In the Matter of:

HUNTER R. LEVI,	**ARB CASE NOS. 06-102**
	07-020
COMPLAINANT,	**08-006**
v.	**ALJ CASE NOS. 2006-SOX-037**
	2006-SOX-108
ANHEUSER BUSCH COMPANIES, INC.,	**2007-SOX-055**
RESPONDENT.	**DATE: April 30, 2008**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Hunter R. Levi, *pro se*, Overland Park, Kansas

For the Respondent:
Joseph Torres, Esq., *Winston Strawn*, Chicago, Illinois; Sabrina M. Wrenn, Esq., *Anheuser Busch Inc.*, St. Louis, Missouri

ORDER OF CONSOLIDATION AND FINAL DECISION AND ORDER

This case arose originally from a complaint Hunter R. Levi filed alleging that his employer, Anheuser Busch Companies (ABI), violated the employee protection (i.e., whistleblower) provisions under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 ,18 U.S.C.A. § 1514A (West Supp. 2005)(SOX), and its implementing regulations at 29 C.F.R. Part 1980 (2007), when it terminated his employment. Levi filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA). OSHA dismissed his claim as untimely and Levi objected to OSHA's findings. A Department of Labor Administrative Law Judge (ALJ) issued an Initial [Recommended] Decision and Order (R. D. & O.), dismissing the

complaint (*Levi I*) because of Levi's failure to file a viable SOX complaint within the 90-day time frame mandated by 18 U.S.C.A. § 1514A(b)(2)(D). We affirm the ALJ's dismissal of *Levi I*.

Levi filed a second complaint, alleging that ABI again violated the whistleblower protection provisions of the SOX when its counsel made false statements in the *Levi I* motion to dismiss. Levi's complaint claimed that the statements were designed to "derail" his SOX complaint and blacklist him from rehire and other future employment. The ALJ granted summary decision against Levi's blacklisting claim and dismissed *Levi II*. We also affirm the ALJ's dismissal of *Levi II*.

Levi subsequently filed a third complaint (*Levi III*) alleging retaliation and blacklisting under SOX. The ALJ found that Levi's claims in *Levi III* were untimely and duplicative and dismissed his claim. We again affirm the ALJ's dismissal of *Levi III*.

BACKGROUND AND PROCEDURAL HISTORY - *LEVI I*

The record consists almost entirely of letters Levi wrote to the ABI Board of Directors (ABI Board), other ABI managers and letters he wrote to federal entities and officials.[1] The ALJ fairly and accurately characterized the content of this correspondence. R. D. & O. (*Levi I*) at 1-2, 10-15; R. D. & O. (*Levi II*) at 1-2; R. D. & O. (*Levi III*) at 1-3. We briefly summarize.

Beginning in 1997, Levi wrote to ABI expressing his views on aspects of ABI policy and recommending business opportunities for ABI to pursue. In 1997, Levi wrote the ABI Chief Executive Officer (CEO) to recommend that ABI buy a coal company instead of transitioning to natural gas. Over the next few years, Levi continued to write letters. In a May 15, 2001 letter,

[1] The Levi correspondence, which the ALJ summarized, includes an August 28, 2001 letter to ABI Vice-President of Human Relations (VP of HR) (racial discrimination, harassment and retaliation); September 9, 2001 letter to plant manager (squandering resources, retaliation, neglect of facilities; Levi recounts that he received warnings from ABI about his letters); October 14, 2001 letter to ABI CEO (missed coal company purchase, racial discrimination); November 26, 2001 letter to ABI VP of HR (coal company purchase); March 11, 2002 letter to ABI Vice-President of Operations(VP of Oper.) (racial discrimination, harassment, poor use of company resources and retaliation); March 23, 2002 letter to ABI VP of Oper. (retaliation); April 30, 2002 letter from ABI to Levi (warning Levi about disruptive letters); May 4, 2002 letter to ABI CEO (racial discrimination, company resources, workplace safety, and retaliation); June 2, 2002 letter to ABI Board (complaining of unethical activities affecting shareholder value including missed business opportunities, poor labor relations and retaliation for his conduct); July 22, 2002 letter to ABI CEO (raising claims of corporate arrogance and workplace safety concerns); July 29, 2002 letter to ABI CEO (coal company and retaliation). Levi also sent correspondence to OSHA, the Securities and Exchange Commission (SEC), the National Labor Relations Board (NLRB), and the Equal Employment Opportunity Commission (EEOC) beginning in September 2002 and through the spring of 2003. R. D. & O. (*Levi I*) 20.

Levi renewed his coal plant suggestion and raised allegations of racial discrimination by ABI supervisors. In general, Levi's letters to ABI reiterate claims of racial discrimination, poor business decision-making and workplace safety. R. D. & O. (*Levi I*) at 15-16.

In late 2001, ABI began to warn Levi about his letters. On April 30, 2002, an ABI senior manager expressed concerns about the tone of Levi's letters. R. D. & O. (*Levi I*) at 12. In the letter, ABI indicated that Levi was rehashing unfounded rumors and half-truths, which were disruptive and needed to stop. ABI's letter indicated that this was Levi's final notice and that if the insubordination continued, Levi might receive discipline up to and including discharge. R. D. & O. (*Levi I*) at 12.

Levi continued to write letters. Levi wrote a May 4, 2002 letter to the CEO claiming retaliation for his letters concerning safety violations, wasting company resources and violations of federal law. R. D. & O. (*Levi I*) at 12. As a result of his May 4 letter to the CEO, on June 2, 2002, ABI suspended Levi for four weeks. ABI charged that his letters were harassing and injurious to fellow employees. In July of 2002, Levi was suspended again for a week for using abusive language and confronting an employee. R. D. & O. (*Levi I*) at 13-14.

On September 24, 2002, Levi wrote a letter to Harvey Pitt, Chairman of the SEC, informing the SEC of several concerns with ABI. In the letter, Levi claimed that ABI engaged in "bad corporate behavior" that had an unspecified negative impact on shareholders. Levi generally complained about excessive executive compensation but failed to identify ABI company policies or SEC rules or regulations that might be at issue. Levi enclosed attachments with the letter but did not produce these attachments for the ALJ. R. D. & O. (*Levi I*) at 19.

After a hostile altercation with supervisors on February 14, 2003, in which Levi refused to cooperate with ABI personnel and used abusive and threatening language, ABI suspended Levi indefinitely with intent to discharge. ABI listed Levi's continued "belligerent and disrespectful conduct toward [ABI] management and supervision" as a principal reason for the discharge. Sept. 22, 2003 arbitration order at 3, 7-17. Levi's discharge became final on August 6, 2003, after union arbitration.[2]

Shortly after his suspension, Levi wrote to the Secretary of Labor (Secretary) on March 3, 2003. Levi complained about alleged labor law violations, including wage and hour violations, racial discrimination and workplace safety. Levi enclosed attachments of his earlier correspondence with his March 3 letter.[3] Thereafter, in late March or early April 2003, Levi

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[2] Levi had an arbitration hearing on July 22, 2003. Although the R. D. & O. says Levi's discharge became final on August 6, 2003, R. D. & O. at 2, we note that the arbitrator's decision is dated September 22, 2003. As we discuss in more detail below, the ALJ correctly used February 14, 2003, as the proper accrual date for Levi's adverse action, even though the termination did not become final until a later date.

[3] Levi attempts to identify the correspondence that was attached to the March 3 letter, but the record contains two conflicting indices of the enclosures.

filed a complaint with OSHA in which he expressed workplace safety concerns relating to ABI boilers.[4] OSHA followed up on Levi's complaint, and after noting that ABI had corrected the hazardous conditions, OSHA closed the case.[5]

On November 19, 2004, after learning of SOX whistleblower protection, Levi wrote to the Secretary to inquire whether his earlier correspondence had been filed under SOX. If not, Levi requested that his earlier letters be filed as SOX complaints. In the letter, Levi criticized the recipients of his earlier letters for failing to direct him to SOX's whistleblower protection provisions. OSHA treated the letter as a valid whistleblower retaliation complaint under the SOX. However, on December 16, 2005, OSHA dismissed the November 19, 2004 complaint as untimely. Levi objected to OSHA's findings. The case was assigned to an ALJ, and on March 14, 2006, ABI filed a motion to dismiss. Levi objected to ABI's motion. Finding that Levi failed to present a timely and viable SOX claim, the ALJ granted ABI's motion to dismiss on May 3, 2006. Levi timely filed an appeal on May 12, 2006, with the Department of Labor's Administrative Review Board (Board or ARB).[6]

BACKGROUND AND PROCEDURAL HISTORY - *LEVI II*

On May 23, 2006, shortly after filing his appeal in *Levi I*, Levi filed a second complaint generally alleging ABI retaliation for filing his first complaint, specifically that ABI counsel made false statements in its March 14, 2006 motion to dismiss. In *Levi II*, Levi claims these false statements were designed to "derail" his SOX complaint and blacklist him from rehire and other future employment. R. D. & O. (*Levi II*) at 1. OSHA dismissed the complaint as a matter pending before the Board in *Levi I*. Levi appealed to an ALJ. On August 25, 2006, ABI filed a motion to dismiss and motion to consolidate. Levi objected. The ALJ held a telephone conference on September 8, 2006. During the conference call, the ALJ asked if the parties had filed testimony or affidavits in *Levi I*. The ALJ explained the summary decision process and gave Levi 30 days to respond to the motion to dismiss or amend his complaint. On October 11, 2006, Levi filed a supplemental brief alleging that counsel for ABI lied in the September 8, 2006 telephone conference. The ALJ ruled that Levi's claims in *Levi II* were "subsumed" in his earlier action and that Levi failed to show that ABI's actions gave rise to an independent claim

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[4] R. D. & O. (*Levi I*) at 17; April-June correspondence with OSHA. In one letter, Levi contends that he was terminated for speaking up about problems including safety but there is no specific mention of retaliation for SOX-related activity. Levi's April 25, 2003 response to ABI's reply to OSHA.

[5] On April 25, 2003, Levi wrote to the investigator to indicate that he was not satisfied with ABI's response to the OSHA investigation. On May 6, 2003, OSHA responded that the case was closed as the hazardous conditions no longer exist.

[6] *See* 29 C.F.R. § 1980.110.

for retaliation under the SOX.[7] On October 18, 2006, the ALJ granted ABI's motion for summary decision against Levi's blacklisting claim and dismissed Levi's second complaint as collaterally estopped by the decision in *Levi I* and barred by the "law of the case" doctrine. Levi appealed the ALJ's decision in *Levi II* to the ARB.

BACKGROUND AND PROCEDURAL HISTORY *LEVI III*

In December of 2006, Levi wrote to the ARB and requested a copy of the transcript from the September 8, 2006 telephone conference in *Levi II*. The Board sent Levi a copy of the transcript. After reading the transcript, he claimed to have discovered three additional alleged false statements by ABI counsel. Subsequently, Levi filed a third complaint, again claiming retaliation and blacklisting in part based on the additional falsehoods from prior proceedings. Levi also claims ABI blacklisted him in his employment relationship with another company, Aerotek, in October of 2005. Levi began working for Aerotek in February 2005. In June 2005, *Levi* informed Aerotek that he might be moving. Aerotek replied that they had several locations and requested him to send his resume. Levi sent his resume in October of 2005, which included his work at ABI. According to Levi, he spoke with his former supervisor at Aerotek, who indicated he would look into Levi's application. R. D. & O. (*Levi III*) at 5. Receiving no response, Levi filed for unemployment. Aerotek contested Levi's unemployment, arguing that Levi quit. R. D. & O. (*Levi III*) at 5. The state agency denied unemployment and Levi was unsuccessful through two levels of appeals. Levi further claims that ABI retaliated against him by incorrectly stating that he was fired for "misconduct" in his 2003 state employment records. Petition (*Levi III*) at 5. Levi asserts that the label of "misconduct" resulted in him losing unemployment benefits, which in turn resulted in bankruptcy and child support garnishment. Petition (*Levi III*) at 5. OSHA rejected Levi's complaint on April 27, 2007. Levi objected to OSHA's findings and the case was assigned to an ALJ.[8] On June 13, 2007, the ALJ issued an order to show cause why the case should not be dismissed as untimely and duplicative. After both parties responded to the order, on September 17, 2007, the ALJ dismissed *Levi III*. Levi timely appealed to the Board on September 27, 2007.

ISSUES

1. Whether the ALJ erred in dismissing Levi's original complaint as untimely filed (*Levi I*).

2. Whether the ALJ erred in dismissing Levi's claim of false

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[7] Levi raised issues of false statements in ABI's motion to dismiss to the ALJ and before the Board on appeal. Levi's Mar. 28, 2006 response to ABI's motion to dismiss at 3; Petition (*Levi I*) at 3.

[8] The ALJ for *Levi III* was the same ALJ assigned in *Levi I*. Levi requested that the ALJ recuse himself, which the ALJ denied. On appeal in *Levi III*, Levi claims the ALJ erred by not recusing himself.

allegations and in granting summary decision to ABI against Levi's claim of blacklisting (*Levi II*).

3. Whether the ALJ erred in dismissing Levi's third complaint as duplicative and untimely and in refusing to recuse himself (*Levi III*).

CONSOLIDATION OF ARB CASE NOS. 06-102, 07-020, AND 08-006

In view of the substantial identity of the legal issues and the commonality of much of the evidence, and in the interest of judicial and administrative economy, Levi's appeals in his three complaints (*Levi I*, *II*, and *III*) are hereby consolidated for the purpose of review and decision. *Harvey v. Home Depot*, ARB Nos. 04-114, 115, ALJ Nos. 2004-SOX-020, 036, slip op. at 8 (ARB June 2, 2006); *Agosto v. Consol. Edison Co. Inc.*, ARB Nos. 98-007, 152, ALJ Nos. 1996-ERA-002, 1997-ERA-054, slip op. at 2 (ARB July 27, 1999).

JURISDICTION AND STANDARD OF REVIEW

The ARB's jurisdiction to review the ALJ's decision is set out in Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002), which delegated to the ARB the Secretary's authority to review ALJ decisions issued under the SOX. 18 U.S.C.A. § 1514A.

The ARB reviews the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 1980.110(b). In reviewing the ALJ's conclusions of law the ARB, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's conclusions of law de novo. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 7 (ARB June 29, 2006).

The Board reviews an ALJ's recommended grant of summary decision de novo, i.e., the same standard that the ALJ applies in initially evaluating a motion for summary judgment governs our review. *Nixon v. Stewart & Stevenson Servs., Inc.*, ARB No. 05-066, ALJ No. 2005-SOX-001, slip op. at 6 (ARB Sept. 28, 2007); *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ No. 2000-ERA-036, slip op. at 4 (ARB Mar. 25, 2003). The standard for granting summary decision is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. *Hasan v. Burns & Roe Enter., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-006, slip op. at 6 (ARB Jan. 30, 2001). Thus, pursuant to 29 C.F.R. § 18.40(d) (2007), the ALJ may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."

DISCUSSION

A. Governing Law

The employee protection provision of the SOX, Section 806, prohibits covered employers from retaliating against covered employees for providing information or assisting in investigations related to listed categories of fraud or securities violations

> (a) Whistleblower Protection For Employees Of Publicly Traded Companies. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78*o*(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
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> (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, 1343, 1344, or 1348, 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
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> (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
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> (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, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C.A. § 1514A(a).

Section 806 thus protects employees who provide information to a covered employer or a federal agency or Congress regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission

(*see, e.g.*, 17 C.F.R. Part 210 (2007), Form and Content of the Requirements for Financial Statements), or any provision of federal law relating to fraud against shareholders. In addition, employees are protected against discrimination when they have filed, testified in, participated in, or otherwise assisted in a proceeding filed or about to be filed against one of the above companies relating to any such alleged violation. 68 Fed. Reg. 31,864 (May 28, 2003); 18 U.S.C.A. § 1514A(a).

Actions brought pursuant to the SOX are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121 (West Supp. 2005) (AIR 21). 18 U.S.C.A. § 1514A(b)(2)(C). Accordingly, to prevail, a SOX complainant must prove by a preponderance of the evidence that (1) he engaged in a protected activity or conduct (i.e., provided information or participated in a proceeding); (2) the respondent knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *Harvey*, slip op. at 10; *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 8 (ARB July 29, 2005). The respondent can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 49 U.S.C.A. § 42121(a)-(b)(2)(B)(iv); *Harvey*, slip op. at 10; *Getman*, slip op. at 8; *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 7 (ARB Jan. 30, 2004).

An employee alleging retaliation in violation of the SOX should file his or her complaint with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may file with any OSHA officer or employee. 29 C.F.R. § 1980.103(c). "No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations." 29 C.F.R. § 1980.103(b). The complaint alleging retaliation must be filed within 90 days of the alleged violation; i.e., when the discriminatory act has been both made and communicated to the complainant. 18 U.S.C.A. § 1514A(b)(2)(D) ("An action . . . shall be commenced not later than 90 days after the date on which the violation occurs."); 29 C.F.R. § 1980.103(d) ("Time for filing. Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.").

B. *Levi I*

Before we turn to the question at hand, whether Levi filed a timely SOX complaint, we discuss two preliminary issues. The ALJ treated ABI's motion for dismissal as a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). R. D. & O. (*Levi I*) at 4-5; Fed. R. of Civ. P. 12(b)(1). But since the ALJ in effect accepted jurisdiction to determine whether Levi had filed a cognizable SOX complaint, we will consider dismissal under a Rule 12(b)(6) (failure to state a claim upon which relief can be granted) analysis, applying the standard set forth in 29 C.F.R. § 1980.103(b). To the extent that we consider correspondence and pleadings in addition to Levi's November 19, 2004 letter, we apply the summary decision

standard. 29 C.F.R. § 18.40(d). Under the summary decision standard, Levi's submissions, considered singly or collectively, fail to create a genuine issue of material fact concerning whether he filed a timely claim for relief under the whistleblower protection provisions of the SOX.

The ALJ's use of the word "complaint" requires some clarification that is not fully evident in the R. D. & O. To succeed in establishing a prima facie case and ultimately on the merits, Levi must have made a SOX-protected "complaint" prior to his discharge from employment. He must have been a whistleblower. Specifically, his letters to the ABI Board or outside government officials must have "provide[d] information" regarding ABI's conduct that Levi "reasonably believe[d]" constituted a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C.A. § 1514A(a)(2); 29 C.F.R. Part 1980.

But after the unfavorable personnel action that he claims was in retaliation for his protected activities, in this case his discharge, Levi must have filed a "complaint" in a different sense of the word. He must allege retaliation and the right to recover for his whistleblowing. Specifically, he must have filed a timely "complaint" with the DOL (or another agency under the tolling theory) that establishes his right to recover against ABI for the company's violation of the SOX, i.e., his protected activities (e.g., "complaints" of fraud or securities violations) were a contributing factor in the unfavorable personnel action (discharge) ABI took against him. Only then does he state a claim that entitles him to relief. Our inquiry is largely concerned with "complaint" in this latter sense of the word.

November 19, 2004 Letter to the Secretary

We begin with Levi's November 19, 2004 letter to the Secretary, asking if his earlier correspondence had been filed as a SOX whistleblower complaint. If not, he requested that it be so filed. November 19, 2004 letter at 1. OSHA treated this letter as a SOX complaint, which it dismissed as untimely filed.[9] Since we affirm the ALJ in ruling the letter untimely, we do not address whether it actually states a valid cause of action under the SOX.

Under SOX, a complaint must be filed with the Secretary of Labor within 90 days of the alleged violation. 18 U.S.C.A. § 1514A(b)(2)(D). ABI suspended Levi indefinitely with intent to discharge on February 14, 2003. R. D. & O. (*Levi I*) at 2. The ALJ correctly concluded that the claim accrued on February 14, 2003, when Levi had notice as opposed to when the discharge

[9] The regulations implementing the SOX specify that a complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the complainant employee resides or was employed or with any OSHA officer or employee. 29 C.F.R. § 1980.103(c). But a complainant's omission or failure to comply with the procedures outlined in the regulations and, instead, filing a complaint directly with the Secretary of Labor does not by itself indicate bad faith on the part of the complainant and satisfies the filing requirements under the SOX. *Harvey*, slip op. at 13; *Murray v. TXU Corp.*, 279 F. Supp. 2d 799, 804 (N.D. Tex. 2003).

became final. *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980). Even if the ALJ had used the August 6, 2003 date, when he said the discharge became final, or the September 22, 2003 date of the arbitrator's decision as the date on which Levi's cause of action accrued, Levi's November 19, 2004 complaint would still have been untimely, as not filed within 90 days. Therefore, the ALJ correctly dismissed Levi's complaint as untimely filed. R. D. & O. (*Levi I*) at 6.

If the November 19 letter were the only correspondence in question, Levi would be outside the 90-day period, rendering his claim time-barred as a matter of law. However, Levi argued before the ALJ that his other correspondence also constitutes SOX complaints. Levi's March 28, 2006 response to motion to dismiss at 13-15. Thus, in the course of affirming the ALJ's determination that Levi failed to file a timely SOX complaint, we also examine, as did the ALJ, Levi's other correspondence.

March 3, 2003 letter

On March 3, 2003, Levi wrote a letter to the Secretary of Labor discussing wage-hour concerns, racial discrimination and workplace safety issues. The ALJ concluded that the March 3, 2003 letter itself does not include a viable SOX whistleblower complaint. R. D. & O. (*Levi I*) at 9. The March 3 letter identified employer practices but did not assert a simple statement of facts that ABI retaliated against him for engaging in SOX-protected activity. Nor does it request any specific relief on his behalf. Therefore, we agree with the ALJ that the March 3 letter fails to state a cause of action for which relief can be granted. R. D. & O. (*Levi I*) at 9; 29 C.F.R. § 1980.103(b).

But the inquiry does not end here. Levi claims to have attached several letters to the March 3 letter.[10] The ALJ reviewed the letters and categorized them into general claims of poor ABI business decision-making, toleration of racial discrimination and concerns over workplace safety. R. D. & O. (*Levi I*) at 15-16. After reviewing the March 3 letter and its attachments, the ALJ concluded that Levi's factual allegations in those various letters did not fall within SOX's six listed categories of fraud and securities violations. R. D. & O. (*Levi I*) at 17.

We agree with the ALJ's characterization of the content of Levi's attachments. Levi's attachments do not allege facts that could plausibly support a SOX claim. None of Levi's specific allegations, taken as true and in the light most favorable to him, relates to mail fraud, wire fraud, bank fraud or securities fraud. Likewise, his allegations do not point to violations of SEC rules and regulations, which regulate the issuance of, and transactions involving, the securities of publicly traded corporations. For example, although a company that tolerates discriminatory practices or unsafe conditions may not be acting in the best interests of its shareholders, a SOX-protected activity must involve an alleged violation of a federal law directly related to fraud or securities violations. As we said in *Harvey*, "while Title VII protects individuals against discrimination, SOX protects shareholders from inaccurate reporting of a publicly held corporation's financial condition . . . . Providing information to management about questionable personnel actions, racially discriminatory practices, executive decisions or

[10] It is not precisely clear which letters Levi attached to the March 3, 2003 letter. R. D. & O. (*Levi I*) at 7.

corporate expenditures with which the employee disagrees, or even possible violations of other federal laws . . . standing alone, is not protected conduct under the SOX." *Harvey*, slip op. at 14. To bring himself under the protection of the act, the information the employee provides must directly relate to the listed categories of fraud or securities violations. 18 U.S.C.A. § 1514A(a); 29 C.F.R. §§ 1980.104(b), 1980.109(a). Thus, Levi does not allege facts which, taken in the light most favorable to him, point to SOX-protected activity.

But even if this correspondence were read to provide notice to ABI of fraud or securities violations, and thus protect Levi from retaliation, it was all written before notice of Levi's discharge, and therefore could not as a matter of law state a viable claim for relief for retaliation that had not yet occurred. We agree with the ALJ that, reading the March 3, 2003 letter together with its attached pre-termination letters, Levi fails to state a cause of action under which relief can be granted under the SOX. 29 C.F.R. § 1980.103(b).

April-June OSHA Correspondence

In late March 2003, Levi filed a complaint with OSHA identifying what he claimed were unsafe conditions at an ABI plant. In the correspondence, Levi complained of retaliation and safety problems with ABI boilers, which could, according to Levi, result in dangerous conditions. April 15, 2003 response from ABI to OSHA at 1. OSHA followed up on Levi's complaint, and based on ABI's responses, determined that ABI had corrected any potential safety hazards. None of his correspondence with OSHA contained any possible SOX-related allegations. Thus, for the reasons discussed above, the ALJ was correct to conclude that the April-June OSHA correspondence was not a valid SOX complaint for which relief can be granted. R. D. & O. (*Levi I*) at 18.

Equitable Tolling

Although Levi did not timely file a SOX complaint with OSHA or the Secretary of Labor, the SOX's limitations period is not jurisdictional and therefore is subject to equitable tolling. *Harvey*, slip op. at 16; *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003-SOX-026, slip op. at 5 (ARB Dec. 30, 2005). Thus, we next consider whether existing circumstances would warrant equitable tolling of the deadline for filing a SOX complaint.

When deciding whether to relax the limitations period in a particular case, the Board is guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines. *Harvey*, slip op. at 16; *Moldauer*, slip op. at 5. The Third Circuit recognized three situations in which tolling is proper:

> (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
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> (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
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> (3) the plaintiff has raised the precise statutory claim in

issue but has mistakenly done so in the wrong forum.

Sch. Dist. of the City of Allentown v. Marshall, 657 F.2d 16, 18-20 (3d Cir. 1981) (citation omitted).

Levi bears the burden of justifying the application of equitable tolling principles. *Harvey*, slip op. at 17. Though Levi's inability to satisfy one of these elements is not necessarily fatal to his claim, courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Herchak v. Am. W. Airlines, Inc*., ARB No. 03-057, ALJ No. 2002-AIR-012, slip op. at 5 (ARB May 14, 2003); *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (pro se party who was informed of due date, but nevertheless filed six days late was not entitled to equitable tolling because she failed to exercise due diligence). Furthermore, an absence of prejudice to the other party "is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Baldwin County Welcome Ctr*., 446 U.S. at 152.

The ALJ concluded that Levi did not satisfy the grounds for equitable tolling. R. D. & O. (*Levi I*) at 22-23. Levi argues, among other things, that the timing limitations of SOX should be tolled because he had contacted Congressman Richard Gephardt, who, Levi contends, had a duty to direct him to SOX, and that ABI prevented Levi from presenting a timely complaint. Petition (*Levi I*) at 6, 8. We do not agree. Levi has failed to support any claim of interference and the failure of a Congressman to direct Levi to SOX does not constitute a ground for tolling. In considering Levi's claim for equitable tolling, we note with emphasis that following Levi's termination, and within the SOX time limits, Levi fully participated in a detailed correspondence with OSHA, complaining about ABI boilers. April-June 2003 OSHA correspondence. Levi has failed to reconcile how he can simultaneously argue that he was estopped from making a similar complaint to OSHA concerning SOX-related protected activity. Therefore, we agree with the ALJ that Levi was not prevented from filing a SOX complaint with OSHA. *Harvey*, slip op. at 16; *Marshall*, 657 F.2d at 18, 21.

A final tolling question the ALJ addressed was whether Levi "has raised the precise statutory claim in issue, but has mistakenly done so in the wrong forum." *Marshall*, 657 F.2d at 20. As we have said, in September of 2002, Levi asked the SEC to investigate ABI because ABI's bad "behavior" and "arrogance" hurts shareholders in unidentified ways. Sept. 24, 2002 letter to the SEC at 1. Levi noted in the letter that "[t]his is not accounting fraud, it is much worse." *Id.* Levi did not specify the behavior and arrogance which was "much worse," but if the previous letters, allegedly attached to the September 24, 2002 letter, were representative, then the worse behavior and arrogance by ABI relates to workplace safety, alleged racial discrimination and poor ABI decision-making, the subject matter of Levi's earlier letters. As noted above, none of. Levi's specific allegations, taken as true and in the light most favorable to him, relates to mail fraud, wire fraud, bank fraud or securities fraud. Likewise, his allegations do not point to violations of SEC rules and regulations, which regulate the issuance of, and transactions involving, the securities of publicly traded corporations. Levi's Sept. 24, 2002 letter to the SEC, like much of his other correspondence, was written before the notice of his termination. Even if that correspondence were read to provide notice to the SEC of fraud or securities violations, it

could not be read to state a claim for relief for an act of retaliation (notice of discharge) that had not yet taken place. We conclude, as did the ALJ, that Levi has not made the showing that Levi's letter was a precise statutory claim filed in the wrong forum.[11]

Before and after Levi's February 14, 2003 suspension with intent to terminate, Levi wrote to Congressman Gephardt about his problems at ABI. Levi claims that this qualifies as a valid means of filing a SOX complaint. Petition (*Levi I*) at 6. We do not agree, but even if we were to consider Levi's letter as filing a precise statutory claim in the wrong forum, it suffers from the same defect as his letter to the SEC. 29 C.F.R. § 1980.103(c) (specifying place to file complaint). On January 31, 2003, Levi informed Gephardt about retaliation, safety concerns and poor ABI decision-making. R. D. & O. (*Levi I*) at 21. On February 21, 2003, Levi wrote to Gephardt informing him of his suspension. Levi again wrote to Gephardt on April 8, 2003, asking him to take a stand against "dishonest corporate behavior." R. D. & O. (*Levi I*) at 21. The ALJ reviewed the letters and concluded as we do that Levi's reporting alleged "dishonest corporate behavior" did not constitute a valid SOX complaint for which relief can be granted. R. D. & O. (*Levi I*) at 22.

In sum, although Levi made general, conclusory accusations of bad corporate governance, safety problems and racial discrimination against ABI prior to his discharge, these do not constitute SOX-protected activity. But even if this correspondence were read to provide information to ABI or government agencies regarding listed categories of fraud or securities violations, that would be beside the point. After his discharge, Levi must have filed a timely complaint with the DOL (or another agency under the tolling theory) that establishes his right to recover against ABI for the company's violation of the SOX, i.e., his protected whistleblowing was a contributing factor in the adverse action ABI took against him. Levi failed to do so. Consequently, we conclude that the ALJ did not err in dismissing the complaint in *Levi I* as untimely.

C. *Levi II*

We next address Levi's second SOX complaint filed with OSHA on May 23, 2006, shortly after appealing the ALJ's ruling in *Levi I*. In this complaint, Levi alleged that statements ABI made in its March 14, 2006 motion to dismiss (*Levi I*) and during the September 8, 2006 telephone conference (*Levi II*) were false and ongoing retaliation designed to "derail" Levi's SOX complaint and blacklist him from rehire and future employment. R. D. & O. (*Levi II*) at 1-2. After giving Levi 30 days to submit evidence or amend his pleadings, the ALJ granted summary decision against Levi.

We agree that statements of ABI's counsel are not evidence. R. D. & O. (*Levi II*) at 2, *citing Barcamerica Int'l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 593 n.4 (9th Cir. 2002) (statements of counsel "are not evidence and do not create issues of material fact"); *Peoples v. Brigadier Homes, Inc.*, 1987 STA-030, slip op. at 3 (Sec'y June 16, 1988); *Powell v.*

[11] At the time he sent the letter to the SEC, Levi also sent the same letter addressed to the NLRB and EEOC. These letters fail to state a claim for relief under the SOX for the same reasons as the letter to the SEC.

COBE Labs., Inc., 208 F.3d 227, 2000 WL 235241, at *13 (10th Cir. Mar. 2, 2000)(unpublished). The ALJ pointed out that false statements would go to the party's credibility and not to whether the party established an element of its case. Accordingly, the statements of ABI's counsel do not constitute a separately actionable adverse action.

The ALJ correctly granted summary decision to ABI on Levi's blacklisting claim because, after an opportunity to do so, Levi failed to present any evidence that ABI had blacklisted him from rehire or future employment. R. D. & O. (*Levi II*) at 3-4. Having reviewed the record, we agree with the ALJ's determination that Levi failed to produce sufficient evidence to present a genuine issue of a material fact concerning his blacklisting claim. Consequently, we conclude that the ALJ was correct and we affirm the ALJ's grant of summary decision in favor of ABI on that issue.

The balance of Levi's claims in *Levi II* are derivative of *Levi I*. They either duplicate claims made in *Levi I* or raise claims that depend for their success on *Levi I*. Thus, since it appears from the record that Levi never engaged in SOX-protected activity, claims of subsequent retaliation, whether repeated from *Levi I* or newly stated in *Levi II*, are not actionable. We concur with the ALJ in dismissing *Levi II*.[12]

D. *Levi III*

In December of 2006, Levi requested from the Board a copy of the transcript from the September 8, 2006 telephone conference that was at issue in *Levi II*. Upon receipt of the transcript, Levi claimed to have discovered three additional false statements and proceeded to file a third SOX whistleblower claim against ABI. In Levi's third complaint, he alleges that sometime between 2003 and 2005 he was blacklisted in his employment with Aerotek Company and that a state unemployment filing incorrectly states that he was fired for misconduct. R. D. & O. (*Levi III*) at 3.

False statements

The ALJ in *Levi III* dismissed Levi's claim concerning false statements as duplicative. R. D. & O. (*Levi III*) at 6. The ALJ also noted, as did the ALJ in *Levi II*, that statements by an attorney are not evidence and do not constitute an actionable adverse action in this case. *Id.* For the reasons discussed above in *Levi II*, we agree with the ALJ.

[12] The ALJ held that Levi "is now barred by the doctrine of issue preclusion and the law of the case from re-litigating whether he was a whistleblower in the previous case." R. D. & O. (*Levi II*) at 4-5. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984); *Munio v. Florida Power & Light, Co.*, ARB No. 06-092, 143, ALJ No. 2006-ERA-002, 008, slip op. at 9-10 (ARB Apr. 2, 2008). We agree with the ALJ's holding in *Levi I*, now affirmed by the Board, that Levi did not state a viable SOX cause of action in *Levi I*. However, to the extent that *Levi II* may raise issues not actually decided in *Levi I* (e.g., a blacklisting claim), preclusion doctrines do not apply.

Untimely blacklisting claims

Besides false statements, Levi's petition for review in *Levi III* charges that ABI blacklisted his employment with Aerotek. Levi concedes, however, that he has no basis to support such a claim. Levi writes in his petition for review in *Levi III*: "I [have] no idea if Aerotek contacted AB[I] about my work record in 2005, 2006, or 2007. . . . There was no basis for me to claim that AB[I] had anything to do with Aerotek ending my employment in 2005." Petition (*Levi III*) at 4.

Even if not purely speculative, Levi's blacklisting claim is untimely. By his own admission, he did not "sit still" on the issue of seeking unemployment compensation based on his employment with Aerotek. He notes in his petition in *Levi III* that he pursued the matter of his separation from Aerotek through three levels of state appeals. Petition (*Levi III*) at 4. Levi was thus aware of the injury and the facts that would support a blacklisting claim during his pursuit of the Aerotek matter. Only after failing in state appeals against Aerotek did he attempt, well beyond the 90-day limitations period for filing a complaint, to bring a blacklisting claim against ABI.

Similarly, the ALJ found that Levi's claim of blacklisting with respect to his 2003 personnel file stating he was fired for "misconduct," taken as true, would have occurred sometime between 2003 and 2005 to affect his employment with Aerotek. Thus, a possible blacklisting by ABI with Aerotek would have taken place prior to October 2005. Levi filed *Levi III* on December 1, 2006, well beyond the 90-day requirement. Therefore, the ALJ correctly concluded that Levi's claim of blacklisting in *Levi III* was untimely.

Finally, in adjudicating the untimely blacklisting claim, the ALJ also considered equitable estoppel but found that Levi did not satisfy the requirements for equitable estoppel. R. D. & O. (*Levi III*) at 8. Because Levi failed to file a timely complaint concerning his blacklisting claim, we affirm the ALJ's finding that Levi's claim of blacklisting is time-barred.

Recusal

Levi also argues that the ALJ erred in failing to recuse himself. The ALJ for *Levi III* was the same ALJ assigned in *Levi I*. Absent specific allegations of personal bias, prejudice, or interest, neither a judge's prior adverse rulings, nor his participation in a related or prior proceeding is sufficient to require recusal. *Davis v. Fendler*, 650 F.2d 1154, 1163 (9th Cir. 1981); 13A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3542 (West Supp. 2008). Federal courts have required personal bias rather than judicial bias to support recusal. *Id.* The ARB has held that previous unfavorable dispositions do not amount to personal bias. *Eash v. Roadway Express, Inc.*, ARB No. 00-061, ALJ No. 1998-STA-028, slip op. at 8 (ARB Dec. 31, 2002) (ALJ twice recommended dispositions contrary to Eash's interests, which fact was found insufficient to show personal bias); *Roach v. National Transp. Safety Bd.*, 804 F.2d 1147, 1160 (10th Cir. 1986). Consequently, the ALJ did not err in failing to recuse himself.

E. Other motions

During the course of proceedings before the Board, Levi filed an emergency motion (1) to refer investigation to the Justice Department, the Federal Bureau of Investigation and the SEC, (2) for a protective order forbidding the destruction of documents, (3) for reopening the record and (4) for economic reinstatement. We deny these motions. Further, Levi raises miscellaneous points of error including venue requests, the ALJ's citation to cases, and requests to compel discovery. Consideration of Levi's motions and other issues he raises is not necessary to our disposition of his case, dismissal for failing to file a timely SOX complaint.

CONCLUSION

The record supports the ALJ's recommendation to dismiss Levi's original complaint (*Levi I*) as untimely. Within 90 days of his termination, Levi failed to allege facts, either to the DOL or to another forum, that he had engaged in SOX-protected activity before his termination and that he had been terminated as a consequence. We therefore **AFFIRM** the ALJ's R. D. & O. in *Levi I* and **DISMISS** Levi's original complaint.

Because Levi failed to create a genuine issue of a material fact to support his blacklisting and retaliation claims, the ALJ did not err in dismissing Levi's second claim. Therefore, we **AFFIRM** the ALJ's R. D. & O. in *Levi II* and hereby **DISMISS** Levi's second complaint.

Because Levi's third complaint is beyond the statute of limitations and repeats claims made in *Levi II*, we **AFFIRM** the ALJ's R. D. & O. in *Levi III* and hereby **DISMISS** Levi's third complaint as duplicative and time-barred.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge