



Issue Date: 18 June 2007

CASE NO.: 2006-SOX-111

IN THE MATTER OF

**KEITH G. FARNHAM,
Complainant**

vs.

**INTERNATIONAL MANUFACTURING SOLUTIONS,
Respondent.**

DECISION AND ORDER

PROCEDURAL AND FACTUAL BACKGROUND

This matter involves a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (the Act)¹ and the regulations promulgated pursuant thereto² brought by Keith G. Farnham (Complainant) against International Manufacturing Solutions and David Coburn (Respondents).

In February of 2005, Complainant resigned from his position with Respondent IMS. In May 2005, Respondents filed a civil suit against Complainant.

On 14 Jan 06, Complainant e-mailed his congressman asking for protection as a corporate whistleblower under the Act. The email was followed by an 8 Mar 06 letter. The letter recounted a lengthy set of factual assertions concerning Respondents and the Eureka Company as a subdivision of Electrolux Home Care Products, which he alleged is a publicly traded company. The letter alleged that Complainant had suffered retaliation under the Act, but it did not specify what assistance he sought from his congressman.

¹ 18 U.S.C. §1514A *et seq.*

² 29 C.F.R. Part 1980.

On 2 May 06, the congressman forwarded the letter to the Department of Labor, which in turn forwarded it to OSHA on or about 06 Jun 06. OSHA treated the letter as a formal complaint and conducted an investigation. OSHA issued a decision on 6 Jun 06, determining that Complainant's claim was untimely. Complainant subsequently filed his notice of appeal of the OSHA determination on 13 Jul 06 and the case was referred to the Office of Administrative Law Judges.

On 12 Jan 07, Respondents filed a motion for summary decision based on untimeliness and a lack of jurisdiction. The Court denied Respondents' motion on 16 Mar 07 and stated that Complainant's submissions were sufficient to create a genuine issue of material fact as to whether the principle of estoppel should apply and Complainant's failure to file within the time limits was due to the actions of Respondent Coburn.

On 19 Jan 07, the Court bifurcated this case and informed the parties that the 24 Apr 07 hearing would only deal with the issues of timeliness and jurisdiction under the Act. A conference call was held in February 2007, to discuss Complainant's new discovery requests and whether they related solely to the issues of jurisdiction and timeliness.

The parties subsequently waived their rights to appear in person and agreed to submit the case on the written record.

Consequently, my decision is based upon the following:

Exhibits³

Complainant's Exhibits (CX) 1-26

Respondents' Exhibits (RX) 1-2

THE PARTIES' CONTENTIONS

During a conference call, the parties clarified their positions on the issue of timely filing. Complainant alleges that the last adverse action by Respondents was in May 2005, when they filed a civil suit against him. As an alternative, Complainant alleges that the last adverse action would be his constructive termination (resignation) in February 2005. Complainant also conceded that the earliest point that he could be considered to have filed a complaint was his letter to his congressman on 8 Mar 06.

³ The parties were warned that the only evidence the Court would consider as part of the administrative records were those exhibits submitted with their briefs.

On the other hand, Respondents argue that the date of the last purported adverse employment action was the date Complainant resigned his position with Respondent IMS in February 2005. Respondents further contend that Complainant's case should be dismissed because he failed to file his claim within the applicable limitations period and there is no evidence that his cause of action should be equitably tolled.

ISSUE

The sole issue for determination is whether Complainant's complaint can be considered as timely filed, or whether the time for filing should be tolled based on equitable relief due to a fear of violent retaliation. Specifically:

1. What was the date of filing, if any?
2. What was the date of the triggering adverse action? Specifically, was it the date of the filing of the civil suit
 - a. If not, what circumstances created the constructive discharge that led to the resignation.
 - b. If Complainant argues that there was a continuing violation, what circumstances constitute that violation?
3. Was the Complainant reasonably caused to fail to file within the time limits because of the actions of Respondent Coburn?

EVIDENCE

*Complainant's separation notice reflects that:*⁴

Complainant resigned because he could "no longer perform [his] functions considering the past and current circumstances that have jeopardized IMS . . ." Complainant contacted an attorney and was advised to resign.

His resignation was not signed.

⁴ CX-2.

*Complainant's affidavit states in pertinent part that:*⁵

Complainant had heard of the violence in Juarez, but did not know the extent of the violence until he lived there and heard stories about assassinations, tortures, murders, and other crimes related to the drug trade. In addition, one of his coworkers at Electrolux had told him how his son was grabbed by a group of men who poured acid down his throat. The son had been suspected of being an informant about cartel activities. Complainant was also warned by local residents to never mention drug trafficking or cartel activities.⁶

Complainant went to Juarez with Respondent Coburn in September and October 2004. During the September 2004 trip, Respondent Coburn informed Complainant that he had ties to the Juarez drug cartel family and that if anyone ever messed with him, that he had friends. Complainant took the statement as a veiled threat and believed Respondent Coburn was “laying . . . ground rules of their business relationship.” Given Respondent Coburn’s demeanor, Complainant took the threat seriously.⁷

Respondents started having problems with a supplier and Complainant asked why Respondent Coburn did not have his friends in Juarez take care of it, Respondent Coburn replied that the situation was not serious and he did not “pull out [the] big guns for this kind of stuff.”⁸

Around January 2005, Respondent Coburn attempted to get a loan for Respondent IMS and underwent a background check. Respondent Coburn contacted Complainant and told him he was embarrassed by what was revealed. Complainant then looked up Respondent Coburn’s public record and found prior charges for assault to commit bodily harm. It was also at this point that he looked up Mr. Fuentes and found out he was being sought by United States Marshalls and the FBI.⁹

In January 2005, Complainant had a conversation with a crying employee, Michelle Hayden, because Respondent Coburn allegedly screamed at her that they “were all like a bunch of [expletive] Viet Cong that needed to be burned out.”¹⁰

⁵ CX-9.

⁶ CX-9, para. 2.

⁷ CX-9, para. 4, 5.

⁸ Id.

⁹ CX-9, para. 14.

¹⁰ CX-9, para. 15.

Complainant resigned on 3 Feb 05. His resignation was intentionally non-confrontational because he did not want Respondent Coburn to suspect that he knew about the white collar crimes. In Complainant's mind, Respondent "Coburn's past actions supported [his] belief that he had a 'practiced' criminal personality." Complainant was also still very conscious of Respondent Coburn's claim of having ties to the Juarez drug cartel family. Nevertheless, Complainant's "primary concern" was being held liable for Respondents' actions.¹¹

In mid February 2005, Complainant went to federal law enforcement authorities with information about Respondents. He informed them that Respondents had ties to the drug cartel that he suspected misappropriation of corporate funds, and that employees were being asked to destroy emails.¹²

Complainant's fear of retaliation from Respondents' cartel associates took complete hold of him after Respondents filed their defamation suit against him on 6 May 05. Since Respondents now knew that Complainant had crossed them, Complainant had "grave concerns about what lengths he would go to avoid fines and/or prison." Complainant's previous fears of being held liable for Respondents' actions were then eclipsed by his fear of violent retaliation. Complainant stated taking steps to protect himself and his family.¹³

On 10 Oct 05, five months after Respondents filed the complaint against him, Complainant filed a counterclaim.¹⁴ The counterclaim was delayed because of Complainant's "unwillingness to make public certain facts about the Fuentes family . . ." He also contacted a bankruptcy attorney on 12 Oct 05,¹⁵ hoping to stop the civil proceedings and withdraw from any confrontation with Respondents. Complainant argues that he had a real fear that had now escalated into being life threatening. Respondents filed an adversary motion¹⁶ against Complainant's bankruptcy claim.¹⁷

Complainant sought out help from his congressman in March 2006. Nevertheless, he alleges that he still has fear of the alleged cartel associates, but reconciled his fear by realizing that "at some point someone must take a stand."¹⁸

[The rest of Complainant's affidavit related directly to his allegations of fraud against Respondents and had nothing to do with whether his whistleblower complaint was filed

¹¹ CX-9, para. 18.

¹² CX-9, para. 19.

¹³ CX-9, para. 20.

¹⁴ CX-22 (Complainant filed a counterclaim to Respondents' original petition in district court on 10 Oct 05).

¹⁵ Complainant filed for bankruptcy on 16 Oct 05.

¹⁶ CX-20.

¹⁷ CX-9, para. 21, 22.

¹⁸ CX-9, para. 24.

in a timely manner. For the purpose of this decision, the only relevant information in the affidavit relates to Complainant's perception of fear that may have justified a late filing of his complaint.]

*Vickie Farnham's affidavit states in pertinent part that:*¹⁹

She is married to Complainant. Around September 2004, Complainant came home from work and told her that Respondent Coburn told him about his connections to the Juarez drug cartel family "Fuentes." When she asked Complainant why Respondent Coburn would say that, Complainant responded that he thought Respondent Coburn was trying to threaten him to set the ground rules for their business relationship.

As far as she knows, Complainant was forced to leave his job with Respondent IMS because he refused to commit illegal acts and was afraid that Respondents were misappropriating funds.

Shortly after leaving his job with Respondent IMS, Complainant went to law enforcement with information regarding suspicious financial activities at IMS, being asked to break the law, and Respondents' ties to the drug cartel.

Complainant's mental and physical health has deteriorated since he began working for Respondents. He started taking anti-anxiety and anti-depressants. He also began sleeping with a handgun and walking through the house and yard with it at night. He placed various weapons in hidden locations around the house. Complainant had her so worried that she could not sleep either. She finally convinced him to seek professional help in mid 2006.

*Respondent Coburn's deposition taken on 04 Dec 06 states in pertinent part that:*²⁰

He is suing Complainant in state court for fraud because Complainant broke into his computer and email and contacted various friends, customers, and suppliers. Complainant also took damaging and personal information to the FBI.²¹

*Dr. Francisco Marquez's office notes state in pertinent part that:*²²

He is a psychiatrist. He saw Complainant on 19 Jul 06. He noted that Complainant had decreased concentration and decreased appetite. Complainant

¹⁹ CX-15.

²⁰ CX-21 (deposition was taken for the district court case filed in El Paso, Texas by Plastic Source Workers Committee and Ignacio Perez against Respondents and Plastic Source).

²¹ CX-21, p. 11-12.

²² CX-18.

was negative for suicidal or homicidal ideations. However, Complainant believes he is being followed and is always checking to see if someone is there. Complainant believes he is being targeted because the Juarez drug cartel is very powerful.

Dr. Marquez diagnosed Complainant with major depressive disorder, anxiety, and alcohol abuse.

*James Blackwell's affidavit states in pertinent part that:*²³

He was employed by Respondent IMS. He witnessed threats made by IMS officials to employees after payroll checks bounced. Employees were advised that "if anyone contacts the DOL, they are going to be terminated."

*Phil Marin's affidavit states in pertinent part that:*²⁴

He was employed as the inventory manager for Respondent IMS. He was asked by Respondents' officials to falsify the inventory level so it would appear that there was more sellable inventory than there actually was. He refused to falsify information and resigned shortly after.

He was also asked to develop negative information regarding Complainant, but refused to cooperate. He witnessed employees being threatened that if they went to the DOL to complain of the companies actions, then they would be terminated.

*Marcus Land's affidavit states in pertinent part that:*²⁵

He worked for Respondent IMS in August 2005. He witnessed threats after payroll checks bounced. If anyone complained to the DOL, they would be terminated.

*J. Eduardo Cadena's affidavit states in pertinent part that:*²⁶

He is an attorney. Complainant contacted him in June 2005 and informed him about Respondent Coburn's claims to have ties to the drug cartel family in Juarez. Complainant informed him of his conversation with Respondent Coburn, where Respondent Coburn told him in a threatening manner that if anybody got crossways with him, that he had friends in Juarez that could help.

²³ CX-10.

²⁴ CX-11.

²⁵ CX-12.

²⁶ CX-13.

Mr. Cadena confirmed to Complainant that “Fuentes” was reputedly involved with the Juarez drug cartel. Complainant was very concerned about the potential threat posed by Respondent Coburn’s ties to Juarez, Mexico. Complainant feared the possibility that Respondents would retaliate against him if he pursued a legal action against Respondents.

*Robert Schmitt’s affidavit states in pertinent part that:*²⁷

He was directly involved in hiring Complainant in late February 2005 at Border Operations for the Toro Company. Beginning in March 2005, Complainant confided in him that he feared retaliation from alleged Juarez drug cartel members that Respondents claimed to have ties to.

*Various records involving Respondent Coburn show in pertinent part that:*²⁸

Respondent Coburn has prior arrests for driving under the influence, disorderly conduct (fighting, assault, intent, reckless, injury); and a civil action by U.S. Bancorp Equipment v. Industrial Technology and Respondent Coburn.

[However, as there is no evidence in the record to support that Complainant knew any of this information at the time he resigned, this information is irrelevant as to whether Complainant had a genuine fear of violent retaliation that should justify tolling the filing deadline of his claim under the Act.]

*Leonardo Silva’s email to Complainant reflects in pertinent part that:*²⁹

He was terminated from employment with Respondent IMS on 18 Feb 05 after he noted that Plastic Source invoices were being invoiced at zero cost. The day after he asked about the invoices he was terminated and asked to erase all of his emails.

Complainant responded that he had asked that his expenses be closed out and that if he was not paid promptly then he would “deal with the situation on another level.”

*The Original Civil Complaint filed by Respondents against Complainant shows in pertinent part that:*³⁰

Respondents filed suit against Complainant on 6 May 05 alleging that Complainant tortiously interfered with Respondents’ loan transactions, per se

²⁷ CX-14.

²⁸ CX-3; CX-4; CX-5.

²⁹ CX-6.

³⁰ CX-7.

slandered Respondent Coburn, and intentionally inflicted emotional distress on Respondent Coburn. Respondents sought actual damages, punitive damages, pre and post judgment interest and injunctive relief.

*Complainant's counterclaim to Respondents' original civil complaint shows in pertinent part that:*³¹

Complainant filed his counterclaim on 7 Oct 05. Complainant alleged he was wrongfully terminated for refusing to perform illegal acts. He also alleged that Respondents intentionally inflicted him with emotional distress when they abused their special positions as his superiors. Complainant further alleged that Respondents were liable for libel, slander, and defamation.

*Complainant submitted information related to Vicente Carrillo Fuentes that reflects in pertinent part that:*³²

Mr. Fuentes has been charged with a 46 count indictment, including charges related to witness tampering, ordering intentional killings of individuals to prevent communication with law enforcement, and murder in furtherance of a continuing criminal enterprise. The United States Department of State has placed up to a \$5 million reward for any information that could lead to his arrest. It is noted that Mr. Fuentes should be considered armed and dangerous and is allegedly the leader of a large and violent drug trafficking organization.

[Although the information Complainant provided the Court tends to show Mr. Fuentes is a violent man, in the absence of anything in the record indicating Complainant knew any of the information at the time he resigned, the information is irrelevant as to whether Complainant had a genuine fear of violent retaliation that should justify tolling the filing deadline of his claim under the Act. Moreover, there is nothing in the record to support that Respondent Coburn used Mr. Fuentes' name to make a serious threat against Complainant that would have justified him filing his complaint in an untimely manner. According to Complainant, Respondent Coburn merely stated in September 2004, more than 5 months before he resigned, that he had ties to the Juarez drug cartel family and that if anyone messed with him, he has "friends." In addition, in his own affidavit, Complainant admits that he looked up Mr. Fuentes only after Respondent Coburn had called him to complain about the character review by the bank around January 2005.]

³¹ RX-2.

³² CX-8; CX-24.

*Articles regarding area violence in the El Paso Times state in pertinent part that:*³³

On 17 Nov 06, it was reported that a slain man was found wrapped in a blue tarp along a Juarez road. The man had a wire wrapped around his neck and a plastic bag over his head.

On 25 Nov 06, it was reported that a man died of two gunshot wounds to his head. The body was found charred and missing both legs and the right arm.

[These articles are not relevant to Complainant's state of mind from the time he resigned from employment with Respondent IMS to the time he sent his congressman a letter asking for an investigation of violations of the Act. The articles were published more than 8 months after he already contacted his congressman.]

APPLICABLE LAW

Under the Act and implementing regulations, an employee alleging discharge or other discrimination must file a complaint with the Secretary of Labor within 90 days of the violation.³⁴ A violation occurs when the employer communicates to the employee its intent to implement an adverse employment decision, rather than the date the employee experiences the consequence.³⁵ Statutes of limitations in whistleblower acts run from the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision. "Final" and "definitive" notice denotes communication that is decisive or conclusive, i.e. leaving no further chance for action, discussion, or change. "Unequivocal" notice means communication that is not ambiguous, i.e. free of misleading possibilities.³⁶

The law provides for equitable relief from the 90 day limit in certain circumstances. For equitable tolling to apply, the Complainant must have shown that he filed the precise statutory claim in issue (a SOX whistleblower claim) but merely did so in the wrong forum.³⁷ Equitable estoppel applies when actions by a respondent prevent a complainant, who is acting reasonably, from filing a claim.³⁸

³³ CX-25.

³⁴ 18 U.S.C. §1514A(b)(2)(D); 29 C.F.R. §1980.103(d).

³⁵ *Halpern v. XL Capital, LTD.*, 2004-SOX-54 (ARB) (Aug. 31, 2005) (citing *Overall v. Tennessee Valley Auth.*, 97-ERA-53 (ARB) (Apr. 30, 2001); *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981); *Delaware State Coll. V. Ricks*, 449 U.S. 250, 258 (1980)).

³⁶ *Id.* (citing *Jenkins v. United States Envtl. Prot. Agency*, 1988-SWD-2 (ARB) (Feb. 28, 2003); *Larry v. The Detroit Edison Co.*, 86-ERA-32 (Sec'y) (Jun 28, 1991)).

³⁷ *Harvey v. Home Depot U.S.A., Inc.*, 2004-SOX-20 and 36 (ARB June 2, 2006).

³⁸ *Santa Maria v. Pacific Bell*, 202 F.3d 1170 (9th Cir. 2000).

Equitable relief may not afford a complainant the full 90 days once the impediment to filing is removed. The Fifth Circuit has ruled that waiting one month to file a claim, after becoming aware of a viable claim, is not reasonable.³⁹

DISCUSSION

In order to determine if Complainant filed his complaint on time, the dates of the triggering adverse action and filing must be identified. Although Complainant argues that the law suit filed by Respondents on 6 May 05 was an adverse action, he also concedes that he had already been constructively terminated by that time. In as much as the lawsuit had no impact on his employment and no potential for blacklisting than any other civil suit, it did not constitute an adverse action. Accordingly, the triggering adverse action was the date Complainant resigned from his employment with Respondent IMS.⁴⁰ Since that occurred on 3 February 05, Complainant should have filed his complaint no later than 4 May 05.

In fact, Complainant failed to file any complaint directly with appropriate agency. It was not until 6 Jun 06 that OSHA received Complainant's complaint. Complainant did contact his congressman about the matter however and giving him the benefit of equitable tolling would accelerate his date to 6 Mar 06, the date he sent the letter to his congressman asking for help.

Nevertheless, there is no dispute that Complainant did not file his complaint within 90 days of the latest adverse action. Complainant must still account for the period between 4 May 05 and 6 Mar 06. He argues that his failure to file for that time should be excused because he was afraid of Respondent Coburn.

Although Complainant offered evidence of various cases⁴¹ to explain his fear, the only relevant information is what Complainant knew between his resignation and his letter to the congressman. Absent any evidence that Complainant was aware of the prior assault charges against Respondent Coburn, the various cases that Complainant submitted as evidence is irrelevant. The critical question is whether a reasonable person with the same information would have been afraid to file and should be allowed an additional period to file.

³⁹ *Lovett v. Barbour Int'l, Inc.*, 2006 U.S. App. LEXIS 30816 (5th Cir. 2006).

⁴⁰ The Court is assuming the 3 Feb 05 resignation qualifies as a constructive termination for the purpose of this decision only.

⁴¹ CX-3; CX-4; CX-5.

The record does contain evidence that Complainant believed Respondent Coburn asked Complainant to conceal and destroy financial information. It also indicates Complainant heard Respondent Coburn say he has ties to a drug cartel and was exposed to information that the drug cartel was very dangerous. It shows that other employees were told they would be fired if they contacted the DOL.

Mr. Cadena's affidavit reflects that he confirmed with Complainant, around June 2005, that "Fuentes" was reputedly involved with the Juarez drug cartel. Complainant informed Mr. Cadena that he feared that Respondents would retaliate against him if he pursued any legal action against Respondents.

However, more probative than the information Complainant points to as explaining his late filing is his actions. He continued working for Respondent IMS even after being exposed to the initial threatening information. Less than one month after he resigned, Complainant contacted the FBI. He provided the FBI with more information than he would have needed to provide to OSHA to file his whistleblower suit. He informed the FBI that Respondents had ties to the drug cartel that he suspected misappropriation of corporate funds, and that employees were being asked to destroy emails. Moreover, on 12 Oct 05, Complainant filed a counter-claim in the civil suit brought by Respondents.

There is nothing in the record to explain why Complainant could contact the FBI (with much more incriminating information than needed to be disclosed to DOL) after he resigned, but was afraid to file a complaint with DOL. Similarly, there is no rational explanation of why Complainant felt safe to file a civil claim against Respondents, but was afraid to file a complaint with DOL. There is also no explanation of why Complainant felt he could contact many of Respondents' current and former employees to discuss the alleged fraudulent behavior of Respondents, but could not file a complaint with DOL.

Even if the Court found that Complainant had a reasonable fear until he filed his counterclaim to Respondents' civil suit on 12 Oct 05, he still missed his deadline. Complainant did not send the letter describing his cause of action to his congressman until 3 Mar 06, which is more than 120 days after he filed his counterclaim.⁴²

In sum, Complainant's actions in this case speak louder than his pleadings and arguments. His failure to file in a timely fashion was not a result of Respondents' actions. Consequently, he is not entitled to equitable estoppel. He was required to file a complaint by 4 May 05 and failed to do so until almost a year later.

⁴² Even if the 14 Jan 06 email from Complainant to his congressman qualified as the date he filed his claim, that email was still more than 11 months after he resigned and 92 days after his 12 Oct 05 counterclaim was filed.

Therefore, the Court finds Complainant's claim under the Act to be untimely and his case is hereby **DISMISSED**.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

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).