U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 March 2006

In the Matter of:

PETER T. SZYMONIK,
Complainant,

v.

TYMETRIX, INC.,
Respondent

CASE NO.: 2006-SOX-50

Appearances: Michael D. O'Connell, Esquire
For the Complainant

William G. Miossi, Esquire
For the Respondent

Before: Edward Terhune Miller
Administrative Law Judge

RECOMMENDED DECISION AND ORDER OF DISMISSAL

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes Oxley Act of 2002, 18 U.S.C. § 1514A (herein "SOX" or "the Act"). The Act prohibits discriminatory actions by publicly traded companies against their employees who have provided information to their employer, a federal agency or Congress that the employees reasonably believe constitute violations 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.

PROCEDURAL HISTORY

On November 4, 2005, Peter T. Szymonik (herein "Complainant") filed a formal complaint with the Occupational Safety and Health Administration (herein "OSHA"), Department of Labor against TyMetrix, Inc. (herein "Respondent") under the Act. On January 4, 2006, after conducting an investigation, the Regional Administrator of OSHA issued his report. The Administrator found that the complaint was untimely in that Complainant failed to file his complaint within 90 days of the alleged employment violation. The Administrator also stated

that grievances, arbitration actions and settlement discussions are not conditions which would justify an extension of a whistleblower complaint filed under SOX. On January 18, 2006, Complainant filed a timely appeal of that determination.

On February 1, 2006, because the threshold issue of the timeliness of the complaint, which was dismissed by the Administrator as untimely, must be resolved, this tribunal ordered a submission of briefs or legal memoranda identifying the precise issues involved and legal authorities that would apply to their resolution with respect to the timeliness of the complaint. On February 13, 2006, Complainant submitted a legal memorandum as to the issue of timeliness. On February 13, 2006, Respondent also submitted a brief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In his November 4, 2005, complaint, Complainant contends that he was terminated from his job as Vice President of Technology with Respondent on March 14, 2005 after expressing concerns to his supervisors regarding violations of federal and state law. OSHA Complaint. Complainant contends that this action was in direct response to concerns he expressed regarding the security of clients' financial information and noncompliance with SOX. *Id.* at 1. He also contends that he expressed concerns on behalf of numerous employees who complained to him regarding racial and sexual discrimination by Respondent. *Id.* at 2. Complainant contends that he followed the proper internal whistleblower procedures and was terminated as a result. *Id.*

Complainant asserts that he entered into a tolling agreement, dated June 8, 2005, with Respondent which provided that he "would not file any claims, including a whistleblower claim under SOX, and that TyMetrix agreed not to assert any defenses to any such claims based upon a failure to assert these claims in a timely manner." Complainant's Legal Memorandum ("Comp. Legal Memo.") at 1-2. Complainant attached a copy of a letter sent by his attorney to Respondent's attorney as evidence. Exhibit A to Comp. Legal Memo. Respondent acknowledges that the parties entered into a "tolling agreement 'for purposes of having settlement discussions.'" Respondent's Brief ("Resp. Brief") at 7. As a result, Respondent "agreed not to assert any statute of limitations defenses based on Mr. Szymonik's failure to assert a timely claim, to the extent that any delay resulted from these settlement discussions." *Id.*

Respondent contends that it is not a covered company under SOX, so that this tribunal lacks jurisdiction to entertain the complaint under the Act. Respondent has taken no position with respect to the timeliness of the complaint. Respondent asserts that because it is not a publicly-traded company or another type of entity covered under SOX, it is not subject to the whistleblower provisions within the Act. Resp. Brief at 2; 18 U.S.C. § 1514A(a); 29 C.F.R. §§ 1980.101, 1980.102.

Under the Act, an employee alleging discharge or other discrimination must file a complaint with the Secretary of Labor within 90 days of the violation. 18 U.S.C. § 1514A(b)(2)(D) ("An action . . . shall be commenced not later than 90 days after the date on which the violation occurs."); see also 29 C.F.R. § 1980.103(d) ("Within 90 days after an alleged violation of the Act occurs (i.e., when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been

discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.") In this case, the statute of limitations began to run when Complainant was terminated from his employment on March 14, 2005, as that is the date of the alleged adverse action. *See, e.g., Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 97-ERA-53, slip op. at 36 (ARB Apr. 30, 2001) (date employer communicates to employee its intent to implement adverse employment decision marks occurrence of violation rather than date employee experiences consequences of decision). Complainant filed a complaint with the Secretary of Labor on November 4, 2005, well after the 90-day statute of limitations. Complainant was required to file his complaint by June 12, 2005. Therefore, his complaint is untimely under the statute. 18 U.S.C. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d).

Despite the fact that his complaint was untimely under § 1514A(b)(2)(D), Complainant argues that, because of the tolling agreement he entered into with Respondent, he should be entitled to equitable tolling and equitable estoppel. Comp. Legal Memo. at 9-10. As a result, he contends that his claim is properly maintained and should not be dismissed. Throughout Complainant's Legal Memorandum, he uses the terms "equitable tolling" and "equitable estoppel" interchangeably. However, equitable tolling and equitable estoppel are distinct, albeit related, legal doctrines. *Moldauer v. Canadaigua Wine Co.*, 2003-SOX-26 (ALJ Nov. 14, 2003). Therefore, each doctrine must be discussed separately.

Complainant asserts that he is entitled to equitable tolling. *Id.* Equitable tolling focuses on the complainant's inability, despite all due diligence, to obtain vital information bearing on the existence of his complaint. *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000). Thus, equitable tolling extends the statute of limitations until the complainant can gather information needed to articulate a claim.

Generally, there are three situations in which tolling the statute of limitations 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. *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 20 (3rd Cir. 1981), *citing Smith v. American President Lines*, Ltd., 571 F.2d 102, 109 (2d Cir. 1978). However, courts have held that the restrictions on equitable tolling must be scrupulously observed. Equitable tolling is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious claim. *Doyle v. Alabama Power Co.*, 1987-ERA-43 (Sec'y, Sept. 29, 1989). The burden is on the party seeking the benefit of equitable tolling to establish such tolling is warranted. *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1242 (11th Cir. 2004).

With respect to the first possible basis for tolling the statute of limitations, Complainant has not alleged, nor do the facts establish, that Respondent actively misled him in any way regarding his cause of action under the Act. In fact, Complainant's attorney explicitly notes in his June 8, 2005, letter to Respondent's attorney that he is aware of Complainant's right to file a whistleblower claim under the Act. Exhibit A to Comp. Legal Memo. There is no evidence that Respondent persuaded Complainant not to file a SOX claim.

Similarly, with regard to the second ground which might support application of equitable tolling, Complainant has failed to point to any extraordinary circumstances that may have prevented him from timely asserting his rights under the Act. Complainant was represented by counsel within the 90-day statute of limitations period. Therefore, he is deemed to have had constructive notice of the Act's whistleblower complaint procedure and the agency to which such a complaint should have been filed. *Leorna v. U.S. Dept. of State*, 105 F.3d 548, 551 (9th Cir. 1997). There is no evidence presented by Complainant of extraordinary circumstances preventing him from filing a claim under the Act.

Finally, regarding the third situation under which the doctrine might apply, making a proper claim but mistakenly doing so in the wrong forum, does not apply here. There is no evidence submitted by Complainant that he filed a claim in any other forum. Therefore, Complainant has failed to show that he is entitled to equitable tolling.

Complainant asserts that he is also entitled to equitable estoppel. Comp. Legal Memo. at 9-10. Equitable estoppel focuses on actions taken by the respondent that prevent a complainant from filing a claim. *Santa Maria*, 202 F.3d at 1176. In *Cerbone v. International Ladies' Garment Workers' Union*, 768 F.2d 45 (2d Cir. 1985), the Court explained how the doctrine can be used in cases involving settlement negotiations:

> Equitable estoppel has been invoked in cases where the defendant misrepresented the length of the limitations period or in some way lulled the plaintiff into believing that it was not necessary for him to commence litigation. *See e.g. Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959). One factor that frequently appears in the estoppel cases is a settlement negotiation. Thus, where the defendant assures the plaintiff that he intends to settle and the plaintiff, in reasonable reliance on that assurance, delays in bringing his suit until after the statute has run, the defendant may be estopped to rely on the limitations defense. *See, e.g., Atkins v. Union Pacific R. Co.*, 685 F.2d 1146 (9th Cir. 1982); *United States v. Reliance Insurance Co.*, 436 F.2d 1366 (10th Cir. 1971).

Cerbone, 768 F.2d at 49-50.

Complainant does not allege that Respondent affirmatively prevented him from filing a complaint. There is no indication that Respondent assured Complainant that the two parties would reach a settlement in their discussions. In fact, Complainant's attorney sent the June 8, 2005, letter to Respondent's attorney regarding the tolling agreement, which Respondent responded to via email. Exhibit A to Comp. Legal Memo. There was no affirmative attempt on the part of Respondent to lull Complainant into inaction. Respondent stated that "at no time did either TyMetrix or its counsel make any representations whatsoever to Szymonik or his counsel concerning the legal efficacy of such an [tolling] agreement with respect to SOX or any other potential claim or cause of action." Resp. Brief at 8. Complainant has never asserted that Respondent made any representations to that effect. Therefore, Complainant has failed to show that he is entitled to equitable estoppel.

Public policy concerns should also be considered in this case. As the Court in *Allentown* explained, "We [the Court] may not ignore the legislative intent to grant the defendant a period

of repose after the limitations period has expired." *Allentown*, 657 F.2d at 20. When the United States Congress passed the Sarbanes Oxley Act, its explicit intent was for a 90-day statute of limitations for whistleblower claims. 18 U.S.C. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d). There is no suggestion in the language of the Act that Congress intended for private parties to enter into private, legally binding agreements to toll the statute of limitations. The purpose of the Act is "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat 745. To allow private parties to contract at will out of the 90-day limitation would effectively thwart the explicit legislative intent of Congress regarding the applicable statute of limitations.

Because Complainant's assertion that his claim should not be time-barred under 18 U.S.C. § 1514A(b)(2)(D) has not prevailed, it is not necessary to address whether Respondent is covered under the Act.

ORDER

The claim of Peter T. Szymonik under the Sarbanes-Oxley Act is dismissed as time-barred.

A

Edward Terhune Miller
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed by person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found in OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed.