



In the Matter of:

CYNTHIA LOTSPEICH,

ARB CASE NO. 05-072

COMPLAINANT,

ALJ CASE NO. 2005-SOX-14

v.

DATE: July 31, 2006

STARKE MEMORIAL HOSPITAL,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Cynthia Lotspeich, pro se, Culver, Indiana

For the Respondent:

Larry W. Bridgesmith, Esq., Mark W. Peters, Esq., Waller Lansden Dortch & Davis, PLLC, Nashville, Tennessee

FINAL DECISION AND ORDER

This case arises under Section 806 (the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (West Supp. 2005), and its implementing regulations. 29 C.F.R. Part 1980 (2005). Cynthia Lotspeich filed a complaint alleging that Starke Memorial Hospital retaliated against her in violation of the SOX. On March 3, 2005, an Administrative Law Judge (ALJ) issued a “Recommended Order of Dismissal” (R. D. & O.) recommending dismissal of the complaint. Lotspeich appealed the ALJ’s decision to the Administrative Review Board. For the following reasons, we dismiss her appeal.

BACKGROUND

Starke hired Lotspeich as a Healthcare Nurse on July 14, 2003. *See* September 14, 2004 Determination of the Occupational Safety and Health Administration (OSHA), Starke Memorial Hospital/Lotspeich/5-2210-04-008 (Determination) at 1. Starke discharged Lotspeich on or about March 31, 2004. *Id.* On June 15, 2004, Lotspeich, through her attorney, filed a complaint alleging that, prior to her discharge, she had informed her supervisor, other hospital administrators, and her congressman that Starke “was involved in Medicare fraud.” *See* June 15, 2004 Letter to OSHA (Complaint) at 1. She contends that, because she reported this fraud, “her supervisors harassed her with almost daily harangues, reduced her hours, and ultimately terminated her employment with the hospital.” *Id.*

OSHA investigated her complaint and determined that Starke had not violated the SOX. Determination at 2. OSHA mailed copy of the Determination to Lotspeich’s attorney. He received the Determination on September 17, 2004. R. D. & O. at 3; Complainant’s Response to Supplemental Order to Show Cause (Response), Document 8.

On November 30, 2004, Lotspeich submitted a letter to the Office of Administrative Law Judges requesting review of the Determination and waiver of the limitations period applicable to her appeal. Response at 1. In response, the ALJ issued an Order to Show Cause on December 20, 2004, allowing Lotspeich to indicate “why her complaint should not be dismissed for failure to file her request for appeal within thirty days of receipt of the September 14, 2004 notice of findings from OSHA.” Order to Show Cause at 2.

Lotspeich did not respond to the Order to Show Cause. She contacted the ALJ on January 21, 2005 to inquire about the status of her appeal and informed the ALJ that she never received a copy of the Order to Show Cause. In response, the ALJ issued a Supplemental Order to Show Cause on January 24, 2005, allowing Lotspeich fourteen additional days to submit a response. Lotspeich responded to the Supplemental Order to Show Cause on January 31, 2005.¹ In her response, she argued that her appeal should not be dismissed because she did not receive a copy of OSHA’s Determination. Response at 1. She also indicated that, although her attorney received a copy of the Determination, he failed to forward it to her. *Id.* at 2.

The ALJ issued an R. D. & O. on March 3, 2005, in which she concluded that Lotspeich’s appeal of the Determination was untimely. R. D. & O. at 5. She also concluded that Lotspeich had not established grounds for the application of the doctrine

¹ Lotspeich dated the Response “January 21, 2005,” but the date stamp on that document indicates that the ALJ received it on January 31, 2005. *See* Response at 1.

of equitable tolling. *Id.* On March 11, 2005, Lotspeich petitioned for review of the R. D. & O.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the SOX. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64272 (Oct. 17, 2002); 29 C.F.R. § 1980.110.

Pursuant to the SOX and its implementing regulations, the Board reviews the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 1980.110(b). However, the Board reviews an ALJ's conclusions of law *de novo*. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 04-SOX-51, slip op. at 7 (ARB June 29, 2006).

DISCUSSION

The regulations governing the SOX require an appeal from a determination by OSHA to be filed within 30 days of issuance of the determination. 29 C.F.R. § 1980.106(a).² However, the time limits for filing complaints and requesting appeals in whistleblower cases are not jurisdictional, and may be subject to application of the doctrine of equitable tolling. *See, e.g., Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114 and 115, ALJ Nos. 2004-SOX-20 and 36, slip op at 16 (ARB June 2, 2006). When deciding whether to relax the limitations period in a particular case, the Board has been guided by the discussion of equitable tolling of statutory time limits in *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981). The Third Circuit recognized three situations in which tolling is proper:

- (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

² "Any party who desires review, including judicial review, of the findings and preliminary order, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to paragraph (b) of Sec. 1980.105."

657 F.2d 16, 18-20 (1981) (citation omitted).

Lotspeich filed her appeal 80 days after the issuance of the Determination. R. D. & O. at 4. Because her appeal is untimely, Lotspeich bears the burden of justifying the application of equitable tolling principles. *See, e.g., Santamaria v. EPA*, ARB No. 05-023, ALJ No. 2004-ERA-25, slip op. at 4 (ARB Mar. 31, 2005).

In her brief, Lotspeich does not contend that Starke actively misled her as to her cause of action or that she mistakenly filed her claim in the wrong forum. However, she does contend that she “was prevented in an extraordinary way from asserting [her] rights based on the failure of O.S.H.A. to mail [her] a Letter of Determination and the failure of [her] former attorney to forward [her] a copy of the Letter of Determination.” Complainant’s Brief at 6.³

We agree with the ALJ’s conclusion that, even if Lotspeich did not receive a copy of the Determination, delivery of a copy of the Determination to her attorney constituted notice to Lotspeich of OSHA’s Determination. R. D. & O. at 5. Lotspeich’s Response indicates that she was represented by counsel during the 30 days she could have appealed OSHA’s Determination. *See* Response at 1-2, Documents 1-2. The Board has held that equitable tolling is generally inapplicable when a complainant is represented by counsel. *See Day v. Oak Ridge Operations, U.S. Dept. of Energy*, ARB No. 02-032, ALJ No. 1999-CAA-23 slip op. at 2, fn. 2, (ARB July 25, 2003). We have noted in previous cases an attorney’s failure to timely file an appeal does not ordinarily constitute an “extraordinary” circumstance justifying equitable tolling. *See, e.g., Dumaw v. Int’l Bhd. of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-6, (Aug. 27, 2002), slip op. at 5. Likewise, the alleged failure of Lotspeich’s attorney to forward a copy of the Determination to her did not toll the 30 day limitations period.

Accordingly, finding that Lotspeich did not timely file her appeal to the ALJ, and finding no grounds justifying equitable tolling of the limitations period, we **DISMISS** her petition for review.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

³ In response to our briefing order, Lotspeich submitted a document entitled “Request For Motions: To Reverse Recommended Order Of Dismissal Issued On March 3, 2005 By Administrative Law Judge Linda S. Chapman And To Remand This Matter For De Novo Hearing Before The ALJ.” On April 22, 2005, we issued an Order notifying all parties and interested persons that Lotspeich had informed the Board that this document constituted her initial brief.