



In the Matter of:

EDWIN MOLDAUER,

ARB CASE NO. 04-022

COMPLAINANT,

ALJ CASE NO. 03-SOX-026

v.

DATE: December 30, 2005

CANANDAIGUA WINE CO.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:

Edwin Moldauer, *pro se*, Beer Sheva, Israel

For Respondent:

Paul Zief, Esq., Rogers, Joseph, O'Donnell & Phillips, San Francisco, California

FINAL DECISION AND ORDER

This case arose when the Complainant, Edwin Moldauer, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Canandaigua Wine Co., discriminated against him in violation of the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX).¹ Moldauer failed to timely file his complaint with OSHA and thus, the Administrative Review Board must determine whether Moldauer has carried his burden of establishing that he is entitled to equitable tolling of the limitations period. Finding that Moldauer has failed to carry his burden, we dismiss his appeal.

¹ 18 U.S.C.A. § 1514A (West 2002).

BACKGROUND

Congress enacted the Sarbanes-Oxley Act of 2002 (SOX) on July 30, 2002. Title VIII of Sarbanes-Oxley is designated as the Corporate and Criminal Fraud Accountability Act of 2002. Section 806 provides protection to employees against retaliation by companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934² and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934³ or any officer, employee, contractor, subcontractor, or agent of such companies because the employee provided information to the employer, a Federal agency or Congress relating to alleged violations of 18 U.S.C. 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. In addition, SOX protects employees 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 violation or alleged violation.⁴

On October 7, 2002, Canandaigua terminated Moldauer's employment.⁵ On November 1, 2002, Moldauer, represented by legal counsel, signed a severance agreement with Canandaigua.⁶ Among other things, Moldauer agreed to release any discrimination claims he might have under state and federal law against Canandaigua in exchange for the severance package.⁷ Nevertheless, shortly after signing the agreement, Moldauer filed a complaint against Canandaigua with the California Department of Fair Employment and Housing alleging discrimination and harassment in the workplace.⁸ Moldauer also met with the Federal Bureau of Investigation to report accounting irregularities and filed a complaint with the Securities and Exchange Commission.⁹ On December 11, 2002, Moldauer left the United States.¹⁰

² 15 U.S.C.A. § 78l(West 1997).

³ 15 U.S.C.A. § 78o(d).

⁴ 68 FR 31864 (May 28, 2003).

⁵ Respondent Canandaigua Wine Company, Inc.'s Reply Brief (Resp. Rep. Br.) at 2.

⁶ *Moldauer v. Canandaigua Wine Co.*, ALJ No. 2003-SOX-26, slip op. at 1 (Nov. 14, 2003)(Order Granting Motion for Summary Decision (S. D. O.)).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1-2.

¹⁰ *Id.* at 4; Respondent Canandaigua Wine Company, Inc.'s Reply Brief at 21.

On April 24, 2003, Moldauer filed a whistleblower complaint with the United States Department of Labor Office of Occupational Safety and Health (OSHA). Although the complaint itself did not reference SOX, OSHA investigated it as a SOX complaint and determined that Moldauer had failed to timely file it. On July 30, 2003, Moldauer requested a hearing before a Department of Labor Administrative Law Judge.¹¹

On October 9, 2003, Canandaigua filed a Motion for Summary Judgment arguing that Moldauer's cause of action was released as part of his severance agreement and that his complaint was untimely.¹² Moldauer responded that he had not released his right to pursue a SOX claim and that he was entitled to equitable estoppel and equitable tolling of the limitations period.¹³ Finding no genuine issues of material fact in dispute, the ALJ determined that the case should be dismissed because Moldauer had failed to establish that either equitable tolling or estoppel was warranted.¹⁴ Moldauer petitioned the Administrative Review Board to review the ALJ's S. D. O.¹⁵

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under SOX.¹⁶ We review a recommended decision granting summary decision de novo. That is, the standard the ALJ applies, also governs our review.¹⁷ The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.¹⁸ Accordingly summary decision is appropriate if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based.¹⁹ A genuine issue of material fact is one, the resolution of

¹¹ 29 C.F.R. § 1980.106(a)(2003).

¹² S. D. O. at 2.

¹³ *Id.*

¹⁴ *Id.* at 3-5.

¹⁵ *See* 29 C.F.R. § 1980.110(a).

¹⁶ Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a). The interim regulations implementing SOX were in effect when Moldauer filed the appeal in this case on November 24, 2003. *See* 68 Fed. Reg. 31860-31868 (May 28, 2003). The final regulations set forth at 29 C.F.R. § 1980.110(a) are identical.

¹⁷ 29 C.F.R. § 18.40 (2005).

¹⁸ Fed. R. Civ. P. 56.

¹⁹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

which, “could establish an element of a claim or defense and, therefore, affect the outcome of the action.”²⁰

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.²¹ “To prevail on a motion for summary judgment, the moving party must show that the nonmoving party ‘fail[ed] to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial.’”²² Accordingly, a moving party may prevail by pointing to the “absence of evidence proffered by the nonmoving party.”²³

Furthermore, a party opposing a motion for summary decision “may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing.”²⁴

DISCUSSION

An employee who alleges that his employer has retaliated against him in violation of SOX must file his complaint with OSHA within ninety days after the alleged violation occurred.²⁵ In this case, Canandaigua terminated Moldauer’s employment on October 7, 2002, and Canandaigua and Moldauer signed a severance agreement on November 1, 2002. Therefore, regardless which of the two actions is considered the violation, Moldauer’s complaint, filed on April 24, 2003, is untimely.

²⁰ *Bobreski v. United States EPA*, No. 02-0732 (RMU), 2003 WL 22246796, at *3 (D.D.C. Sept. 30, 2003).

²¹ *Lee v. Schneider Nat’l, Inc.*, ARB No. 02-102, ALJ No. 2002- STA-25, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 00-STA-52, slip op. at 2 (Dec. 13, 2002).

²² *Bobreski*, at *3 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

²³ *Bobreski*, at *3.

²⁴ 29 C.F.R. § 18.40(c). See *Webb v. Carolina Power & Light Co.*, No. 93-ERA-42, slip op. at 4-6 (Sec’y July 17, 1995). -

²⁵ 18 U.S.C.A. § 1514A(b)(2)(D).

However, SOX's limitations period is not jurisdictional and therefore is subject to equitable modification.²⁶ In determining whether the Board should toll a statute of limitations, the Board has been guided by the discussion of equitable modification of statutory time limits in *School Dist. v. Marshall*.²⁷ In that case, which arose under whistleblower provisions of the Toxic Substances Control Act,²⁸ the court articulated three principal situations in which equitable modification may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when "the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum."²⁹

Moldauer's inability to satisfy one of these elements is not necessarily fatal to his claim, however courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."³⁰ Furthermore, while we would consider an absence of prejudice to the other party in determining whether we should toll the limitations period once the party requesting modification identifies a factor that might justify such modification, "[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures."³¹

Moldauer bears the burden of justifying the application of equitable modification principles.³² Moldauer initially argues that Canandaigua actively misled him when "in remaining silent about its position that the agreement excluded Sarbanes-Oxley Act claims, Appellee was depriving Appellant of any indication that he had further claims under the Sarbanes-Oxley Act."³³ But Moldauer concedes that Canandaigua made no

²⁶ *Accord Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-50, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. Tennessee Valley Auth.*, ARB No. 98-11, ALJ No. 98-128, slip op. at 40-43 (ARB Apr. 30, 2001)..

²⁷ 657 F.2d 16, 19-21 (3d Cir. 1981).

²⁸ 15 U.S.C.A. § 2622 (West 2004).

²⁹ *Allentown*, 657 F.2d at 20 (internal quotations omitted).

³⁰ *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995), quoting *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

³¹ *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. at 152.

³² *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

³³ Appeal-Initial Briefing (In. Br.) at 9-10.

representations whatsoever regarding SOX.³⁴ Therefore, even assuming that Canandaigua was aware that Congress had enacted SOX, under the facts of this case, we can not find that Canandaigua's mere silence actively misled Moldauer regarding his cause of action, especially given that Moldauer was represented by counsel when he entered into the severance agreement.

Moldauer also claims that his counsel's knowledge or lack of knowledge of SOX raises a genuine issue of material fact. Moldauer is incorrect because he freely chose his attorney and ultimately clients must bear the consequences of the acts and omissions of their attorneys.³⁵ As the Supreme Court held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:

Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all fact, notice of which can be charged upon the attorney."³⁶

Thus even if Moldauer's attorney was unaware of SOX when he represented Moldauer in negotiating his severance agreement, this fact would not be material in determining whether Moldauer is entitled to equitable modification.

Moldauer next argues that the limitations period should be tolled because he was unaware of SOX during the limitations period. He also argues that whether he was represented by counsel after he entered into the severance agreement raised a material question of fact because the ALJ imputed his attorney's expertise to Moldauer.³⁷ Moldauer's argument is not persuasive because ignorance of the law will generally not support a finding of entitlement to equitable modification.³⁸ In *Rose v. Dole*,³⁹ a case

³⁴ In Br. at 9.

³⁵ *Pioneer Investment Services Co., v. Brunswick Assocs Ltd. P'ship*, 507 U.S. 380, 396 (1993); *Malpass v. General Elec. Co.*, Nos. 85-ERA-38, 39 (Sec'y Mar. 1, 1994).

³⁶ *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).

³⁷ In Br. at 6-7.

³⁸ *Accord Wakefield v. Railroad Retirement Bd.*, 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4-5 (ARB Aug. 31, 2000). See also *Felder v. Johnson*, 204 F.3d 168 (5th Cir. 2000)(court refused to toll a limitations period in case in which incarcerated pro se litigant claimed that he

arising under the whistleblower protection provisions of the Energy Reorganization Act (ERA),⁴⁰ the complainant, who filed his complaint twenty-six days late, alleged that the Secretary of Labor should toll the limitations period because he was unaware of his rights under the ERA until he consulted an attorney. Rose argued that he was unable to see an attorney because he was waiting to hear about his unemployment application and because he went on vacation.⁴¹ The court upheld the Secretary's refusal to toll the limitations period because it found that Rose's proffered excuses for failing to seek legal counsel were inadequate.⁴²

Accordingly, in this case it is immaterial whether Moldauer was represented by counsel subsequent to entering into his severance agreement. Even if he was in fact pro se, his ignorance of the law does not compel equitable tolling. Furthermore, regardless whether he left the United States willingly or under compulsion of law, the fact that he was able to file complaints against Canandaigua with the California Department of Fair Employment and Housing and Securities and Exchange Commission and met with the Federal Bureau of Investigation to report accounting irregularities before he left the country indicates that he could have sought legal counsel had he diligently sought to do so. Therefore, Moldauer's ignorance of his rights under SOX does not support equitable tolling and the issues whether he was represented by counsel and whether he left the United States voluntarily do not raise material issues of fact.

Moldauer has raised two additional issues which he claims present questions of material fact. First, he argues that whether the severance agreement included waiver of his rights under SOX raises a material fact question⁴³. Whether his severance agreement included a waiver of his SOX rights would of course be material to the merits of his SOX complaint. But it is not material to the issue whether he timely filed a SOX complaint.

Moldauer also argues that the nature of his communications with various government officials raises a fact question.⁴⁴ But Moldauer admits that he was ignorant

was unaware of the newly-enacted statute of limitations period and because of the inadequacies of the prison's library the law's text was inaccessible to him during the one-year period he had to file his claim).

³⁹ 945 F.2d 1331, 1335-1336 (6th Cir. 1991).

⁴⁰ 42 U.S.C.A. § 5851 (West 1995).

⁴¹ *Rose*, 945 F.2d at 1335-1336.

⁴² *Id.* at 1336.

⁴³ *In. Br.* at 6-7.

⁴⁴ *Id.* at 7.

of the SOX during the limitations period. Accordingly, as we have found that his ignorance does not excuse his failure to timely file his complaint, the resolution of the question whether the government officials with whom he conversed informed him about SOX or not is not material to our consideration of the tolling question.

We are mindful of the fact that SOX was newly enacted five to six months before the limitations period ran on Moldauer's claim, depending on the date of the alleged adverse action. But Moldauer's argument that he could not reasonably have been expected to have learned of his rights under SOX during that period is belied by the number of SOX complaints that were in fact filed during that five to six month period by both pro se and represented complainants.⁴⁵

Accordingly, finding no genuine questions of material fact relevant to the issue of whether Moldauer is entitled to modification of the limitations period and finding no legal basis for such modification, we **DISMISS** Moldauer's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

⁴⁵ See e.g., *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1370 (N.D. Ga. 2004); *Stone v. Duke Energy Corp.*, No. 3:03-CV-256, 2004 WL 1834597, at *1 (W.D. N.C. June 10, 2004); *Murray v. TXU Corp.*, 279 F. Supp. 2d 799, 802-803 (N.D. Tex. 2003); *Halloum v. Intel Corp.*, ALJ No. 2003-SOX-7 (ALJ Mar. 4, 2004); *Getman v. Southwest Securities*, ALJ No. 2003-SOX-8 (Feb. 2, 2004); *Flake v. New World Pasta Co.*, ALJ No. 2003-SOX-18 (July 7, 2003); *Willy v. Ameriton Properties, Inc.*, ALJ No. 2003-SOX-9 (June 27, 2003); *Kunkler v. Global Futures & Forex Ltd.*, ALJ No. 2003-SOX-0006 (Apr. 24, 2003); *Marchand v. AM South Bank*, ALJ No. 2003-SOX-3 (ALJ Apr. 24, 2003); *Gilmore v. Parametric Tech. Corp.*, ALJ No. 2003-SOX-1 (Feb. 6, 2003); *Greenwald v. UBS Paine Webber, Inc.*, ALJ No. 2003-SOX-2 (Apr. 17, 2003).

Wayne C. Beyer, Administrative Appeals Judge, concurring:

Although I agree with my colleagues' conclusion that Moldauer's Sarbanes-Oxley Act (SOX) complaint was untimely and is barred under equitable tolling principles, I write separately to address what I think is the threshold issue, that Moldauer's severance agreement released all claims arising from his employment with Canandaigua, including his SOX whistleblower complaint.

BACKGROUND

Canandaigua owned and operated wineries in California, including the Mission Bell Winery in Madera County. Moldauer worked for Canandaigua at the Mission Bell Winery as a financial analyst from September 2000 until October 2002, when Canandaigua terminated his employment for what it considered to be a continuing pattern of insubordination. After receiving warnings about his performance, Moldauer complained that he was harassed and discriminated against based on his nationality and immigration status. The company investigated and concluded that the claims were without merit. Moldauer then raised concerns about Canandaigua's accounting practices, specifically the allocation of overhead between two divisions. An audit team from Canandaigua's parent company found the practices to be reasonable and appropriate.

A. Severance agreement

Beyond that, it is not necessary to discuss Moldauer's disputes with Canandaigua, because on November 1, 2002, about three weeks after his termination, he entered into a Severance Agreement, General Release and Waiver (severance agreement) that legally ended them. Motion for Summary Decision, Penn Declaration, Exhibit 6. At the time the severance agreement was drafted and executed, Jacob Weisberg, an experienced employment attorney, represented Moldauer. Under the agreement, Moldauer acknowledged that the "terms and implications" have been "fully explained" to him; that he "has been given 21 days to consider this Agreement and decide for himself whether or not he wanted to sign it"; that he "has been advised to consult with an attorney of his choice concerning this Agreement and has been advised of the implications . . . of signing or not signing it"; that he "has carefully considered other alternatives to executing this Agreement, and has decided that he wants to sign it"; and that he was "entitled to change his mind and revoke this Agreement within seven (7) days after signing it." Agreement, paragraphs 1-6.

Moldauer also acknowledged that he "knows that there are various Federal, State and Local laws which prohibit employment discrimination on the basis of age, sex, race, color, creed, national origin, marital status, religion, disability, veteran status, and other protected classifications . . . "; that he "voluntarily give[s] up any rights he may have under these or any other laws with respect to his employment with CWC [Canandaigua Wine Company] or the termination (including the manner and circumstances of termination) of his employment . . . "; and that "CWC has not during the course of his

employment, or in the termination thereof (a) discriminated against him, (b) breached any express or implied contract with him, or (c) otherwise acted unlawfully towards him.” Agreement, paragraph 7.

In exchange for \$15,915.64 and fringe benefits enumerated in the Appendix to the severance agreement, Moldauer “release[s] and discharge[s]” Canandaigua

from all claims, liabilities, demands of causes of action, known or unknown, arising out of or in any way connected with or related to [Moldauer’s] employment or the termination (including the manner and circumstances of termination) thereof. This includes, but is not limited to, claims of wrongful discharge, breach of any implied or express contract, whether oral or written, intentional or negligent infliction of emotional harm, defamation, or any other tort. This also includes any claims based on any local, state, or federal constitution or statute relating to age, sex, race, or any other form of discrimination . . .

Agreement, paragraph 8.

In addition, Moldauer “agrees to not disclose any confidential information received or acquired during [his] employment concerning the business of [Canandaigua]” and to return all company property in his possession. Agreement, paragraphs 9-10.

Moldauer

waives and relinquishes all rights and benefits afforded by Section 1542 of the California Civil Code. [Moldauer] understands that the facts with respect to this Agreement may be different from the facts now known and believed by him to be true, and he accepts and assumes the risk of the facts being different, and agrees that this Agreement shall remain in all respects effective and not subject to termination by virtue of any such difference in facts and understands and acknowledges the significance and consequences of such waiver of Section 1542.

Agreement, paragraph 15.

The following language appears in all capitals above the line bearing Moldauer’s signature:

BY SIGNING THIS AGREEMENT AND GENERAL
RELEASE AND WAIVER, [MOLDAUER] STATES

THAT: HE HAD READ IT; HE UNDERSTANDS IT AND KNOWS THAT HE IS GIVING UP IMPORTANT RIGHTS; HE AGREES WITH EVERYTHING IN IT; HE WAS TOLD, IN WRITING, TO CONSULT AN ATTORNEY BEFORE SIGNING IT; HE HAS HAD 21 DAYS TO REVIEW THE AGREEMENT, AND TO THINK ABOUT WHETHER OR NOT HE WANTED TO SIGN IT; AND HE HAS SIGNED IT KNOWINGLY AND VOLUNTARILY.

Agreement.

B. Moldauer's violations of agreement

Notwithstanding the Agreement and general release of all claims arising from his employment with Canandaigua, about three weeks later, on November 19, 2002, Moldauer complained to the California Department of Fair Employment and Housing (DFEH) that Canandaigua had discriminated against and harassed him, and he met with an FBI agent about what he alleged were accounting irregularities. On November 24, Moldauer made contact with the SEC, the substance of which communication is unknown. And beginning in December 2002, Moldauer posted accusations of accounting fraud and retaliatory termination on an electronic bulletin board that Yahoo!, Inc., hosted.

Also in December 2002, someone anonymously sent Canandaigua's confidential price and customer lists to a Canandaigua competitor. A Madera County Sheriff's Department investigation concluded that Moldauer had stolen and disseminated Canandaigua's trade secrets. A warrant was issued for Moldauer's arrest on December 31, 2002, but it was not executed, because Moldauer had already fled the country. Previously, on December 19, 2002, Canandaigua filed a civil suit in federal court against Moldauer, alleging theft, dissemination of trade secrets and defamation.

In April of 2003, while visiting the SEC website, Moldauer came across the Sarbanes-Oxley Act, and on April 24, 2003, complained to the Department of Labor (DOL) that, "On Oct. 7, 2002, my employment has been terminated after I reported (1) financial mismanagement (2) abuse discrimination . . ." Motion for Summary Decision, Exhibit 1.

Following an investigation, OSHA notified Moldauer on July 2, 2003, that it was dismissing his SOX complaint as untimely. Motion for Summary Decision, Exhibit 2. Under the SOX, the complaint must be brought within 90 days of the alleged violation, i.e., when the discriminatory act has been both made and communicated to the complainant. *See* 18 U.S.C.A. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d). Canandaigua terminated Moldauer on October 7, 2002, but he did not file his whistleblower complaint with OSHA for more than six months, until April 24, 2003.

C. Proceedings before ALJ

On July 30, 2003, Moldauer appealed the OSHA decision to an ALJ. On October 9, 2003, Canandaigua filed a motion for summary decision, *see* 29 C.F.R. §§ 18.40-41 (2005), making two principal points: (1) Moldauer's SOX complaint was untimely and the limitations period was not tolled on the basis of his ignorance of the law; and (2) he had already released it by entering into the severance agreement. Memorandum of Points and Authorities in Support of Canandaigua's Motion for Summary Decision, at 12-19.

Moldauer, who was by then appearing pro se, filed an opposition to the motion for summary decision on October 23, 2003. Moldauer argued that the filing period should be tolled, because Canandaigua misled him, i.e., failed to disclose that he had a cause of action under the SOX; because he was prevented from finding out about and asserting his rights because economic necessity and the threat of criminal prosecution forced him to leave the United States; and because he provided "essentially the same narrative" of events to the DFEH and the FBI as he later gave in his SOX complaint. Edwin Moldauer's Response to Notice and Motion for Summary Decision Presented by Canandaigua Wine Company, at 5-6.

As to the severance agreement, Moldauer acknowledged that it settled his discrimination claim "based on his foreign nationality," but argued that SOX is a "whole new type of liability" that is not "fairly encompassed" within the terms of the release. Under California law involving good faith and fair dealing, Canandaigua should have told Moldauer that the company intended to exclude liability under SOX, and therefore he could not make an informed decision. *Id.* at 6-7.

On November 14, 2003, the ALJ granted Canandaigua's motion for summary decision. Order Granting Motion for Summary Decision. The ALJ distinguished between equitable estoppel, which he said focuses on actions taken by the respondent that prevent a complainant from filing a claim, and equitable tolling, which he noted focuses on the complainant's inability to obtain information bearing on the existence of the complainant's complaint.⁴⁶ *Id.* at 3. Moldauer, he observed, had opposed Canandaigua's motion for summary decision on both grounds. *Id.*

⁴⁶ The ARB has likewise distinguished those two doctrines of equitable modification of a limitations period. *See, e.g., Overall v. Tennessee Valley Auth.*, ARB No. 98-111, ALJ No. 97-ERA-53, slip op. at 39-40 (ARB Apr. 30, 2001). Equitable estoppel, also known as fraudulent concealment, applies when the complainant has discovered that the respondent has injured him, but the respondent acts affirmatively to prevent the complainant from filing a timely complaint. *Id.* at 39. Equitable tolling applies when a complainant, despite due diligence, is unable to secure information supporting the existence of a claim. *Id.* at 40.

The ALJ dealt with the severance agreement as raising an equitable estoppel issue:

Mr. Moldauer claims that the severance agreement he entered with Respondent should allow this matter to be adjudicated on the merits for one of two reasons: either the agreement was not intended to release Mr. Moldauer's right to pursue a cause of action based on his status as a whistleblower, or Respondent used the agreement to prevent him from pursuing his rights under the Act.

Id.

The ALJ did not address the validity of the release per se, but he did address its enforceability:

Even if the parties to the agreement did not intend to release Mr. Moldauer's right to pursue a cause of action under a whistleblower protection statute, this cause of action was not filed until after the statute of limitations had run. Thus, the dispositive issue is whether Respondent entered the severance agreement in order to prevent Mr. Moldauer from asserting his rights under the Act.

Id.

When he executed the severance agreement on November 1, 2002, Moldauer still had two months within which to file a timely SOX complaint. During that time, Moldauer filed a complaint with the DFEH, met with the FBI, and contacted the SEC. "Collectively, these actions indicate that Mr. Moldauer was not lulled into inaction by the severance agreement. As a result, equitable estoppel is inappropriate in this matter." *Id.*

The ALJ next addressed Moldauer's equitable tolling arguments in opposition to Canandaigua's motion for summary decision. Moldauer failed to show that his departure from the country prevented him from exercising his legal rights. *Id.* at 4. He did not demonstrate that his DFEH or SEC filings were "identical" to a SOX complaint, but filed in the wrong forum. *Id.* Finally, Moldauer was represented by counsel and neither his nor his lawyer's lack of knowledge of SOX's whistleblower protection provisions is ground for equitably tolling the limitations period. *Id.* Accordingly, the ALJ granted Canandaigua's motion for summary decision.

D. Arguments before ARB

Moldauer appealed the ALJ's decision to the ARB. Notice of Appeal on Order Granting Motion for Summary Decision Issued on 14 Nov. 2003. In his notice of appeal, he contends that without "submission of evidence and a trial it is premature to rule on: (a)

the limitations period and (b) the effect of a settlement agreement under state law.” *Id.* at 2 (emphasis omitted). “The Complainant never fully and voluntarily agreed or would have agreed to any agreement unless he was forced or imposed upon,” he writes. *Id.* at 5. He claims “there is no evidence” that “[h]e understood the contract;” that “[h]e was giving up important rights under Sarbanes-Oxley Act;” that “[h]e agreed with everything in it;” that “[h]e had 21 days to review it;” or that “[h]e signed it knowingly and voluntarily.” *Id.* Moldauer asserts further that “he was obstructed, misinformed and mislead [sic] getting his complaint in the legal system to pursue his rights any time sooner, [and] he was forced to participate to an agreement involuntarily.” *Id.* at 9 (emphasis omitted).

Moldauer’s initial brief before us also makes separate arguments with respect to the scope of the severance agreement, equitable estoppel and equitable tolling. Appeal – Initial Briefing, arguments 4, 5, 6, at 5-12. He argues that an issue of fact exists precluding summary judgment on the “circumstances before, at the time and after, the validity of [the severance] agreement.” *Id.* at 5. “Arguably, [the severance agreement] did not apply to all possible discrimination claims. . . . It does not explicitly apply to employees protected under the Sarbanes-Oxley Act.” *Id.* at 6-7. He did not release a SOX claim, but if he did, Canandaigua should be estopped from enforcing the release because of its wrongful conduct. Canandaigua “never disclosed” SOX coverage

during the 21-day period when appellant allegedly was able to consider reviewing the agreement (clause 2), nor in the following seven days when he could have cancelled it (clause 5). In remaining silent about its position that the agreement excluded [released] Sarbanes-Oxley Act claims, [Canandaigua] was depriving [Moldauer] of any indication that he had further claims under the Sarbanes-Oxley Act. . . . [Moldauer] actually and reasonably relied on [Canandaigua’s] conduct or representations in its presentation of the [severance] Agreement.

Id. at 9-10 (emphasis omitted). *See also* Reply Brief of Complainant to Reply of Respondent [sic] Rebuttal Brief, at 6-9, 11.

Likewise, Canandaigua’s reply brief makes distinct arguments: that Moldauer’s SOX complaint was time-barred, Respondent Canandaigua Wine Company, Inc.’s Reply Brief, at 9-12; that he failed to raise any material dispute of fact with respect to equitable tolling, *id.* at 12-26; that he failed to demonstrate any legitimate basis for equitable estoppel, *id.* at 26-28; and that, because Moldauer’s SOX claim was released, it was subject to dismissal for reasons independent of the 90-day filing period, *id.* at 28-30. On equitable estoppel, Canandaigua argues:

[I]t cannot possibly be argued that affirmative actions of Canandaigua somehow prevented Mr. Moldauer from filing a timely complaint. Unable to offer up evidence of active

misconduct, Mr. Moldauer instead argues that Canandaigua's silence on the subject of the Sarbanes-Oxley Act is sufficient to support equitable estoppel. This, of course, is not enough.

Id. at 27.

With regard to the severance agreement, Canandaigua notes that Moldauer executed a general release of "all claims" arising out of his "employment or the termination . . . thereof" including "any claims based on any . . . federal . . . statute relating to . . . any . . . form of discrimination." *Id.* at 28. Since Moldauer's SOX claim arose out of his employment with Canandaigua and is based on discrimination against him as a whistleblower, it was released under the severance agreement. *Id.* at 29.

ANALYSIS

In my view, the starting point should be whether, in executing the severance agreement, which includes a waiver and a general release, Moldauer released any claim he might have had under the SOX. Further, he has created no triable issue of fact over whether he executed the agreement knowingly and voluntarily or whether Canandaigua misrepresented or concealed facts that could lead to its invalidity. In addition, I agree that, even if Moldauer did not release a SOX claim, he did not file it within 90 days of his termination from employment, and that the limitations period is not enlarged through either the principles of equitable estoppel or equitable tolling.

A. Scope and effect of severance agreement and general release

1. *Applicable law*

An employee who, for consideration, has knowingly and voluntarily executed a general release of all claims arising from his or her employment is held to have released an unspecified employment discrimination or other federal cause of action. Because this case arose in California, I begin with two cases decided under California law.

In *Pardi v. Kaiser Permanente Hosp., Inc.*, 309 F.3d 840 (9th Cir. 2004), a respiration therapist and his employer entered into a settlement agreement under which he resigned and accepted \$130,000. The employee agreed to withdraw pending complaints with the EEOC and he executed a general release for all claims arising before the date of the agreement. The employee then brought Americans with Disabilities Act (ADA) and state law claims.

The Ninth Circuit affirmed the grant of summary judgment for the employer on ADA and state law claims that took place prior to the employee's execution of the agreement. *Id.* at 848. The court ruled that the plaintiff

failed to establish that the [s]ettlement [a]greement was procured by fraud, duress, failure of informed consent, or any other basis that would render it invalid. [The plaintiff] did not submit any evidence in support of his claims that [the employer] concealed facts that it had a duty to reveal, that he was induced to sign the agreement as a result of economic duress, or that he lacked informed consent because he had no lawyer and did not understand the agreement.

Id. However, the court remanded for further consideration claims for breach of the settlement agreement and an ADA claim for post settlement retaliation. *Id.* at 853.

In *Kaufman and Broad-South Bay v. Unisys Corp.*, 822 F. Supp. 1468 (N.D. Cal. 1993), the buyer brought an action against the seller of property who, it alleged, had not disclosed toxic waste buried on the property. However, the buyer had executed an agreement that acknowledged that the buyer had accused the seller of intentionally concealing the nature and extent of the contamination at the site, but which then released all claims against the seller for environmental cleanup of contaminants, both discovered and undiscovered. The court noted that, under California Civil Code § 1542, a person seeking to invalidate a release must show that it was procured through fraud, undue influence, mistake or deceit. A person can release unknown or unsuspected claims, but, if the parties have not dealt at arm's length and the releasor has relied on fraudulent statements or misrepresentations by the releasee, the release is only binding to the extent actually intended by the releasor. *Id.* at 1474. In that case, because the buyer was unable to allege that it relied on any misrepresentation of the seller when it entered into the release, the court dismissed the buyer's claim. *Id.*

A Fifth Circuit case, *Smith v. Amedisys*, 298 F.3d 434 (2002), is also illustrative. The plaintiff had allegedly made derogatory remarks about her employer. Facing termination, she resigned. Under a separation agreement, she received two months severance pay and favorable job references, and executed a general release of "all employment related claims." Nevertheless, she brought Title VII, 42 U.S.C.A. § 2000e et seq. (West 2003), and state law discrimination actions against her employer, which raised the general release as a defense.

The court said an individual may validly waive a claim of discrimination under Title VII, if the waiver is "knowing and voluntary." *Id.* at 441 (quotation and citation omitted). Factors to consider are:

- 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of [the] plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, and 6) whether consideration

given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Id.

Applying the factors, the court determined that the plaintiff's waiver of her Title VII discrimination action was knowing and voluntary. *Id.* at 441-44. Similarly, applying state law to her state law discrimination claim, the court concluded that plaintiff did not present substantial evidence that she was mistaken as to what she was signing, that she misunderstood the rights being released, or that she did not intend to release certain aspects of her claim. *Id.* at 444-47. Hence, the trial court properly granted summary judgment for the employer on the federal and state claims. *Id.* at 444, 446.

Another representative case is *Morgan v. Federal Home Loan Mortgage Corp.*, 172 F. Supp. 2d 98 (D.D.C. 2001). The Federal Home Loan Mortgage Corporation (Freddie Mac) terminated the plaintiff's employment as a result of a reduction in force. In exchange for six additional months of severance pay and outplacement assistance, the plaintiff executed a "Release of All Claims." The release applied broadly to any "known or unknown" "claims of any nature," including "claims arising out of or relating in any way to [plaintiff's] employment relationship" and "claims involving any damages or continuing or future effects arising out of or resulting from any actions or practices which took place or arose prior to the date of this Release of Claims." *Id.* at 106. The plaintiff had applied for, but been rejected for, four positions prior to signing the release. The plaintiff claimed discriminatory refusal to hire on the basis of race and political affiliation under Title VII and 42 U.S.C.A. § 1981 (West 2003). Freddie Mac raised the general release as a defense to the refusal to hire claims that arose prior to the date of the release.

The court said Virginia law governed according to the terms of the release. Under Virginia law, "When the release language is lawful and unambiguous, the agreement will be enforced as written." 172 F. Supp. 2d at 105-06. Likewise, under federal law, "plaintiff's decision to waive federal discrimination and retaliation claims will be enforceable if the decision was knowing and voluntary." *Id.* at 106. Whether or not the plaintiff knew he had not been selected for four positions before executing the release, "the language of this Release forecloses plaintiff's claim." *Id.* at 108. The plaintiff "surrendered" the refusal to hire claims "when he chose to execute the Release." *Id.*

Numerous other decisions also stand for the proposition that an employee who enters into a general release that releases "all claims" against an employer also releases claims that are not specifically mentioned. *See, e.g., Shaw v. Sacramento*, 250 F.3d 1289, 1293 (9th Cir. 2001) (under California law, general release deputy chief of police executed clearly and unambiguously waived Title VII claim for employment discrimination); *Fair v. International Flavors & Fragrances, Inc.*, 905 F.2d 1114 (7th Cir. 1990) (employee settled Title VII gender discrimination claim and signed general release, under which she received lump-sum payment, reinstatement and resumption of salary payments for agreed period; general release waived right to bring Employment

Retirement Income Security Act (ERISA) claim to include lump-sum settlement payment in determining base for computing pension); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.1986) (general release resolving factual dispute and executed by experienced labor lawyer released claim that his discharge was discriminatory under Age Discrimination in Employment Act (ADEA)); *Nail v. Brazoria County Drainage Dist. No. 4*, 992 F. Supp. 921 (S.D. Tex. 1998) (general release of claims arising out of employment barred employee's § 1983 claim for deprivation of due process in connection with his dismissal, where employee received at least \$7,500 in consideration for signing release); *Baba v. Warren Mgmt. Consultants, Inc.*, 882 F. Supp. 339, 344 (S.D.N.Y. 1995) (applying same 6-factor test as in *Amedisys*, court held that, in executing general release, plaintiff "knowingly and willfully" waived Title VII discrimination claim).

2. *Application to Moldauer's severance agreement*

Under these precedents, in executing a general release of all claims against Canandaigua, Moldauer also knowingly and voluntarily released any claim for discrimination he might have had under the SOX. An experienced employment attorney represented Moldauer and "fully explained" the "terms and implications" of the severance agreement to him. Moldauer had 21 days to "consider" the agreement and "decide for himself whether he wanted to sign it." He also had 7 days after signing the agreement to "change his mind and revoke" it.

In addition, Moldauer acknowledged that "there are various Federal . . . laws, which prohibit employment discrimination" and that he was "voluntarily [giving] up any rights he may have under these or any other laws with respect to his employment with [Canandaigua] or the termination . . . of his employment." He denied that Canandaigua had "(a) discriminated against him, (b) breached any express or implied contract with him, or (c) otherwise acted unlawfully towards him." In consideration of payment of \$15,915.64 and enumerated fringe benefits, Moldauer "release[d] and discharge[d]" Canandaigua "from all claims" "related to" his "employment" with Canandaigua or its "termination." Although not specifically mentioning the SOX, those claims include but are not limited to "wrongful discharge" and "any claims based on . . . any . . . form of discrimination."

Moreover, Moldauer "waive[d] and relinquishe[d] all rights and benefits afforded by Section 1542 of the California Civil Code" and he "accept[ed] and assume[d] the risk of the facts being different" from those he understood at the time he entered into the agreement. And he signed the agreement under a paragraph which, in all capitals, reiterates his rights and then avers that he has executed the "AGREEMENT AND GENERAL RELEASE" "KNOWINGLY AND VOLUNTARILY."

Accordingly, for valuable consideration, Moldauer knowingly and voluntarily executed a general release of all claims, arising out of his employment with Canandaigua, including employment discrimination. SOX protects whistleblowers from employment "discrimination." 18 U.S.C.A. § 1514A(a). Therefore, Moldauer waived a SOX claim,

even though the Sarbanes-Oxley Act is not specifically mentioned in the release. *See, e.g. Pardi; Smith; Morgan, supra.* The release is effective as to even unknown, unspecified claims. *Kaufman, supra.*

To prove that he did not intend to release a SOX claim, Moldauer seeks to show through extrinsic evidence that Canandaigua obtained the facially valid severance agreement through fraud or misrepresentation of the facts. *Kaufman, supra.* However, Moldauer was aware of the facts giving rise to a SOX complaint before he entered into the severance agreement: he raised concerns about Canandaigua's accounting practices, specifically the allocation of overhead between two divisions, followed by Canandaigua's termination of his employment.

But the gravamen of Moldauer's complaint is not that Canandaigua concealed facts from him that were pertinent to his SOX cause of action, but rather that Canandaigua concealed the existence of the SOX law itself. None of the case law, though, requires an employer to advise an employee of all of the theories upon which the employee might sue the employer before the employee enters into a settlement agreement. That obligation rests with the employee's attorney. To say, as Moldauer does, that Canandaigua entered into the severance agreement to extinguish a SOX action is to say nothing more than the agreement itself; it evidences an intent by both parties to bring finality to a business relationship. Thus, in the light most favorable to Moldauer's contentions, there was no actionable fraud or misrepresentation. His assertions that he did not waive a right to bring a SOX complaint or was defrauded into waiving it fail as a matter of law.

B. Timeliness, estoppel and tolling

A valid release, knowingly and voluntarily entered into for valuable consideration, and not voidable in part because of concealed facts could end the matter. Yet there are other good and sufficient reasons why the ALJ correctly granted summary judgment. Canandaigua argues them well and my colleagues discuss them, so I mention my concurrence only for completeness.

Even if Moldauer did not waive his SOX complaint, it was filed too late to be considered. Under the SOX, a complaint must be brought within 90 days of the alleged violation. *See* 18 U.S.C.A. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d). Canandaigua terminated Moldauer on October 7, 2002, but he did not file his whistleblower complaint with OSHA for more than six months, until April 24, 2003. It should be barred because it was untimely.

Equitable estoppel could enlarge the limitations period if Canandaigua hid the facts necessary for Moldauer's SOX claim from him. But even he does not say Canandaigua hid the facts from him, only the existence of the SOX law itself. And his evidence of concealment is only that Canandaigua did not advise him of his legal rights – a duty they did not have.

In the alternative, Moldauer asserts that equitable tolling should apply. For instance, he could not attend to his SOX claim, because he was out of the country. However, if he was unavailable, it was because of circumstances of his own making.

Moldauer also says his complaint to DFEH, and his contacts with the FBI and SEC fell within the 90 day limitations period. But to suspend the limitations period for filing a SOX claim, he must have filed “the precise statutory claim in issue, but has done so in the wrong forum.” In contesting summary judgment for Canandaigua, Moldauer has not made that showing. At most, he contends that he provided those agencies with “essentially the same narrative” of events. Indeed, since he admitted that he was not aware of the SOX until April 2003, it is impossible for him to have filed “the precise statutory claim in issue” three months before with the wrong agency. Therefore, Moldauer is not entitled to an enlargement of the filing deadline, which he missed.

In sum, I join in concluding that the ALJ properly granted summary judgment for Canandaigua, and would **DISMISS** Moldauer’s SOX complaint.

WAYNE C. BEYER
Administrative Appeals Judge