above section, Complainant provided information to several of Respondent's officers regarding alleged acts of fraud. Respondents clearly had knowledge of Complainant's engagement in protected activity. As such, the second prong for a case of retaliation has been satisfied.

Adverse Employment Action

Complainant asserts that as a result of alerting several of Respondent's officers to fraudulent conduct performed by its agents, he was terminated on August 28, 2002. First Amend. Compl. of Discrimination, ¶ 1. While it is clear that the termination itself would

[8] In its decision in *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ALJ No. 2004-SOX-11, ARB No. 04-149 (May 31, 2006), the Administrative Review Board has suggested that an innocent violation of an SEC rule may give rise to jurisdiction under the Act if an employee were retaliated against for reporting it.

constitute an adverse employment action, the complaint is untimely when measured from the termination date, as discussed below. Accordingly, Complainant has asserted that subsequent acts taken by the Respondent also constitute actionable adverse employment actions.

On August 20, 2003, almost one year following his termination, Complainant received a letter from Respondent's chief legal counsel informing him that he was eligible to receive a bonus of $255,589.00.[9] *Id.* ¶ 35. However, the offer stated it was made to Complainant in consideration for his efforts in reporting the alleged unlawful conduct and that he could pursue no further legal action against Respondent or report the information to any other person or regulatory agency if he accepted the bonus. *Id.* The letter stated Complainant had 21 days from receipt to accept, and although he met with Respondent's outside counsel to discuss the offer on September 12, 2003, he failed to accept it within the prescribed period, or before September 14, 2003. *Id*. ¶ 36. Complainant has treated the date the consideration period ended as the date the offer expired.

Complainant argues that the expiration of this offer constitutes an adverse action for purposes of Section 806 of the Sarbanes-Oxley Act. *Id.* ¶ 46. Respondent insists there was no adverse action, but if one existed, it would have been when the initial offer was made and not when it expired. *See* Respondent's Motion to Dismiss the First Amended Complaint. The date of the alleged adverse action is crucial because a complaint must be filed within 90 days of the discriminatory act's communication to the employee. *See* 29 C.F.R. §1980.103(d).[10]

Unfavorable Personnel Action

I first turn to the issue of what constitutes an adverse action for purposes of a SOX claim. Section 806 of the Act states that no company subject to the Act or its officers, employees, contractors, subcontractors or agents 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—. . . .

15 U.S.C. §1514A(a); *see also* 29 C.F.R. §1980.102(a). To date, no authority has set forth an exhaustive list of employer actions prohibited by this language.

As a general rule, for a whistleblower claim to be actionable, the alleged adverse employment action must involve a tangible job detriment or consequence, which affects the terms and conditions of employment (such as dismissal, failure to hire, or demotion) or it may take the form of harassment that is sufficiently pervasive as to alter the conditions of employment and create an abusive or hostile work environment. *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2 (ARB Feb. 29, 2000). *See also Friday v.*

[9] The letter setting forth the proposed separation agreement appears as Exhibit # 3 to the Declaration of Stephani L. Ayers, Esq., filed in support of Complainant's Motion for Partial Summary Decision. It also appears as an attachment to Complainant's original complaint.

[10] The complaint must be filed with the office of the OSHA Area Director located in the complainant's geographical vicinity. 29 C.F.R. §1980.103(c).

Northwest Airlines, Inc., ARB No. 03-132, ALJ Nos. 2003-AIR-19 and 20 (ARB July 29, 2005); *Shelton v. Oak Ridge National Laboratories*, ARB Case No. 98-100, ALJ No. 1995-CAA-19, slip op. at 7 (ARB Mar. 30, 2001).[11] The Supreme Court has defined a tangible job consequence as one "which constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). This definition emerged from the Court's interpretation of language found in the general anti-discrimination provision (section 703(a)(1)) of Title VII of the Civil Rights Act of 1964 ("Title VII"), language which is similar to Section 806 of the Sarbanes-Oxley Act (but does not include all of the prohibited actions).[12]

Applying this standard, administrative law judges deciding SOX claims have generally held against an employee where an employer's unfavorable action does not create a tangible job consequence. *See, e.g., Bechtel v. Competitive Technologies, Inc.*, 2005-SOX-33 (ALJ Oct. 5, 2005) (failure to perform an employee evaluation not tangible); *Allen v. Stewart Enterprises, Inc.*, 2004-SOX-60, 61, 62, slip op. at 94 (ALJ Feb. 15, 2005) (holding workplace relocation not a tangible consequence); *Dolan v. EMC Corp.*, 2004-SOX-1, slip op. at 3 (ALJ Mar. 24, 2004) (negative evaluation unaccompanied by tangible consequence not actionable). However, it has been suggested that the inclusion of threats and harassment as prohibited actions, which is unique to the SOX provision, may warrant a broader reading of the adverse action provision. *See Hendrix v. American Airlines, Inc.*, 2004-SOX-23 (ALJ Dec. 9, 2004), slip. op. at 14, n. 10 (finding that an employee's placement on a lay-off list could satisfy the adverse action requirement for a SOX whistleblower claim, even though the employee was not laid off, under Tenth Circuit law).[13]

In *Halloum v. Intel Corporation,* ARB No. 04-068, ALJ No. 2003-SOX-7 (ARB Jan. 31, 2006) *appeal filed* No. 06-71902 (9th Cir. 2006), the Administrative Review Board reviewed each personnel action complainant claimed was unfavorable to determine whether it was an "unfavorable personnel action." The ARB found that providing the complainant with a modified corrective action plan that was unreasonable was sufficient to establish an adverse action. *Id.* While not squarely addressing the issue, the ARB did not apply the tangible job consequences test.

Recently, the Supreme Court greatly expanded the scope of actionable conduct under Title VII's anti-retaliation provision (section 704).[14] In *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006), the Court determined Title VII's anti-retaliation provision (as opposed to its anti-discrimination provision) included actions not related to the workplace or

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[11] In *Shelton*, the ARB disagreed with my finding (based upon *Helmstetter v. Pacific Gas and Electric*, 1986-SWD-2 (Sec'y Sept. 9, 1992)), that an oral reminder, which was the first step in a progressive discipline system that could lead to termination, was an adverse action. In so doing, the ARB essentially overruled *Helmstetter*.

[12] Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a), provides that it shall be an unlawful employment practice "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment."

[13] The controlling Tenth Circuit case was *Hillig v. Rumsfeld,* 381 F.3d 1028 (10th Cir. 2004).

[14] Section 704 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a), states: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment…because he has opposed any practice made an unlawful employment practice…"

employment.[15] *Id*. at 2409. The majority determined that the more expansive language found in Title VII's retaliation provision required a prohibition on conduct that would not be prohibited by its general discrimination provision. *Id*. at 2411-12. Given the reliance upon Title VII by administrative authorities interpreting the Sarbanes-Oxley Act, it is unclear what, if any, effect the Court's decision will have on retaliation claims under SOX.

In his Amended Complaint, Complainant alleges that as a result of work performed on previous projects for Respondent, he was fairly entitled to receive a discretionary bonus of $255,589.00. First Amend. Compl., ¶ 34.[16] Complainant argues he suffered an adverse action when Respondent made the severance offer to him and conditioned it upon his silence. More specifically, Complainant contends the actual adverse action did not occur until the offer expired. The proposed agreement provided:

> **1. Bonus.** Even though you were not employed on the date bonuses for the Columbia Town Center Project were paid and therefore under the rules of the bonus program *are not eligible for a bonus on this project*, if you sign this Agreement and it becomes fully effective, in appreciation of your efforts on behalf of the Company it is willing to provide you a 2002 Development Incentive Bonus in the amount of Two Hundred Fifty-Five Thousand Five Hundred Eighty-Nine Dollars ($225,589), less applicable deductions and withholdings.

Complainant's Opposition to Respondent's Motion to Dismiss First Amend. Compl., at 4-5 (emphasis added). The proposed agreement clearly states that Complainant was *not* entitled to the bonus due to his employment status; instead, the bonus was only offered as part of the severance package and was contingent on Complainant's agreement to its terms.[17]

Given the recentness of the Sarbanes-Oxley Act, together with the absence of authority addressing the precise issue before me in other whistleblower cases, it is appropriate to examine Title VII case law to address unanswered questions. *See generally Brune v. Horizon Air Industries, Inc*., ARB Case No. 04-037, ALJ Case No. 2002-AIR-8 (Jan. 31, 2006) (applying Title VII law to an AIR 21 claim). Analyzing claims of retaliation under Title VII, courts will find retaliation has occurred when an employer takes away benefits the employee is entitled to. *Davis v. Precoat Metals*, 328 F. Supp. 2d 847, 851 (N.D. Ill. 2004), *citing Equal Employment Opportunity Comm'n v. Cosmair, Inc.*, 821 F.2d 1085, 1089 (5th Cir. 1987); *Carney v. Am. Univ.*, 151 F.3d 1090, 1095 (D.C. Cir. 1998)). By contrast, when an employee is not entitled to

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[15] Examples given by the Supreme Court included refusal to investigate death threats and filing of false criminal charges.

[16] In paragraph 34 of the First Amended Complaint, Complainant asserts that he was entitled to receive a Development Incentive Plan Bonus for 2002 in the amount of $255,589.00 but he was unaware the bonus could be paid to him as a former employee prior to the audit findings in 2003. First Amended Complaint, ¶ 34. However, the August 20, 2003 Audit Report Summary reflects that the bonus was being offered to Complainant as part of a Settlement Offer, not that he was entitled to it. (Exhibit #4 to Declaration of Stephani L. Ayers, Esq. in Support of Complainant's Motion for Partial Summary Decision on Issue of Timeliness of Commencing Action.)

[17] The Archstone Communities Trust Development Incentive Plan, annexed to Respondent's Opposition to Complainant's Motion for Partial Summary Decision, reflects that the bonus plan is discretionary and dependent upon the employee's employment (although the Compensation Committee may award bonuses to participants who have terminated employment due to retirement, death, or disability.)

benefits, "[o]ffering severance benefits in return for a general release of claims is neither discriminatory nor retaliatory." *Davis*, 328 F. Supp. 2d at 852; *see also Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 884 (5th Cir. 2003); *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1508 (10th Cir. 1996); *Bernstein v. St. Paul Co., Inc.*, 134 F. Supp. 2d 730, 733 (D. Md. 2001). In such circumstances, the severance benefits are "viewed as additional consideration for an employee's agreement to waive his or her rights and claims." *Davis,* 328 F. Supp. 2d at 852 (citations omitted).

In *EEOC v. Sundance Rehabilitation Corp.*, 466 F.3d 490 (6th Cir. 2006), the U.S. Court of Appeals for the Sixth Circuit recently had occasion to consider whether the offering of a separation agreement that conditioned the receipt of severance benefits on confidentiality and a release of claims could be considered to be adverse action. The Sixth Circuit found that, while the portion of the agreement prohibiting the employee from filing charges with the EEOC may have been unenforceable, the inclusion of such a provision did not make offering the agreement in and of itself retaliatory. *Id.* at 500-01. Furthermore, under the traditional Title VII burden-shifting analysis, the Sixth Circuit held that, even assuming that the employee engaged in protected activity when she asked a human resources representative to strike the objectionable portions of the agreement, she suffered no adverse employment action when her employer failed to pay her severance benefits to which she was not otherwise entitled, because she refused to sign the agreement. *Id.* at 501. In so holding, the Sixth Circuit noted with approval cases such as *Davis* holding that declining to pay severance or settlement amounts (not otherwise due) when an employee refused to sign a waiver or release does not amount to an adverse employment action in the retaliation context. *Id.* at 502.

Utilizing the above authority, I am not persuaded that either Respondent's severance offer or its expiration constitutes an adverse action for purposes of Section 806 of the Sarbanes-Oxley Act even under an expansive view of the adverse action provision. The Complainant set forth no facts in his Amended Complaint or elsewhere that demonstrate he was entitled to receive the bonus. To the contrary, it is clear that the Complainant was not eligible for the bonus and that the bonus was offered in consideration for not only his whistle blowing efforts, but also for his agreement that he would waive any further claims. (Exhibits # 3 and # 4 to Declaration of Stephani L. Ayers, Esq. in Support of Complainant's Motion for Partial Summary Decision on Issue of Timeliness of Commencing Action.) Moreover, the offer was made after employment ended, ostensibly in an attempt to avert potential litigation. There simply cannot be a tangible consequence on the conditions of Complainant's employment under these circumstances.

Complainant nevertheless maintains that severance agreements like the one at issue constitute adverse action because they would always be found unlawful by the Secretary of Labor. In support of this contention, Complainant relies heavily upon *Connecticut Light & Power v. Sec'y of U.S. Department of Labor*, 85 F.3d 89 (2d Cir. 1996) ("*CL&P*"). The employee in *CL&P* brought an action under Section 210 of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. §5851(a), alleging he was discriminated against for engaging in protected activity. *Id*. at 91. On appeal, a panel for the Second Circuit affirmed the Secretary of Labor's determination that the employee suffered an adverse action when a severance agreement was offered to him (in the course of other litigation) on the condition that he pursue no further

action.[18] *Id*. The Court of Appeals noted that, although the act of inducing an employee to relinquish his rights under the ERA through a settlement agreement was "less obvious than more direct action, such as termination, it is certainly aimed at the same objective: keeping an employee quiet." *Id.* Noting that a continuing violation exists when there is a relationship between a series of discriminatory actions and an invalid, underlying policy, the Second Circuit noted that such an action required proof of the two prongs of (1) a discriminatory policy or practice and (2) an action taken pursuant to that policy during the statutory period preceding the filing of the complaint. After finding that the practice of using "the carrot of a settlement agreement to impose discriminatory restrictions" satisfied the first prong, the Second Circuit reasoned:

> The second prong of the inquiry focuses on whether the defendants took some action pursuant to this policy within the thirty days preceding May 11, 1989. The Secretary asserts that the policy of imposing these discriminatory restrictions occurred throughout the negotiating process, a process which was not terminated until April 25, 1989. The proposed provisions were part and parcel of the entire negotiation process. Thus, so long as the negotiation process continued, the adverse action persisted, and the violation continued. Moreover, CL & P revoked the settlement agreement on April 25, an act made pursuant to its discriminatory policy and within the limitations period. Therefore, the second prong of the continuing violation test is met.

Id. Here, in contrast, the Employer did not take any action within the 30 days preceding the filing of the complaint. Employer made the settlement offer, which remained open for 21 days, but there was no revocation of the offer by the Employer.

While somewhat similar to the instant case, *CL&P* is distinguishable on the facts presented, particularly in regards to *CL&P*'s reliance upon a continuing violation. In *CL&P*, the employee and employer engaged in prolonged negotiations in an attempt reach an agreed upon settlement in a district court action that was unrelated to the ERA whistleblower claim. *Id*. at 96. The majority held that tactics used in prolonging the negotiations were in themselves adverse. *Id*. Furthermore, the employer broke off settlement negotiations, after the employee made a counteroffer. *Id*. By contrast, Respondent in the instant case made an offer, and aside from one meeting between Complainant and Respondent's counsel, there appear to have been no other negotiations. *See* First Amend. Compl., ¶ 36. Additionally, the offer expired by its own terms; Complainant does not currently contend that Respondent ended any sort of ongoing negotiations between the parties. Thus, the Second Circuit's reliance upon a continuing violation, which did not culminate until the employer ended negotiations, is inapplicable here.

[18] The complainant in *CL&P* was terminated in September 1987 by his employer, a contractor with Connecticut Light and Power; the following year he commenced an action in state court, which was later removed to federal court, alleging, inter alia, violation of the Connecticut whistleblower statute, wrongful termination, and defamation. It was in the context of that litigation that the settlement negotiations between the employee, his employer, and CL & P were conducted. The complainant's ERA whistleblower claim was filed with the Department of Labor in May 1989, less than one month after settlement negotiations broke down.

It is also worth noting that the settlement in *CL&P* arose out of litigation pending in another forum. Here, there was no pending litigation and the offer was made to Complainant independently.[19]

Furthermore, a different statute, the ERA, was involved in *CL&P*, and the finding of an adverse action under the ERA whistleblower provision was premised upon its relationship to a discriminatory policy or practice that was contrary to the remedial purpose of the ERA.[20] In ruling against the employer, the Secretary of Labor relied upon a memorandum prepared by counsel for the Nuclear Regulatory Commission ("NRC") stating that Section 210 of the ERA afforded employees "special protection" due to "national policy," and subsequently the NRC adopted a regulation which explicitly forbade employers from conditioning severance packages on an employee's agreement to not provide any information to the NRC (10 C.F.R. §50.7(f) (1994)). *CL&P*, 85 F.3d at 95. While recognizing the inapplicability of the regulation, the Second Circuit panel majority found these policy concerns to be persuasive. *Id*. Complainant in the instant case has not pointed to similar authority from any regulatory agency expressing comparable concerns about settlement agreements under SOX.

Actions, or more accurately inactions, by agencies in the current claim also lead me to further distinguish this matter from *CL&P*. Pursuant to 29 C.F.R. §1980.108, I requested *amicus curiae* briefs from the Assistant Secretary of Labor and the Securities and Exchange Commission ("SEC") seeking their views on the issues involved in this matter. *See* Order Requesting Amicus Briefs of November 7, 2006. Both the Assistant Secretary and the SEC declined to submit amicus briefs. As noted above, by letter of January 4, 2007, on behalf of the Assistant Secretary for OSHA, the Counsel for Whistleblower Programs advised that they declined to submit an amicus brief due to budgetary limitations. In a letter dated February 6, 2007, the Assistant General Counsel for the SEC, however, stated it would not provide a brief because SEC staff concluded that the retaliation issue in the instant case "turns on issues of employment law (i.e., the examination of what constitutes an adverse employment action)" and the SEC "*generally* only addresses issues in *amicus* briefs regarding interpretations of the federal securities laws that it administers." SEC Response of Feb. 6, 2007 (emphasis added).

The policy concerns raised by the SOX's retaliation provision are obviously important. *See, e.g.,* Congressional Record of July 26, 2002 at S7420 (reported on the Office of Administrative Law Judges website, www.oalj.dol.gov); 69 Fed. Reg. 52104 (Aug. 24, 2004). However, unlike the NRC in *CL&P,* neither OSHA nor the SEC has expressed a position on this matter; thus, the policy concerns behind the SOX Act do not appear to reach the same level as the policy concerns behind the ERA. Moreover, the SEC stated that it "generally" does not

[19] The offer did, however, require Complainant to release any potential claims.

[20] The ERA provision prohibits the discharge or discrimination against an employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (A) notified his employer of any alleged violations of the Atomic Energy Act; (B) refused to engage in practices made unlawful by the Atomic Energy Act if brought to the employer's attention; (C) testified before Congress or at any Federal or State proceeding regarding the Atomic Energy Act; (D) "commenced, caused to be commenced, or **is about to commence** a proceeding" under the Atomic Energy Act or a proceeding for the administration or enforcement of any requirement imposed thereunder; (E) "testified **or is about to testify** in any such proceeding," or; (F) assisted or participated **or is about to assist or participate** in any manner in such a proceeding or in any other action to carry out the purposes of the Atomic Energy Act. 42 U.S.C. § 5851(a)(1) [emphasis added].

address matters beyond federal securities law, thereby implying that it could if warranted. Thus, the SEC has taken the position that the issue of whether a confidentiality agreement could constitute an adverse action neither directly impacts federal securities law nor raises policy considerations of significance to the SEC. This is in sharp contrast to the NRC's concerns discussed in *CL&P*, whereby the NRC stated its opinion that it was a matter of "national policy" to protect employees who engaged in whistleblower activities and subsequently adopted a regulation prohibiting settlement agreements with gag provisions. While the SEC's position (or lack of interest) is not an endorsement of Respondent's actions, it further downplays the policy concerns raised here versus the policy concerns raised in *CL&P*. This lack of concern is further solidified by the fact that no regulations have been promulgated or proposed addressing the instant issues, whereas there was such a regulation in play in *CL&P*. Consequentially, the policy concerns raised in *CL&P* are not applicable to the instant claim.

I find that neither the Respondent's offering of a severance package containing a benefit to which the employee would not otherwise be entitled, in an attempt to settle claims, nor the expiration of the same constituted an unfavorable personnel action under Section 806 of the Sarbanes-Oxley Act. While there may be instances in which protracted negotiations culminating in a severance package could give rise to an adverse action under SOX, based upon a continuing violation analysis, the facts alleged here do not.

I also find no merit to the argument that that Respondent's failure to pay Complainant the bonus referenced in the severance package constitutes an adverse action. Such an argument makes no sense where, as here, Complainant had no right to the bonus independent of the agreement. Thus, Complainant has not properly asserted the existence of an adverse action apart from his termination.[21]

Timing of Alleged Adverse Action

Even were I to consider the gag provision in the proposed severance agreement to be an adverse action, I would consider the action to have occurred when the offer was officially made, not when it expired, because it expired without any further action by Respondent. Thus, Complainant's claim would still be dismissed as untimely. Although Complainant produced several date stamped exhibits in his Partial Motion for Summary Decision bearing various early December dates, and his declaration states he mailed the complaint "around Thanksgiving," it is undisputed that the offer was made on August 20, 2003.[22] The timeframe of late November 2003 to early December 2003 clearly exceeds the 90 day limitation which would start running from August 20, 2003.

Complainant nevertheless sets forth three arguments as to why only the offer's expiration is an adverse action: (1) the offer itself did not create a tangible job consequence; (2) the offer

[21] Since I have decided there was no adverse action, it is not necessary to discuss the fourth requirement for a violation of Section 806, i.e., whether Complainant's protected activity was a contributing factor to the adverse action.

[22] These exhibits include: (1) the first page of Complainant's complaint filed with OSHA with one date stamp reading "Dec 15, 2003" and another reading "03 Dec 24" (Partial Motion for Summary Decision, EX 1); and (2) the first page of the same complaint sent to Complainant's regional SEC office with a date stamp reading "Dec 04, 2003." (Partial Motion for Summary Decision, EX 2).

did not provide Complainant with sufficient notice that an adverse action had occurred; and (3) the offer conflicts with requirements under the Age Discrimination Employment Act. I shall address each argument in turn.[23]

A. The Offer Itself Did Not Create a Tangible Job Consequence

Complainant first argues that the agreement's offer cannot constitute an adverse action because it did not have a tangible effect on his employment, but its expiration did. In Complainant's Opposition to Respondent's Motion to Dismiss First Amended Complaint, Complainant stresses that it is simply not possible for the offering of a severance agreement conditioned on silence to create a tangible effect on one's employment. By contrast, according to Complainant, the agreement's expiration *would* create the required effect. However, Complainant cites no authority that actually makes such a distinction.

While Complainant points to *CL&P* as support for his contention that only an offer's expiration would create a tangible employment action, his reliance on that case is misplaced. In *CL&P,* the Secretary found that the proffering of a settlement agreement containing gag provisions constituted an adverse action and the termination of settlement negotiations in response to the former employee's failure to accept the provisions constituted a separate and independent violation. *CL&P*, 85 F.3d at 93. The Second Circuit examined the prolonged negotiations between the parties and held, rather, that there was a continuing violation which culminated with the offer's withdrawal. *Id*. at 96-97. In doing so, it accepted the notion that the initial offer would constitute an adverse action under the ERA. Thus, the context for finding an offer's expiration to constitute an adverse action is not in accord with the circumstances surrounding the instant case. Therefore, I reject Complainant's contention that, assuming that a severance agreement conditioned on silence would create a tangible employment action, it is the termination date of the offer, rather than the date the offer was made, that is controlling.

B. Complainant Was Not Given Sufficient Notice of an Adverse Action

Complainant next argues that the initial severance offer cannot constitute an adverse action because it did not adequately provide him with sufficient notice that an adverse action had occurred. *See Delaware State College v. Ricks*, 449 U.S. 250 (1980) (holding statute of limitations did not start to run until employee receives actual notice of adverse action); *see also Equal Employment Opportunity Commission v. United Parcel Service*, 249 F.3d 557, 561-62 (6th Cir. 2001); *Albright v. Virtue*, 273 F.3d 564, 575 n.10 (3rd Cir. 2001); *Librizzi v. Children's Memorial Med. Ctr.*, 134 F.3d 1302 (7th Cir. 1998). Complainant also argues that since the severance agreement contained "legalese" and was subject to interpretation, it was not final, definitive and unequivocal.

Complainant argues that only upon a severance agreement's expiration has an employee received "unequivocal"[24] and "definite"[25] notice that an adverse action has occurred. This links

[23] For purposes of addressing these arguments only, I will assume the severance agreement negotiations could give rise to an adverse action.

into Complainant's argument that an agreement steeped in legalese does not satisfy the notice requirement established by *Ricks* and its progeny. While *Ricks* does stand for the proposition that an employee must receive actual notice of the action, it cannot be construed as broadly as Complainant suggests it should be. It would seem obvious that offering an employee an agreement containing a gag provision, which Complainant essentially argues is *per se* invalid, and making its acceptance a condition precedent to receiving a bonus would be adequate notice to an employee that an adverse action has been taken. Indeed, Complainant has not explained what notice would have been adequate. Nor has Complainant explained how an employee would not realize an adverse action has occurred upon receipt of an offer steeped in legalese, but would be able to recognize an adverse action has occurred upon the exact same offer's expiration.

In addition to relying upon *Ricks* and its progeny, Complainant also relies extensively on the ARB's decision in *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Aug. 31, 2005). Complainant argues *Halpern* shows that where discussions between an employee and an employer are ongoing, an employee has not received sufficient notice of an adverse action. *Id*. at 3-4. While that may be true, the facts in *Halpern* are markedly different from those in the instant case. The employee in *Halpern* received notice that he was to be terminated from his supervisors. *Id.* at 4. However, the employee received an e-mail from employer's general counsel essentially stating that no final decision had been made regarding his employment status. *Id*. at 2. In the instant case, Complainant had already been terminated and was made a definite, unequivocal offer. The mere fact that the offer required the return of documents or may have been subject to interpretation does not alter the definitiveness of the offer. Complainant has not stated that he received any sort of information which would have placed the outcome of the offer or his status with Respondent in doubt. Nor was he engaged in continued negotiations with Respondent.

As discussed *supra*, the offer in issue was only open for a limited (21-day) period. There was no threat of future action; the action occurred when Respondent made an offer to Complainant that was allegedly against public policy with a set expiration date. Furthermore, Complainant is unable to sufficiently point to any authority which states a severance offer would not provide sufficient notice because of its "legalese." Thus, I reject these contentions.

C. Respondent's Offer Conflicts with the ADEA

Complainant's final argument is that Respondent's offer conflicts with policy behind the Age Discrimination in Employment Act of 1967, 29 USC §621, et. seq. ("ADEA"). Complainant's argument is premised upon 29 USC §626(f)(1)(F)(i), which requires an individual to be given 21 days to consider whether or not to waive a claim under the ADEA. Complainant argues that since he had 21 days to consider Respondent's offer, consistent with the requirements of the ADEA, it would contravene the purpose of the ADEA to count that period against

[24] Unequivocal under these circumstance "means communication that is not ambiguous, i.e., free of misleading possibilities." *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-54, slip op. at 3 (ARB Aug. 31, 2005), *citing Larry v. The Detroit Edison Co*., 86-ERA-32, slip op. at 14, (Sec'y June 28, 1991).

[25] Definite means "communication that is decisive or conclusive, i.e., leaving no further chance for discussion, change, or debate." *Halpern* at 3.

limitations periods in other federal discrimination statutes, some of which are only 30 days long and would therefore only allow the employee nine days to file a claim. Likewise, Complainant reasons, to allow the periods to run concurrently would prematurely cut off the 90 day limit for a SOX claim. See 29 C.F.R. §1980.103(d). In support, Complainant cites authority relating to specific provisions of title VII and the ADA, where courts invalidated severance agreements that would require an employee to file a discrimination suit before exhausting administrative remedies before the EEOC. *See Mabry v. Western & Southern Life Ins. Co.*, 2005 WL 1167002, p. 3 (M.D.N.C. 2005) (unpublished). Such cases are inapposite here.

The validity of the proposed severance agreement is not the issue before me. Rather, the issue is whether the limitations period expired. In fact, the SOX limitations period based upon Complainant's termination had already expired at the time the proposed severance agreement was given to Complainant. The existence of other limitation periods pertinent to the proposed agreement is not relevant to the issue of whether the limitations period expired here.

The Statute of Limitations and Equitable Tolling and Estoppel

Having determined that neither the initial offer nor its expiration constitutes an adverse action, I turn to the question of whether the claim was timely filed. As noted above, 29 C.F.R. §1980.103(d) requires an employee to file his claim with the regional OSHA director 90 days after the adverse employment action is communicated to him. As the severance offer and its expiration do not constitute adverse actions, the timeliness of a claim based upon either would be moot. Thus, I must examine whether any other adverse action was plead by Complainant which would allow him to proceed.

Complainant initially argued his termination from employment was the adverse action he suffered in retaliation for his alleged protected activity. An employee's termination under such circumstances clearly would constitute an adverse action for purposes of a SOX claim of retaliation. *See* 18 U.S.C. §1514A(a) (stating an employer may not discharge an employee in contravention of the statute). Given that Complainant's termination occurred in August 2002, Complainant's action would have undoubtedly been untimely absent any equitable argument because it was not filed until sometime around November 30, 2003. *See* 29 C.F.R. §1980.115 (permitting administrative law judge to waive rules governing SOX claims when "justice requires").

A party who files a late claim may argue that the time limitations should not bar the claim because of either equitable estoppel or equitable tolling. Equitable estoppel is utilized when a complainant argues that a respondent took action to prevent him from timely filing his claim. *See Moldauer v. Canandaigua Wine Co.*, ARB Case No. 04-022, ALJ Case No.03-SOX-026, slip op. at 5 (ARB Dec. 30, 2005). To succeed under an equitable tolling theory, in contrast, a complainant must merely demonstrate that despite all due diligence, he was unable to obtain information necessary to proceed with his claim. *Id*. Thus, under the latter theory, the focus would not be on any wrongdoing by the respondent.

In his objections to OSHA's determinations dated February 7, 2004, Complainant initially argued the lateness of his claim should be excused due to equitable estoppel and/or

equitable tolling.[26] With respect to equitable estoppel, Complainant initially contended that negotiations between him and Respondent began shortly after his termination in 2002 and extended into September 2003, well beyond the time requirements for filing a complaint, which was Respondent's intention. Regarding equitable tolling, Complainant alleged he was unable to find an attorney who possessed sufficient knowledge of the Sarbanes-Oxley Act to protect his rights in time, and the attorney he initially retained was not knowledgeable in this area of the law.[27]

Despite his initial reliance upon these theories, in subsequent pleadings and motions, Complainant abandoned them to pursue the arguments discussed *supra*. Consequently, it is no longer necessary to determine whether principles of equity permit Complainant's claim to proceed since he now relies on different legal theories. Further, Complainant has not alleged facts supportive of either equitable estoppel or equitable tolling in the First Amended Complaint.

Since I do not find that equitable arguments are appropriate for tolling the statute of limitations in this matter, and have also found that no part of Respondent's offer constitutes an adverse action, the only other adverse action present in this case is Complainant's termination, which occurred on August 28, 2002. Because the complaint in this matter was not filed with OSHA until late November 2003-early December 2003, more than one year after Complainant's termination in August 2002, his complaint clearly exceeds the 90 day requirement under 29 C.F.R. §1980.103(d). Therefore, I find the complaint in this matter is untimely irrespective of the dates involved with Respondent's severance offer.

CONCLUSION

For the reasons set forth above I find that Complainant's claim must be dismissed because (1) it is untimely as related to his termination and (2) with respect to his alternate theory based upon a proposed post termination severance agreement, he has not made out an essential element of his claim, namely that he suffered an adverse action as a result of engaging in protected activity under the Sarbanes-Oxley Act. Even in viewing the evidence most favorably to the Complainant, I find that Respondent's severance offer conditioned on silence did not satisfy this requirement. Even if I were to find that the severance offer constituted an adverse action, I would find the adverse action was the actual offer and not its expiration, and this action would still be untimely. Since Complainant has not demonstrated an actionable claim of retaliation, I also deny his Partial Motion for Summary Decision.

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[26] Although Complainant never used the terms "equitable estoppel" or "equitable tolling", the specific facts he points to nevertheless suggest these theories. This is further evidenced by his citation to 29 C.F.R. §1980.115 in support of his contention why his failure to comply with the time requirements should be waived. Accordingly, I allowed discovery to proceed on the equitable estoppel and equitable tolling issues.

[27] While I do not decide the issue of whether equitable tolling is applicable, I note that other administrative authorities have rejected the equitable tolling arguments raised by Complainant. *See Moldauer*, ARB No. 04-022 at 6 (*citing Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-634 (1962)) (holding attorney's lack of knowledge regarding Sarbanes-Oxley Act did not trigger equitable tolling); *see also Guy v. SBC Global Services*, 2005-SOX-113 (ALJ Dec. 14, 2005) (holding that complainant's ignorance of the law did not trigger equitable tolling). The applicability of the principles of equitable tolling or estoppel depends upon the particular facts in each case.

ORDER

IT IS HEREBY ORDERED that the Complainant's claim be, and hereby is, **DISMISSED**.

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

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 has accepted the case for review. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).