



Issue Date: 03 May 2006

CASE NO.: 2006 SOX 37

In the Matter of

HUNTER R. LEVI
Complainant

v.

ANHEUSER-BUSCH COMPANIES, INC.
Respondent

Appearances: Mr. Hunter R. Levi
Pro Se

Ms. Sabrina M. Wrenn, Attorney
Mr. Joseph Torres, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**INITIAL DECISION AND ORDER -
DISMISSAL OF UNTIMELY SOX WHISTLEBLOWER COMPLAINT**

On March 14, 2006, I received from the Respondent's counsel a Motion to Dismiss Mr. Levi's November 19, 2004 Sarbanes-Oxley ("SOX") whistleblower complaint as untimely. In his March 28, 2006 response, Mr. Levi objected to dismissal of his SOX complaint on several grounds, including his earlier submissions in 2002 and 2003 to the Secretary, U.S. Department of Labor, ("Secretary") and other entities. Based on his submission, and pursuant to my request, the Respondent's counsel provided a supplemental brief in support of the Motion to Dismiss on April 10, 2006.

Background

On November 19, 2004, Mr. Levi sent a letter to the Secretary, asking her, "if my complaints directed to your department were ever filed for whistleblower protection under Sarbanes-Oxley." Mr. Levi indicated that he had directed his correspondence to the Secretary, the Occupational Safety and Health Administration ("OSHA"), Securities and Exchange Commission ("SEC") and the National Labor Relations Board ("NLRB") beginning in September 2002 and through the spring of 2003. In the letters, Mr. Levi claimed his former employer, Anheuser-Busch Companies, Inc. ("Anheuser-Busch"), had retaliated against him for

expressing concerns about racial discrimination, sexual harassment, employee safety, financial mismanagement, and compensation manipulation through option awards and treasury stock purchases. Anheuser-Busch suspended Mr. Levi with intent to discharge on February 14, 2003 and fired him on August 6, 2003 following union arbitration. Despite his prior correspondence to the Secretary and others, no one had advised him to file a SOX whistleblower complaint. Mr. Levi was “stunned” to discover in newspaper articles in November 2004 that SOX whistleblower protection was available through OSHA. Mr. Levi was “upset” with the department’s failure to appropriately respond to his earlier correspondence.

On December 16, 2005, upon investigation of Mr. Levi’s November 19, 2004 SOX complaint, the Regional Administrator, OSHA, dismissed the complaint as untimely because Mr. Levi had not filed the complaint within the requisite 90 day period from the adverse personnel actions of suspension and termination.

On December 27, 2005, Mr. Levi submitted a timely objection to the dismissal of his SOX complaint and requested a hearing before the Office of Administrative Law Judges (“OALJ”). Based on a February 22, 2006 continuance order, I have scheduled the hearing for May 23, 2006 in Kansas City, Missouri.

Parties’ Positions

Respondent

Mr. Levi’s November 2004 SOX complaint should be dismissed as untimely. On its face, the complaint was clearly filed after more than 90 days after any of the following adverse actions which occurred in 2003 : indefinite suspension with intent to discharge - February 14, 2003; discharge subject to arbitration - March 5, 2003; and, final discharge - August 6, 2003.

Mr. Levi has also failed to establish that equitable tolling of the complaint filing time limit is warranted. His ignorance of the SOX whistleblower protection provisions until November 2004 is an insufficient basis for equitable tolling. Similarly, Mr. Levi’s earlier correspondence to the Secretary does not provide a grounds for equitable tolling. His March 3, 2003 letter to the Secretary did not contain a readily apparent SOX complaint, which is understandable since Mr. Levi indicates that he was unaware of SOX until November 2004. Instead, Mr. Levi asserted that Anheuser-Busch had violated labor laws concerning pay associated with holiday pay and employee suspensions. Additionally, no evidence exists that the Secretary either misled or misinformed Mr. Levi about his SOX rights.

Likewise, Mr. Levi’s correspondence with OSHA between April 18 and June 5, 2003 did not involve SOX protected activities. His specific concerns covered safety compliance, an employee assault, and failure to treat and report an industrial injury.

Mr. Levi’s September 24, 2002 letter to the SEC chairman is not a viable SOX complaint because it predates the adverse actions of suspension and discharge which occurred in 2003. Further, the complaint does not allege any actions which violate the six specific categories of

impermissible conduct under SOX, relating to shareholder fraud. Instead, Mr. Levi alleges mistreatment of employees and corporate mismanagement.

Complainant

Mr. Levi strongly objects to the Motion to Dismiss on several grounds. First, following the enactment of SOX on July 30, 2002, employees were provided almost no information about the whistleblower provisions. When Mr. Levi corresponded with the Secretary, OSHA, and SEC, no one provided him either the SOX regulations or an informational guide on the new statute. This failure to advise him of his SOX rights was “serious dereliction of duty.”

Second, the SOX complaint filing requirement of 90 days is unfair. Although an aggrieved employee only has 90 days to file a complaint, government oversight of corporate behavior under SOX extends for several years. Additionally, other federal agencies set their complaint filing limits from 180 to 300 days. Also, since Anheuser-Busch retaliated against him everyday, it was unfair to expect him to file 365 complaints a year.

Third, considering the purpose of SOX is to protect shareholders from corporate securities fraud, Mr. Levi should be permitted to proceed with his SOX complaint. To successfully identify corporate fraud, employees must be encouraged to speak up. Thus, in assessing whether a complaint is timely, an administrative law judge should embrace “a couple of things beyond my case” related to the “nature of law.”

Fourth, in a July 1, 2003 letter to Representative Gephardt, with copies to SEC and DOL, Mr. Levi reported a discrepancy in which the top five executives received a significantly disproportionate amount of all stock options over the course of several years. Mr. Levi believes the transactions amount to executive greed. As a result, his letter and the copies were proper SOX complaints and Anheuser-Busch retaliated against him for raising this concern.

Fifth, Mr. Levi’s September 2002 letter to the SEC chairman is a timely SOX complaint. Since the SEC is charged with protection of shareholders from corporate securities fraud, he was understandably under the impression that the agency was the proper forum for his complaints about corporate mismanagement and arrogance. The contents of his letter related to SOX because he specifically noted a \$10 drop in share price and excessive executive perks which harm shareholders. Mr. Levi did not specifically allege fraud because that determination was for the SEC. His SEC complaint does not pre-date his second suspension and company retaliation that had occurred since June 2001. With his letter to the SEC, in which he asked for help keeping his job, Mr. Levi attached various internal letters concerning the problems at Anheuser-Busch. Consequently, if the September 24, 2002 SEC letter is considered to be a timely filed complaint, “there will be no dispute that my termination was a violation of SOX.”

Sixth, following his suspension with intent to discharge, Mr. Levi promptly sent letters to the Secretary and OSHA in March and April 2003, and attached similar correspondence, raising concerns about excessive executive perks and a \$9 billion loss of shareholder value in one week due to a \$10 drop in stock price. According to Mr. Levi, his “case and timely complaint were derailed by inaction of the government agencies responsible for protecting my rights.”

Seventh, several perceived irregularities occurred during OSHA's investigation of his November 2004 letter to the Secretary. Despite a reported referral in December 2004, the OSHA office in Kansas City had no record of it when Mr. Levi called in October 2005. Then, prior to receiving any evidence, OSHA attempted to have Mr. Levi withdraw his complaint in November 2005 because he did not have a prima facie case. Mr. Levi believes that if dismissal for timeliness was warranted, OSHA should have raised it in November 2005. Instead, Mr. Levi sent OSHA "the relevant information they needed."

Eighth, other special circumstances also warrant permitting Mr. Levi to continue with his SOX complaint against Anheuser- Busch. After expressing great frustration and disappointment with the inaction in response to his letters by several senators, congressional representatives, the SEC Chairman, Teamster president, and the Secretary, Mr. Levi asserts his case is being purposefully suppressed. His "case threatened to expose" a scandal involving the Teamsters, the SEC, Wall Street, the White House, and the Secretary. Specifically, the individual being pushed by the White House for the chairmanship of the SEC had been responsible for oversight of the Teamsters pension fund when the fund suffered "the loss of billions." Additionally, the Secretary was responsible for oversight of the fund. Mr. Levi's case "threatened to shine a light on this scandal."

FINDINGS AND CONCLUSIONS OF LAW

Motion to Dismiss

At this stage of the proceedings, the Respondent's timeliness objection to Mr. Levi's November 2004 SOX complaint and other correspondence represents a motion to dismiss for lack of subject matter jurisdiction. To invoke the investigative and adjudicative processes in the SOX employee protection provisions, a complainant must file his allegation of a violation of the SOX whistleblower protections within 90 days of the adverse personnel action. Absent any equitable relief, failure to meet the statutory filing deadline precludes consideration of the SOX complaint. See *Roberts v. Rivas Environmental Consultants, Inc.*, 96 CER 1 (ARB Sept. 17, 1997), slip op. at 3-4 (the parties treated the complainant's presentation as a CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act) whistleblower complaint because the Complainant worked at a CERCLA Superfund site. However, the nature of the complaints were not environmental. As a result, the Administrative Review Board ("ARB") concluded that "[u]nder CERCLA, there can be no adjudication on the merits if an alleged discriminatee has failed to submit a complaint alleging CERCLA employee protection violations to the Department of Labor for investigation within the prescribed time period. 42 U.S.C. §9610(b) (1994) and 29 C.F.R. §24.3(c) (1995)." Because the complainant had not satisfied this jurisdictional requirement the ARB declined to review the complaint).

Although 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings, does not contain a section pertaining to such a motion to dismiss, 29 C.F.R. § 18.1 (a) indicates that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. In turn, FED. R. CIV. P. 12 (b) (1), addresses a motion to dismiss for lack of subject

matter jurisdiction. The courts recognize two approaches in considering a 12 (b) (1) motion.¹ Mr. Levi's case involves consideration of both approaches.

The first consideration of a 12 (b) (1) motion is whether the pleading, or complaint, on its face is sufficient. In reviewing a "facial" motion to dismiss, I consider the allegations in the complaint as true. The second consideration under 12 (b) (1) concerns a factual consideration of the complaint. In this "factual" analysis, no presumption of truthfulness applies to the allegations in the complaint. Instead, I may rely on affidavits and other documents submitted in support of the motion.

With these principles in mind, I will first determine whether dismissal of Mr. Levi's formal November 19, 2004 SOX complaint due to timeliness is appropriate. This assessment involves a facial determination. Then, I will consider the other correspondence Mr. Levi submitted prior to November 2004 for timeliness in terms of factual sufficiency. Finally, I will address whether equitable tolling of the time filing requirements is warranted in Mr. Levi's case.

I. November 19, 2004 SOX Complaint

On November 19, 2004, Mr. Levi sent a letter to the Secretary, inquiring whether a whistleblower complaint had been filed on his behalf based on his letters in September 2002 to the SEC and NRLB and in March 2003 to OSHA and the Secretary. Mr. Levi claimed that in the earlier correspondence he had alleged retaliation by Anheuser-Busch for his report of violations of federal law by the company. He had reported violations relating to racial discrimination, sexual discrimination, employee safety, financial mismanagement, and manipulation of compensation through option awards and treasury stock purchases. According to Mr. Levi, due to his reports of major financial wrongdoing, he was suspended with an intent to discharge on February 14, 2003;² terminated subject to arbitration on March 5, 2003; and, officially terminated on August 6, 2003.

Subsection 1514A (a) of the Act and 29 C.F.R. § 1980.102 of the implementing interim regulations prohibit a company with either a class of securities registered under section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 781, 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)) from discharging, demoting, suspending, threatening, harassing or in any manner discriminating against an employee in the terms and conditions of employment because an employee engaged designated protected activities. The SOX protected activities include in any lawful act to provide information, cause information to be provided, or otherwise assist in an investigation, regarding any conduct the employee reasonably believes constitutes a violation of 18 U.S.C. §§ 1341 (mail fraud and swindle), 1343 (fraud by wire, radio, or television), 1344 (bank fraud), or 1348 (security fraud), or any rule or regulation of the Securities and Exchange Commission or any provision of federal law relating to fraud against shareholders, when the information is provided to a federal regulatory or law enforcement agency, any member of congress, or a person with

¹See *Ohio National Life Insurance Co. v. United States*, 922 F.2d 320 (6th Cir. 1990).

²On February 14, 2003, an intermediate supervisor verbally placed Mr. Levi on indefinite suspension with intent to discharge. The formal written determination by the department head is dated February 20, 2003.

supervisory authority over the employee. According to the SOX statute of limitations in 18 U.S.C. § 1514A (b) (2) (D), as implemented by 29 C.F.R. § 1980.103 (d), a whistleblower complaint “shall commence not later than 90 days after the date on which the violation occurs.”³

In terms of the trigger date for starting the 90 day clock, the statute of limitations begins to run from the date the employee received final, definitive, and unequivocal notice of an adverse employment decision, rather than the date the consequence of the decision become effective. *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004 SOX 54 (ARB Aug. 31, 2005), slip op. at 3. In Mr. Levi’s case, Anheuser-Busch’s notice of suspension with intent to discharge represents the definitive notice of an actionable adverse personnel action. Because Mr. Levi received the notice on February 14, 2003, he had 90 days from that date to file a timely SOX complaint. Consequently, on its face, the November 19, 2004 correspondence to the Secretary does not represent a timely SOX complaint and should be dismissed.⁴

II. Other Correspondence

Since his November 19, 2004 SOX complaint is untimely on its face, the SOX proceedings before OALJ may continue only if Mr. Levi establishes subject matter jurisdiction through some other means. Based on the documents presented to me, three other possibilities exist which may permit Mr. Levi to demonstrate compliance with the requirement to file a SOX complaint within 90 days of his February 14, 2003 suspension with intent to discharge. Specifically, Mr. Levi may be able to demonstrate compliance with the statute of limitations by a) timely submission of correspondence to the Secretary containing a SOX complaint; b) constructive service of a timely complaint on the Secretary; or, c) the filing of a timely SOX complaint albeit in an incorrect forum.

A. Correspondence to the Secretary of Labor

March 3, 2003 Letter

On March 3, 2003, Mr. Levi wrote the Secretary, requesting her help in determining whether Anheuser-Busch was violating labor laws in its treatment of employees. Specifically, Mr. Levi alleged a worker had been discriminated against through an unwarranted application of a contract provision concerning qualification for overtime pay because the company deemed his suspension as an unexcused absence. According to Mr. Levi, Anheuser-Busch was applying this overtime qualification provision to penalize a worker who missed work through no fault of his

³I note that the 90 day limit for filing a SOX complaint was established by Congress and not the U.S. Department of Labor.

⁴In his opposition, Mr. Levi raised the issue of continuing violations when he queried whether an employee had to file a complaint for every day of discrimination and retaliation. I simply note that a continuing violation doctrine exists in which a timely complaint with respect to an incident of discrimination taken in furtherance of a policy of discrimination renders other claims against earlier acts of discrimination pursuant to that policy also timely. See *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 1999 WPC 3 (ARB Aug. 28, 2001), slip op. at 7.

own. This individual was an African-American who had been previously mistreated by “various members of supervision.” And, Mr. Levi had reported that previous mistreatment.

Mr. Levi also alleged that the company immediately suspended an employee who had just been injured by another employee and refused provide a medical doctor. At that time, the plant was just days away from a significant injury-free safety record. Mr. Levi asserted the company suspended the injured worker so it would not be a recordable injury. Mr. Levi questioned the company’s use of suspensions to a) cost one worker 6 and a half days of pay for an imposed three day suspension; and, b) avoid reporting a workplace injury.⁵

As part of his letter, to demonstrate his long campaign to stop the company’s mistreatment of its employees, Mr. Levi indicated that he had “written 12 letters to upper management and now 6 to various outside agencies. I have enclosed some previous correspondence to give you a sense of what I have encountered.” Notably, at the close of his letter, while indicating the correspondents who would receive copies of his letter, Mr. Levi did not specifically identify the enclosed correspondence. However, on March 16, 2006 Mr. Levi forwarded copies of the specific attachments and stated that when he wrote the Secretary in March 2003 he “enclosed the previous letters he had written to AB (Anheuser-Busch) and “outside” letters from September 24, 2002 to February 21, 2003.⁶

In evaluating whether his correspondence with the Secretary represented a complaint under SOX, I first note that the implementing regulation, 20 C.F.R. § 1980.103 (b), states that no particular form is required for a SOX complaint. However, the written complaint must contain a “full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.” *See also Aurich v. Consolidated Edison Co. of New York, Inc.*, 86-CAA-2 (Sec’y Apr. 23, 1987) (the substance of the complaint determines whether activity is protected under the particular statute at issue) and *Wilkinson v. Texas Utilities*, 92-ERA-16 (Sec’y July 13, 1993) (when the complainant did not raise any safety issues concerning the respondent's operation of a nuclear power plant, but rather insisted that the employer had discriminated against her on the basis of her sex, the complainant failed to state a violation of the ERA's employee protection provision). Thus, to determine whether an alleged violation relates to SOX and constitutes a viable SOX complaint, a review of the SOX statute, the elements of viable SOX complaint and the corporate behavior regulated by SOX is necessary.

By reference,⁷ SOX incorporates the procedural provisions and rules of the employee protection provisions of the Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. § 42121 (b). According to 49 U.S.C. § 42121 (b) (2) (B) (iii) and 29 C.F.R.. §

⁵On March 27, 2003, a representative of the Employment Standards Administration (“ESA”), DOL, acknowledged receipt of Mr. Levi’s letter to the Secretary and indicated their review of the allegations did not provide evidence of a violation of the Fair Labor Standards Act (“FLSA”). According to the representative, although the FLSA established a minimum wage and hours of work standards, it did not regulate suspension or holiday pay practices. The representative indicated the ESA could not be of further assistance to Mr. Levi.

⁶The attachments identified as letters to the EEOC and Representative Gephardt will be discussed later.

⁷18 U.S.C. § 1541A (b) (2) (A).

1980.109 (a), a violation of SOX employee protection provisions will be established if the complainant establishes through the preponderance of the evidence that his protected activity was a contributing factor in the alleged unfavorable personnel action. That is, the complainant must prove that:

1. He engaged in a protected activity or conduct under the Act;
2. The respondent knew the complainant engaged in the protected activity;
3. He suffered an unfavorable personnel action; and,
4. The protected activity was a contributing factor in the respondent's decision to take the unfavorable personnel action.⁸

In terms of protected activity, as previously discussed, Subsection 1514A (a) of the Act and 29 C.F.R. § 1980.102 of the implementing interim regulations prohibit a publicly-traded company from taking an adverse personnel action against an employee who provides information to supervisors regarding corporate conduct which the employee reasonably believes, both subjectively and objectively, involves at least one of six specific categories of criminal fraud or regulatory violations. Under the statute, 18 U.S.C. § 1514A (a) (1), the corporate conduct addressed in the employee's complaint to supervision must relate to at least one of the following specific categories:

1. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1341, Frauds⁹ and swindles. This provision establishes that use of the Post Service or private or commercial interstate carrier as a means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime punishable by up to five years (or thirty years if the victim is a financial institution) imprisonment.

2. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1343, Fraud by wire, radio, or television. This provision establishes that use of wire, radio, or television communication as means to intentionally defraud or obtain property by false or fraudulent pretenses is a felony crime punishable by up to five years (or thirty years if the victim is a financial institution) imprisonment.

3. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1344, Bank fraud. This provision establishes that executing a scheme or artifice to defraud a financial institution is a felony crime punishable by not more than thirty years imprisonment.

⁸Although not pertinent in consideration of the Motion to Dismiss, I note that in the actual adjudication of a SOX complaint, even if the complainant proves that his protected activity was a contributing factor in the unfavorable personnel action, 49 U.S.C. § 42121 (b) (2) (B) (iv) and 29 C.F.R. § 1980.109 (a) state no relief is available to the complainant if the respondent proves by clear and convincing evidence that it would have taken the same unfavorable personnel action even in the absence of any protected activity.

⁹Fraud is defined as "false representation of a matter of fact. . .which is intended to deceive another so that he will act upon it to his legal injury." BLACK'S LAW DICTIONARY 788 (4th ed. 1968).

4. Title 18, Crimes and Criminal Procedure, Chapter 63, Section 1348, Securities fraud.¹⁰ This provision establishes that executing a scheme or artifice a) to defraud any person in connection with any security of an issuer of a class of securities registered under Section 12 of the Securities Exchange Act or that is required to file reports under Section 15 (d) of the Securities Exchange Act; or b) to obtain by means of false or fraudulent pretenses any money or property in connection with the purchase of such security identified in a) above is a felony crime punishable by not more than twenty-five years imprisonment.

5. Any rule or regulation of the Securities Exchange Commission.

6. Any provision of federal law relating to fraud against shareholders.

Consequently, in light of these various provisions, a complainant must provide sufficient facts in his SOX employee protection complaint to at least minimally raise the possibility that a) the complainant engaged in a protected activity by presenting to his supervisors an assertion of misconduct involving at least one of the six specified violations identified in SOX; b) the employer was aware of the protected activity; and, c) the complaint suffered an adverse personnel action.

With these specific SOX provisions in mind, I first conclude that within the four corners of his March 3, 2003 letter to the Secretary, Mr. Levi did not present a SOX whistleblower complaint because he did not allege Anheuser-Busch suspended him due to a SOX protected activity. Additionally, as the case law and statutory provisions above demonstrate, Mr. Levi's general allegation of a long campaign against the company's mistreatment of employees, absent specific details or reference to conduct that falls within the six categories of the conducted regulated by SOX, does not establish a viable complaint relating to the employee protection provisions of SOX even though SOX may be considered a federal labor law. In other words, protestations to supervisors and management become protected under SOX only if the specific factual allegations may reasonably be considered to fall within the six SOX specified categories of impermissible corporate conduct.

In terms of specifics, Mr. Levi also cited his prior reports of mistreatment of an African-American employee. While individual racial discrimination is not to be condoned and other federal statutes may be implicated, Mr. Levi's complaint's about the discrimination an employee suffered does not rise to requisite level of materiality to conclude the supervisors' conduct would represent fraud against the Anheuser-Busch shareholders that is covered by SOX.

More significantly, even if Mr. Levi's reports of individual employee mistreatment had been covered under SOX as protected activities, Mr. Levi makes no specific reference to any adverse action against him. Instead, straightforward reading of his letter establishes that Mr. Levi was asking the Secretary to determine whether the company's suspension practices in regards to two other employees might violate labor laws. Consequently, on its face, the March 3, 2003 letter to the Secretary is not a viable SOX whistleblower complaint.

¹⁰This criminal provision was added by Section 807 of the Sarbanes-Oxley Act (2002).

Attachments to March 3, 2003 Letter

Although Mr. Levi's letter fails on its face as a SOX whistleblower complaint, an argument may be made that his attachments to the letter and his reference to them in the letter as evidence of a long campaign against employee mistreatment might represent a SOX whistleblower complaint. The contents of that correspondence is set out below:

December 3, 1997 letter to Anheuser-Busch CEO. Mr. Levi recommends that the company purchase a coal company. Rather than transitioning to natural gas, Mr. Levi suggests coal provides a better long-term solution to the company's utility needs. He predicts increasing demand will raise natural gas prices whereas coal was relatively inexpensive at that time. Purchasing a coal company would permit Anheuser-Busch to lock-in its future energy costs.

January 6, 1998 letter to Mr. Levi from Anheuser-Busch CEO. The CEO thanks Mr. Levi for his suggestion about the long-range energy needs of the company and indicates that he has passed on his suggestion for consideration.

May 15, 2001 letter to Anheuser-Busch CEO. In light of the recent increase in energy prices, Mr. Levi wanted to follow-up on his 1998 suggestion to purchase a coal company. He notes that if Anheuser-Busch had purchased of coal company in 1998 for \$70 million, it would presently be worth up to \$550 million. He opined that this lost opportunity was a symptom of the two threats facing Anheuser-Busch, complacency and arrogance. According to Mr. Levi, "We are wasting huge amounts of money because communication is at an all-time low." People were afraid to speak up. With possible succession coming up, Mr. Levi was also concerned about employee morale. Following a recent strike, which Mr. Levi believed was instigated by some of the supervisors in his plant, some workers had been fired, others lost their jobs, and other strike actions were taken. Mr. Levi then provided several examples of continuing racial discrimination from derogatory comments by a supervisor to other employees trying to force a minority out of his job and replacing him with white employees. He noted one supervisor had held his genitals while threatening a subordinate and that another employee was mysteriously suspended after reporting sexual harassment. Other supervisors engaged in verbal abuse and threats. Mr. Levi had brought these concerns to the attention of supervisors but the practices continued.

August 28, 2001 letter to Anheuser-Busch VP for Corporate Human Resources. Mr. Levi asked the vice president for help. In January 2001, he had reported five supervisors for racial discrimination, sexual harassment, and threats of termination. No investigation was conducted and he received no response. Following Mr. Levi's letter to the CEO, two of the supervisors were interviewed. However, Mr. Levi was subsequently informed that there was not a racial problem and the exchange between two men was not sexual harassment. At that time, Mr. Levi was also warned that his actions were disruptive of operations. After returning from sick leave, Mr. Levi discovered his work hours had been changed, overtime reduced, and some tasks removed. Mr. Levi objected and though there had been a meeting about his complaint, no decision had been made. Mr. Levi believed he was suffering retaliation for expressing his concerns about the five supervisors. He also noted that two African-Americans had been

recently forced out through retirement. Mr. Levi asked for an immediate investigation and termination of the supervisors who were jeopardizing Anheuser-Busch's reputation.

September 9, 2001 letter to Plant Manager. Mr. Levi advises the plant manager of his concerns about the recent changes in his hours and job assignments. Due to the demands of his job and the nature of the equipment, he believed having day workers temporarily replace him was "totally irresponsible." He noted that other employees had problems with his job while he had been on sick leave. When he discussed his situation with supervisors, he was told to stop writing letters with false allegations or he would be terminated. Additionally, Mr. Levi emphasized long term neglect of plant equipment and facilities. He asserted a lack of planning was squandering company resources. As an example, the company had failed to procure a long term coal supplier. Finally, his supervisors had resisted Mr. Levi's demonstrated cost saving suggestions.

October 14, 2001 letter to Anheuser-Busch CEO. Mr. Levi provided an update to the top executive since his last letter in May. He commented about the missed coal company investment, litigation regarding a distributorship, and another corporation's struggle during CEO succession. Mr. Levi noted that after a partial investigation of his complaints of racial discrimination and threats, he was informed nothing was wrong. Instead, Mr. Levi was told he was disrupting operations. When Mr. Levi asked for the vice president's help, two executives met with him and indicated the company was considering terminating his employment. He was advised that his coal company investment idea was "silly" because a beer company would never buy a coal company. Mr. Levi hoped the CEO would remedy the situation about the supervisors. Mr. Levi indicated that he would be turning the matter over to the union leadership and "this is my final letter to you." In closing, Mr. Levi stated, "You should be extremely upset knowing that your employees are being mistreated. You should be upset that your company is being put at risk because of inaction and cover-ups by management." In a three point post-script, Mr. Levi asked a) why he hadn't seen a woman or African-American in 8 levels of supervision in the company; b) to whom he should report his immediate supervisor's operational decision that will cost an additional \$240,000; and, c) why the plant was now being visited three times a day by the resident engineer when in the past, he made only 3 visits a year?

On November 26, 2001 letter to Anheuser-Busch VP for Corporate Human Resources. Mr. Levi expresses his displeasure with the vice president's attitude toward his coal company investment suggestion. Mr. Levi believes the corporate officer had ridiculed his idea.

March 11, 2002 letter to Anheuser-Busch VP for Operations. Mr. Levi indicates that he has raised many concerns about violations of company policies and waste of resources. In response, he has been threatened with termination and subject to retaliation. Mr. Levi has reported sexual harassment, racial discrimination, and "blatant" waste of company resources. He also objected to the proposed reduction in operators in the utility plant and recalled an industrial accident from the 1980s and another situation in which a boiler overheated and could have exploded in February 2002. Mr. Levi was concerned about lax operations and safety practices in the plant. He alleged one supervisor violated safety rules and threatened employees. In closing, Mr. Levi offers to provide suggestions that would save the company \$300,000 to \$500,000 a year. He notes that in the past, plant supervisors had resisted his money-saving suggestions. He

also objected to the creation of a position of facility manager helper because the individual simply walked around. For another \$1 an hour, Mr. Levi offered to do that job in addition to his regular assignment, saving the company about \$45,000 a year in payroll.

March 23, 2002 letter to Anheuser-Busch VP for Operations. Mr. Levi indicates that he is upset with the vice president's response. Instead of having corporate human resources investigate his complaints, the vice president sent them to his supervisors, who in turn called him in and demanded to know the specifics of the retaliation complaints. Mr. Levi didn't respond because at least one of the supervisors was involved in his complaints. Eventually, he provided details to another supervisor. Mr. Levi believed it was inappropriate to be summoned by the supervisors who were the subjects of his complaints and, in Mr. Levi's belief, should be terminated. Mr. Levi sought an impartial investigation.

April 30, 2002 letter by the Anheuser-Busch Senior Manager for Human Resources to Mr. Levi. In response to Mr. Levi's March 23, 2003 letter to the operations vice president, the Senior Manager explained some of the staffing plans. At the same time, the manager was concerned about the tone of Mr. Levi's letter. He noted prior meetings with Mr. Levi and management's previous attempts to consider his issues, investigate the problems and provide feedback. Yet, "despite your personal acknowledgement of our efforts to address your concerns and your understanding that we would not revisit these issues, you continue to replay them in correspondence to brewery and senior management." The managers considered Mr. Levi's continued letter writing for the purpose of "rehashing your unsupported claims against management and others is not productive and is disruptive to our operation." Specifically, on several occasions in 2001, Mr. Levi was advised that unfounded accusations, personal spin on facts, and issues based on hearsay, rumor, and half-truths were disruptive. The senior manager advised that the "time has come to put an end to your writing letters that lack factual support and your re-visiting stale issues." The senior manager indicated that his letter represented a "final notice" that this type of disruptive conduct must stop. If the insubordinate conduct continued, Mr. Levi might be subject to serious discipline, "up to and including discharge."

May 4, 2002 letter to Anheuser-Busch CEO. Mr. Levi indicates that a year has passed since he last wrote the CEO about racial discrimination, sexual harassment, and threatening behavior against employees. He was concerned about the lack of investigation into his charges and the retaliatory threats he had received for disrupting operations. After no one took his concerns about violations of company policies seriously, Mr. Levi then raised concerns about the wasting of company resources by several supervisors. In response, a corporate representative berated and threatened him. As a result, Mr. Levi then wrote the operations vice president about safety issues. Even those concerns were not properly or fully investigated and addressed. At present, Mr. Levi was being written up for contrived incidents as "direct retaliation for my informing upper management of serious violations of company policies, wasting of company resources, and safety lapses and violation of federal law." The only way Mr. Levi could protect himself was to put everything into writing. According to Mr. Levi, unless the CEO helped, "this will become ugly and embarrassing." He asked the CEO to meet with him.

June 2, 2002 suspension letter. Mr. Levi was notified that as of June 3, 2002 he was being suspended for four weeks due to his May 2, 2002 letter to the CEO which disparaged

company managers with mean-spirited and unfounded charges; made reckless and unfounded claims about the investigations; and, revisited subjects which were either a matter of opinion or had been previously addressed. His conduct was considered harassing and injurious to fellow employees. Additionally, he had persistently disregarded instructions by his supervisors to stop these types of letters.

June 2, 2002 letter to Anheuser-Busch Board of Directors. Mr. Levi advised the board members that “a lot of unethical things have happened and billions of potential shareholders value has not been realized.” In review, Mr. Levi noted that he had objected to the costly transition to natural gas in 1997 and instead proposed to the company CEO that Anheuser-Busch purchase a coal company. His idea “could have made billions for the company” and “bumped the share price \$5.” Additionally, poor labor relations was “stalling another \$5 a share.” That \$10 a share value change represents an increase of \$9 billion for shareholders. Due to raising his concerns, Mr. Levi has been “harassed, financially penalized, and threatened.” Mr. Levi urged the Board to act and stated their attention was urgently needed. To date, he had not contacted any outside agencies. “I really do not want to spend the next 3-5 years of my life in depositions and courtrooms. Do you?” During his four week suspension, Mr. Levi planned the following: letter to the Board, interview and select an attorney, contact teamsters, “start notifying shareholders.”

June 5, 2002 letter by Anheuser-Busch Vice President for Operations to Mr. Levi. The vice president indicated that Mr. Levi’s May 4, 2002 letter to the CEO had been forwarded to him. Based on previous investigations of his complaints and management efforts to respond, the corporate officer indicate no further action would be taken.

June 6, 2002 letter by a representative of an advisory board member to Mr. Levi. A representative advised Mr. Levi that the person to whom he sent an information package was no longer an active member of the Board of Directors for Anheuser-Busch. An attached listing of the board members shows the individual as the sole “advisory member.”

July 22, 2002 letter to Anheuser-Busch CEO. Mr. Levi indicates that he doesn’t intend to hurt the company. He also does not want to lose his job. However, “I will not sit by and watch this company continue down the damaging path of arrogance.” He asks what type of company deals with the truth with threats, retaliation, and suspension. Mr. Levi observes that successful labor relations in another major corporation significantly improved revenue per employee. Mr. Levi also describes another near-explosion of an Anheuser-Busch boiler. Additionally, shortly after an employee assault incident was not addressed, another assault occurred with two other individuals. In the present hostile environment for corporations, Mr. Levi believed a great opportunity existed for Anheuser-Busch if it followed his plan. First, the CEO should inform employees that retaliation, cover-ups and threats would not be tolerated. Second, the former CEO should pay every employee who went out on strike or honored the picket line \$300 from his own pocket. Third, the company should make a concerted effort to improve its press coverage and image.

July 25, 2002 suspension letter. Mr. Levi receives notice that he is being suspended for one week for confronting an employee and using abusive language. His actions were

inconsistent with repeated instructions to stop engaging in disruptive behavior in the workplace. Handwritten notes indicate Mr. Levi relayed a comment outside work about an individual, who was related to the Busch family. According to Mr. Levi, the individual was a disgrace to the family.

July 29, 2002 letter to Anheuser-Busch CEO. Mr. Levi informs the CEO that his supervisor is again attempting to get him into trouble. Mr. Levi had just been suspended for one week for a conversation he had outside work. Mr. Levi asked why the company was protecting this supervisor who he considered to be the worst. He asked to CEO stop the supervisors from putting him in unsafe positions. "That I have to write the CEO of a company to get protection is a sad comment on the state of our company."

December 16, 2002 letter to international representative of International Brotherhood of Teamsters. Mr. Levi thanks the representative for his willingness to help him. As part of the process, he encloses copies of his four grievances. Mr. Levi notes that two teamsters had been harmed by Anheuser-Busch and two African-Americans continued to suffer discrimination. He also questions whether Anheuser-Busch had violated any labor laws by providing free outside legal counsel to employees who did not want to pay union dues. And, he expresses concerns about one member of the Board of Directors who also oversaw the teamsters. In his grievance, Mr. Levi alleges the company had failed to permit a union representative to be present during a disciplinary meeting with a supervisor. He also claims Anheuser-Busch had failed to provide a safe work place environment because supervisors did not appropriately or sufficiently respond to an employee assault incident. Mr. Levi believes supervisors hid mitigating evidence and put their personal interests above the company and its policies and employees. As a remedy, Mr. Levi seeks the termination of several supervisors.

February 20, 2003 suspension notice. Mr. Levi was notified that he was being suspended indefinitely with intent to discharge for use of threatening and abusive language and failure to follow supervisor instructions. According to the notice, on two occasions on February 14, 2003 when meeting with his supervisor, Mr. Levi challenged his authority to ask questions about a concern raised by vendor coal delivery drivers. At the same meeting, Mr. Levi called his supervisor untrustworthy and a liar. Despite a warning, Mr. Levi "persisted" in his "affront" to the supervisor's authority. The notice indicated that Mr. Levi had been previously warned about his belligerent and disrespectful conduct toward company supervisors and managers. He had been repeatedly counseled, and suspended twice. Since Mr. Levi apparently would not accept supervisory authority, he could not continue his employment with Anheuser-Busch.

Grievance in response to suspension with intent to discharge. Due his prior complaints about a particular supervisor, Mr. Levi felt uncomfortable meeting with him alone in his office and being asked questions about his conversations with coal delivery drivers. As a result, he refused to answer questions and walked out of the supervisor's office. At the second meeting, Mr. Levi continued to refuse to discuss the situation until he heard from corporate human resources and the union business representative was present. At this second meeting, he also told the supervisor that he had turned in "written proof" to upper management that he had "lied and been dishonest in prior investigations." Based on subsequent conversations with human resources, the discussion about the coal delivery drivers was to be deferred until the following

week. However, later that day, the supervisor indefinitely suspended Mr. Levi. According to Mr. Levi, since reporting company policy violations in 2001, this supervisor had been retaliating against him. Because he had already discussed the coal delivery driver incident with his immediate supervisor, Mr. Levi believed this intermediate level supervisor's behavior was inappropriate. He believed the supervisor purposefully provoked him. Mr. Levi requested reinstatement with back-pay and an end to the harassment.

In considering whether this extensive array of attachments represents a SOX whistleblower complaint, I will identify the numerous types of conduct that Mr. Levi has identified as inappropriate and determine whether that conduct falls within the six types of SOX offenses. Once again, as discussed above, the first four categories of SOX offense relate to violations of criminal fraud statutory provisions, the next category involves violation of SEC rules and regulations, that the sixth class of offense concerns violation of any federal law relating to fraud against shareholders.

For some ease of analysis, I have grouped Mr. Levi's reported concerns into three general categories. First, Mr. Levi expressed numerous concerns with business decisions rendered by the company executives and supervisors and associated missed business opportunities, from neglecting plant equipment to incurring excess operating expenses to failing to invest in a coal company. Mr. Levi also challenged many management decisions relating to his assigned tasks, manpower changes, and reduction in overtime. To the extent Mr. Levi's opinion about such business decisions, omissions, and management determinations was objectively accurate, his concerns might relate to adverse impact the value of shareholders' stake in Anheuser-Bush. However, the stated concerns did not involve any criminal fraud offenses. Additionally, notably absent in Mr. Levi's business operations and management complaints was the requisite element that these business shortfalls, omissions, and management actions violated any rule or regulation of the SEC or a federal law relating to fraud against shareholders. Although a complainant is not required to specifically identify applicable regulatory or legal provisions, his assertions must nevertheless contain either a) a component of purposeful, criminal deceit, or fraud, or b) represent a violation of an SEC rule or regulation. Mr. Levi's assertions of inept or incorrect business decisions do not rise to the requisite level of criminal, statutory and regulatory fraud and do not appear to violate SEC rules and regulations. .

Second, Mr. Levi has consistently presented concerns about racial discrimination, sexual harassment, and intimidation in his work environment. Mr. Levi provided specific examples of individual African-Americans being forced out of their jobs and supervisor derogatory comments. Likewise, he has cited two situations of purported sexual harassment. And, Mr. Levi reported that both he and other employees were periodically threatened with termination of their employment. In determining whether these alleged violations of individual employment rights involve a federal law related to fraud against shareholders, an implicit argument may be made that a company which permits discriminatory practices, harassment and intimidation is acting contrary to the best interests of its share holders.

While that argument has understandable appeal, a SOX protected activity must involve an alleged violation of a federal law directly related to fraud against shareholders. In this case, the federal law actually prohibiting individual employment discriminatory practices, Title VII, is

based on individual rights and establishes procedures to address illegal employment discrimination; it was not enacted to preclude fraud against shareholders. In contrast, a federal law directly linked to the prevention of fraud against shareholders is the SOX statute itself. As set out in the SOX preamble, Congress imposed additional, specific legal requirements and standards on corporations, directors, senior financial officers, lawyers, and accountants to protect shareholders by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws and for other purposes. For example, SOX includes Section 302 (corporate officer certification that a financial disclosure is accurate and does not contain any untrue statement of material fact), Section 401 (enhanced disclosure requirements for mandated financial reports), and Section 406 (code of ethics for senior financial officers).

I have also considered another reasonable argument that since SOX mandates the accuracy of corporate disclosures, the existence of racial discrimination, sexual harassment, and intimidation may also adversely affect the accuracy of corporate disclosures mandated by SOX, which is a federal law concerning fraud against shareholders. Thus, in that regard, Mr. Levi's assertion that his allegations to senior executives that his complaints of discrimination, harassment and intimidation were insufficiently investigated might be protected under SOX as such dereliction might interfere with the requisite disclosure requirements under SOX.

While this presentation also has some logical appeal, the connection becomes tenuous upon close examination of SOX. Specifically, Section 302's requirement for the accuracy of material facts relating to finances, demonstrates Congress' intention to protect shareholders by requiring accurate reporting of a corporation's financial condition. The two key components are accurate accounting and a corporation's financial condition.¹¹ A manager's failure to fully investigate individual acts of discrimination, sexual harassment, and intimidation has a very marginal connection with those two components. Perhaps, the failure to disclose a significant class action lawsuit based on systemic racial discrimination or sexual harassment with the potential to sufficiently affect the financial condition of a corporation might become the subject of a SOX protected activity if an individual complained about the failure to disclose that situation. However, individual, rather than systemic, discrimination does not reach that materiality threshold in terms of a corporation's financial condition. Alleged individual violations of Title VII would not fall into the category of SOX mandated disclosures. Further, Mr. Levi's particular discrimination complaints focused on the alleged existence of racial discrimination, sexual harassment, and employee intimidation, rather than the company's failure to report such discrimination to the public.

Accordingly, for the reasons discussed above, I conclude Mr. Levi's complaints of individual racial discrimination, sexual harassment and employee intimidation do not involve violations of federal laws addressing fraud against shareholders.

Third, Mr. Levi highlighted safety problems associated with boiler operations and workplace violence. Again, although the safety issues were not insignificant, they did not involve violation of criminal fraud statutes or relate to an SEC rule or regulation or federal law

¹¹See *Halloum v. Intel Corp.*, ARB No. 04-068, 2003 SOX 7 (ARB Jan. 31, 2006) (complainant reported that he had been instructed to delay payments on invoices to increase cash on the company's balance sheet to meet Wall Street expectations).

involving fraud against shareholders. While Mr. Levi has subsequently alleged the company actively attempted to suppress disclosure of such problems, I note that Mr. Levi's boiler contemporaneous complaints to supervisors and upper management centered on the continued existence of this safety problem and purported insufficient corrective actions due to incompetence. In regards to employee altercations, Mr. Levi only identified two incidents. As discussed above, these individual events do not rise to the necessary level of materiality such that failure to disclose them might represent fraud against shareholders.

In conclusion, while Mr. Levi's attachments may have presented several labor law concerns to the Secretary, the numerous complaints Mr. Levi presented to his supervisors and upper management did not relate to any of the six SOX violations such that he had engaged in a protected activity under SOX. As a result, the attachments to Mr. Levi's March 3, 2003 letter to the Secretary do not constitute a SOX complaint.

B. Constructive Service on the Secretary

Although Mr. Levi did not submit a timely SOX complaint directly to the Secretary on March 3, 2003, he apparently sent additional correspondence to another agency within with DOL sometime before April 2, 2003. Specifically, based on an inquiry made by OSHA to Anheuser-Busch on April 2, 2003, Mr. Levi apparently made three allegations against the company.¹² Depending on its content, that correspondence may constitute constructive timely service of a SOX complaint on the Secretary.

Mr. Levi's first allegation to OSHA was that three separate boiler explosion "near misses" occurred which could have leveled the St. Louis plant. Second, Mr. Levi reported that one employee was attacked and injured by another employee at work. Third, Mr. Levi asserted the injured employee was not allowed to obtain medical treatment and the injury was not properly reported.

On April 15, 2003, Anheuser-Busch responded to the allegations. First, considering the phrase "near miss" to be vague and absent any other details, the company was unable to investigate the allegation. Second, within the prior twelve months only one altercation involving employees occurred. Both individuals were disciplined. The day after the incident, one employee reported an injury. After he was examined by a doctor, "a determination was made that no injury requiring an entry to the OSHA log had occurred." Third, the company reports all workplace injuries in accordance with OSHA guidelines. Employees were trained to report injuries. The company had no knowledge of an employee being denied medical treatment.

On April 15, 2003, in light of Anheuser-Busch's response, OSHA advised Mr. Levi that the hazards he complained about had been investigated by the company. Attaching the company's response, OSHA indicated it considered the case closed.

In reply, on April 25, 2003, believing Anheuser-Busch had been dishonest, Mr. Levi hoped OSHA would be "very upset" at the company's responses based on the additional material

¹²In his list of correspondence, Mr. Levi did not reference any specific letter to OSHA. My determination that he contacted OSHA is based on the April 15, 2003 response by Anheuser-Busch to an April 2, 2003 OSHA inquiry.

he was providing. He gave the dates of the three boiler incidents in 2002 and the names of the employees that were involved. Mr. Levi noted the incidents occurred after work had been completed by outside contractor. He believed the individual responsible for the contractors' work was "an accident waiting to happen" and a disgrace to his relative's name. Mr. Levi also provided the names of the injured workers.

On May 6, 2003, Anheuser-Busch provided detailed explanations for all three boiler incidents, identified the root causes of the incidents, and stated applicable corrective actions. According to the company, no explosions occurred and there was no impact on the safety of the company employees.

On May 6, 2003, OSHA advised Mr. Levi that Anheuser-Busch had investigated and corrected the hazards he had reported. In light of the company's corrections, OSHA determined the case was close.

On May 12, 2003, Mr. Levi expressed his dissatisfaction with Anheuser-Busch's response because it did not address the communications issue within the company. According to Mr. Levi, Anheuser-Busch suspended and ultimately terminated Mr. Levi after he spoke up. He asked whether their actions were lawful and noted that even after he spoke up two more boiler incidents occurred. Although he had identified to OSHA the individuals responsible for the incident, Mr. Levi noted they were still "running the operation." Since Mr. Levi had worked at Anheuser-Busch, he knew the statement that employees were not at risk was not true. Finally, Mr. Levi noted that no mention was made of the employee altercations. Mr. Levi hoped OSHA was not rushing to close the case. He believed a strong message needed to be sent to Anheuser-Busch that "safety is more important than management careers."

On June 5, 2003, OSHA responded that the communication issue was not within its jurisdiction. Outside of specific safety and health program management, no OSHA standards existed for employer-employee relations. Similarly, the employee altercations were a subject matter for local law enforcement. Finally, since OSHA believed Anheuser-Busch's answer to the OSHA inquiry was "adequate," and having exhausted its statutory authority, OSHA could take no further action on Mr. Levi's complaint.

In bringing his concerns about unsafe boiler operations and employee altercations to OSHA's attention in April 2003, Mr. Levi indicated that he had complained about these conditions to management and was subsequently suspended and terminated. However, based on the subject matter of his stated concerns, I find Mr. Levi's complaints to supervisors and management about boiler safety and employee altercations did not fall within the six types of SOX violations. While not insignificant, Mr. Levi's concerns about boiler operations at the St. Louis plant do not involve the type of fraudulent financial and accounting misconduct prohibited by SOX. Likewise, his complaint to management about one or two incidents of workplace violence and absence of an appropriate management response to the employee injuries was not a SOX protected activity. Since the concerns he raised while an employee of Anheuser-Busch about boiler plant hazards and employee altercations were not SOX protected activities, his subsequent correspondence to OSHA within 90 days of his indefinite suspension was not a viable SOX whistleblower complaint. Consequently, Mr. Levi's April 2003 correspondence to

OSHA did not constitute constructive service of a SOX whistleblower complaint on the Secretary.

C. Timely SOX Whistleblower Complaint in the Wrong Forum

In 2002 and 2003, Mr. Levi sent correspondence to the Chairman of the Securities and Exchange Commission (“SEC”), U.S. Equal Employment Opportunity Commission (“EEOC”), the National Labor Relations Board (“NLRB”), and a member of congress in regards to multiple issues with Anheuser-Busch and his employment situation. I now consider whether the correspondence submitted prior to his February 14, 2003 indefinite suspension with intent to discharge and also within 90 days following his suspension, or May 15, 2003, represent timely SOX complaints filed in the wrong forum.

Letter to SEC

On September 24, 2002, Mr. Levi wrote to the Chairman of the SEC. Mr. Levi asserted that top executives responded to his stated concerns with retaliation rather than correction. Since the retaliation continued, he felt compelled to go outside the company with his concerns. According to Mr. Levi, the executive’s bad corporate behavior and arrogance “hurts shareholders.” He noted an unexplained \$10 price drop in Anheuser-Busch stock the past summer and excessive CEO compensation. “This is not accounting fraud, it is much worse” because the company had declared war on its employees through firings, forced retirements, random enforcement of company policies, and mistreatment of minorities and union members. Mr. Levi hoped to support the SEC’s efforts and believed Anheuser-Busch was the “perfect test to see how far we have come in dealing with bad corporate behavior.” He added, “[I]t may be time to start kicking some of these execs out of the country.” A strong message would restore investor faith. Mr. Levi also hoped he would retain his job. Without specifically identifying attachments, Mr. Levi indicated that he was enclosing some of the letters that he had written to all levels of company management and he had several more to share at the SEC’s request. Mr. Levi indicated that he was sending copies of his complaint to members of congress and several other organizations, including the EEOC and NRLB.

On October 9, 2002, the SEC thanked Mr. Levi for his submission and indicated it would carefully consider his request for an investigation. However, due to the confidentiality of its investigations, the SEC would be unable to advise whether or if an investigation of his concerns was conducted.

In his SEC letter, Mr. Levi asserted Anheuser-Busch executives were engaged in “bad corporate behavior” which was hurting shareholders. In light of that allegation, of all the correspondence presented by Mr. Levi, this document comes the closest to the subject matter of SOX. However, on its face, the generalized and conclusive statements do not provide sufficient specifics to assess whether the content of Mr. Levi’s referenced concerns to management involved SOX prohibited actions, principally fraudulent financial and accounting practices, such that his reports to management were protected activities under SOX. Due the lack of specificity in the letter, Mr. Levi’s letter on its face is not a SOX whistleblower complaint.

Although insufficient on its face as a SOX whistleblower complaint, Mr. Levi's correspondence to the SEC might nevertheless represent a viable complaint if his additional enclosures indicated that he had suffered adverse personnel actions as a result of SOX protected activities. Though Mr. Levi did not specifically identify the attachments to his SEC letter, I have already considered and determined that his earlier correspondence to various levels of Anheuser-Busch and the Board of Directors which would have been included as attachments did not demonstrate that Mr. Levi had suffered employment retaliation for complaints about SOX violations. As a result, Mr. Levi's letter to the SEC with attachments also fails as a SOX whistleblower complaint.

Letter to the EEOC

On September 24, 2002, Mr. Levi sent a copy of his SEC letter to the EEOC. On October 17, 2002, the EEOC responded with a letter describing its jurisdiction and attached an information packet about its procedures. On October 27, 2002, Mr. Levi wrote the District Director, EEOC, thanking her for an information packet, indicating he was returning the requisite forms, and noting that he was attaching letters he had written to the CEO and vice president of Anheuser-Busch in which he asked for help after his supervisors started their retaliation. Previously a stellar performer, for the past two years, Mr. Levi had been threatened, humiliated, and harassed. He had become physically ill and suffered a personal relationship loss. Mr. Levi asked the EEOC for help in resolving his situation. "I heeded the company's mandate on reporting racial discrimination and sexual harassment."

Since the Mr. Levi's September 24, 2002 letter to the SEC was not a SOX whistleblower complaint, Mr. Levi's initial contact with the EEOC with a copy of the SEC letter is likewise not a SOX whistleblower complaint. In his follow-up letter, Mr. Levi alleges that in response to his reports of racial discrimination and sexual harassment, he has suffered adverse personnel action consisting of threats, humiliation and harassment. As I have previously discussed, Mr. Levi's stated concerns about individual racial discrimination and sexual harassment are protected activities under SOX. Accordingly, Mr. Levi's follow-on letter to the EEOC is not a SOX whistleblower complaint.

Letter to the NLRB

On September 24, 2002, Mr. Levi also sent a copy of his SEC letter to the NLRB. On November 6, 2002, the NLRB indicated that it did not note any violation of National Labor Relations Act. Specifically, corporate business and investments decisions were not within its jurisdiction.

For the same reasons just discussed above, the copy of the SEC letter Mr. Levi provided to the NLRB is not a SOX whistleblower complaint.

Correspondence to Congressional Representative

On January 31, 2003, due to a lack of sufficient response from federal agencies and the teamsters, Mr. Levi sent a letter to Representative Richard Gephardt.¹³ Mr. Levi explained that he had raised concerns about the character of his supervisors, their poor business decisions and safety habits. On the issue of credibility, Mr. Levi observed that a manager in a different plant had falsified environmental records. Additionally, in the 1980s, two executives were convicted for misusing corporate funds and a former CEO had failed to prevent a senior executive from going to a rival company which started a price war that led to a strike. The company continued to mistreat its employees and ignored his idea “that could have made \$3 billion” and other cost-saving measures he proposed. Mr. Levi’s alertness had also prevented a boiler from exploding. In return, according to Mr. Levi, his overtime had been slashed and his character defamed. In addition to threats of termination, Mr. Levi had been denied recognition awards, retaliated against, harassed, and suspended. As a consequence, Mr. Levi suffered physical illness and personal relationship loss. Mr. Levi asked Representative Gephardt to contact the Anheuser-Busch Board of Directors to have them remove the CEO who didn’t take any action to stop the adverse treatment. If the board members resisted, Mr. Levi offered to testify before Congress about his mistreatment and the executives could be called to testify. Mr. Levi asserted the CEO was unnecessarily risking the lives of people in St. Louis. He asked, “can you image how easy it would be to get Al Sharpton to protest at Sea World that AB treats dolphins and whales better than its employees.” Finally, Mr. Levi believed a lawsuit by him “would bring terrible publicity to Anheuser-Busch.”

On February 21, 2003, Mr. Levi informed Representative Gephardt that he had been indefinitely suspended with intent to discharge. He attached the suspension notice and his grievance, explaining his refusal to answer the supervisor’s questions due to the supervisor’s record of retaliation against him.

On April 8, 2003, Mr. Levi advised Representative Gephardt that his employment with Anheuser-Busch had been terminated on March 5, 2003.¹⁴ He included his teamsters grievances to provide an understanding of his employment situation. Mr. Levi asked the congressman to take a stand against “dishonest corporate behavior” and noted that Time magazine had recently run a cover story about three whistleblowers. In his grievances, Mr. Levi first challenged his four week suspension because his communications with upper management officials were not irresponsible. Instead, Mr. Levi had demonstrated his complaints were not “stale” in June and July 2002 letters to the Board of Directors and Anheuser-Busch CEO. Likewise, his communication neither harassed nor injured any employees. Next, Mr. Levi objected to his one week suspension because his comment about an employee being a disgrace “hardly qualifies as abusive.” Mr. Levi also objected to his suspension and discharge because the supervisor forced him into a threatening situation. Mr. Levi believed his discharge was an attempt to protect

¹³Among others, Mr. Levi also sent copies of his letter to Representative Gephardt to Representative Tauzin and Senators McCain and Clinton. On March 19, 2003, Senator McCain forwarded the letter to the Senator Bond.

¹⁴On March 5, 2003, the Senior Manager for Human Resources rejected Mr. Levi’s grievance and converted the indefinite suspension to discharge. The manager noted Mr. Levi’s prior disciplinary record and failure to respond to corrective action.

people engaged in misconduct. Mr. Levi suffered for trying to report violations of company policies. Mr. Levi also objected to the denial of an employee award pay increase in October 2001 which represented further retaliation. Mr. Levi also contested the loss of overtime pay which he asserted was retaliation for raising racial and sexual discrimination concerns. Finally, Mr. Levi asked that five reported incidents be removed from his record because they also represented another form of retaliation.

In his exchanges with Representative Gephardt, Mr. Levi alleged Anheuser-Busch had engaged in “dishonest corporate behavior” and he stressed the importance of whistleblowers. However, the specific details of complaints to upper management and supervisor in 2001 and 2002 were the same situations Mr. Levi discussed in his attachments to the Secretary’s letter and the SEC. As previously discussed, I have determined his reports of those events were not SOX protected activities. As a result, Mr. Levi’s correspondence with Representative Gephardt does not constitute a SOX whistleblower complaint.

Summary

Mr. Levi’s correspondence to the SEC, with copies to the EEOC and NLRB, and his letters to Representative Gephardt did not contain allegations that involved the six type of SOX prohibited corporate conduct. Therefore, the correspondence did not represent timely SOX whistleblower complaints filed in the wrong forum.

III. Equitable Tolling

I have determined Mr. Levi’s submissions to the Secretary, OSHA, other federal agencies and a congressman did not involve employment retaliation for expressed concerns relating to the six specified SOX violations, and thus were not SOX whistleblower complaints. As a result, Mr. Levi may avoid dismissal of his remaining, and untimely, November 19, 2004 SOX complaint only if some other equitable reason exists to relieve Mr. Levi of the requirement to file his SOX whistleblower complaint within 90 days of his suspension with intention to discharge on February 14, 2003.

Since the time filing requirement in SOX, 18 U.S.C. §1514A (b) (2) (D) is set out as a statute of limitations, the principle of equitable tolling applies. *See School District of City of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981) and *Lastre v. Veterans Administration Lakeside Medical Center*, 87 ERA 42 (Sec’y Mar. 31, 1988), slip op. at 2-4. Generally, tolling of the statute of limitations filing requirement may be appropriate if: a) the respondent misled the complainant as to the cause of action or b) the respondent prevented the complainant from presenting a timely complaint.¹⁵ *Lahoti v. Brown & Root*, 90 ERA 3 (Sec’y Oct 26, 1992).

On the other hand, tolling is usually not appropriate on the basis that the complainant was not aware of his rights under the federal employee protection provisions. *Id.* Ignorance of the law generally is an insufficient basis to establish equitable tolling of complaint time filing

¹⁵I have already addressed the third basis of equitable relief – complainant timely filed the exact type of claim in the wrong forum.

requirements. *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003 SOX 26 (ARB Dec. 30, 2005), slip op. at 5.

As to the first consideration, Anheuser-Busch did not mislead Mr. Levi concerning the triggering event for the 90 day statute of limitations. The company provided unequivocal notice on February 14, 2003 that he was being indefinitely suspended with the intention to discharge.

Concerning interference with his ability to file a timely SOX complaint, Mr. Levi has asserted that the inaction and dereliction of duty by the Secretary, members of congress and other federal agencies prevented him from filing a timely SOX complaint. However, equitable relief for the statute of limitations time requirement based on interference is available only if the Respondent, Anheuser-Busch, actively prevented Mr. Levi from filing his complaint within 90 days of the indefinite suspension notice. Mr. Levi's frustration with federal agencies' purported failure to promptly advise him of the SOX whistleblower protection provisions upon receipt of his initial correspondence may be understandable. However, such alleged agency inaction does not warrant Mr. Levi being able to equitably revive an untimely SOX complaint against Anheuser-Busch, which did not prevent Mr. Levi from filing a timely SOX complaint.

Similarly, Mr. Levi's assertion that a concerted effort was made to prevent his complaint from coming to light fails to provide a basis for equitable relief because notably absent in the list of actors alleged to have conspired to suppress a SOX complaint to the federal authorities is Anheuser-Busch. Instead, Mr. Levi suggests the Teamster president, a possible SEC chairman, the White House, and the Secretary sought to keep his complaint and related concern about financial losses in the teamsters pension fund from the light of day. Again, the requirement for equitable relief of the statute of limitations is that the named respondent, in this case, Anheuser-Busch, actively interfered with the complainant's ability to promptly file his complaint within the required time limits.

Finally, citing the purported lack of published information about the SOX whistleblower protection provisions upon, and subsequent to, its enactment, Mr. Levi states he first became aware of the SOX whistleblower provisions in November 2004 and promptly wrote his letter to the Secretary. As the cases cited above make fairly clear, a complainant's lack of knowledge of the SOX law and associated statute of limitations is not a sufficient equitable basis for tolling the statute of limitations in regards to filing a timely complaint.

CONCLUSION

Facially, because Mr. Levi did not submit his November 19, 2004 complaint within 90 days of his February 14, 2003 indefinite suspension with intent to discharge, that complaint is untimely. Factually, since the referenced incidents in his correspondence and attachments to the Secretary and OSHA did not relate to the six specific SOX violations, his submissions on March 3, 2003 and in April 2003 were not SOX complaints. For the similar reasons, Mr. Levi's letters to the SEC, EEOC, NLRB, and Representative Gephardt within the same time frame were not SOX whistleblower complaints. Finally, Mr. Levi has not presented a sufficient basis to warrant an equitable suspension of the 90 day complaint filing requirement. Accordingly, since Mr. Levi failed to file a viable SOX whistleblower complaint within the time frame mandated by 18

U.S.C. § 1514 A (b) (2) (D), his complaint of a violation of the Sarbanes-Oxley Act's employee protection provision must be dismissed.

ORDER

The Respondent's Motion for Summary Decision is **GRANTED**. The SOX complaint of Mr. HUNTER R. LEVI is **DISMISSED**. The May 23, 2006 hearing is **CANCELLED**.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: May 2, 2006
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).