



In the Matter of:

MARK CORBETT,

ARB CASE NO. 07-044

COMPLAINANT,

ALJ CASE NO. 2006-SOX-065

v.

DATE: December 31, 2008

**ENERGY EAST CORPORATION,
ROCHESTER GAS AND ELECTRIC, and
NEW YORK STATE ELECTRIC AND GAS,**

RESPONDENTS.

Appearances:

For the Complainant:

Darryll W. Bolduc, Esq., *Bolduc Law Firm PLLC*, Charlotte, North Carolina

For the Respondent:

Judith E. Harris, Esq., Tara Patterson Hammons, Esq., *Morgan, Lewis & Bockius LLP*, Philadelphia, Pennsylvania

FINAL DECISION AND ORDER

On July 13, 2005, Mark Corbett filed a complaint with the Department of Labor, Occupational Safety and Health Administration (OSHA) alleging that his employer, Energy East Corporation and its subsidiaries, Rochester Gas and Electric and New York State Electric and Gas (Respondents or RGS Energy Group), retaliated against him in violation of Section 806 of the Sarbanes-Oxley Act of 2002 for Corbett's refusal to participate in defrauding a union and for reporting accounting irregularities. 18 U.S.C.A. § 1514A (West 2005).

OSHA found that Corbett failed to demonstrate that his alleged protected activity was a contributing factor in his discharge and dismissed his complaint on February 21, 2006. Corbett requested a hearing before an Administrative Law Judge (ALJ). Before a hearing was held, the ALJ assigned to the case issued a show cause order requesting that Corbett show cause why his

complaint should not be dismissed as untimely. 18 U.S.C.A. § 1514A(b)(2)(D) (90-day statute of limitations for filing a complaint). Both parties briefed the issue and furnished exhibits.

After considering arguments, the ALJ concluded that Corbett was “aware or reasonably should have become aware that his termination from Respondents’ employment was imminent and definitive” more than 90 days before he filed his complaint and therefore dismissed Corbett’s case without reaching the merits of his complaint. [Recommended] Decision and Order (R. D. & O.) at 7. As discussed below, because we agree with the ALJ’s findings and conclusions, we affirm the ALJ’s dismissal of Corbett’s claim as untimely.

BACKGROUND

We set forth background facts that concern the issue of the timeliness of Corbett’s complaint. On November 29, 2004, James Laurito, President of the RGS Energy Group, notified Corbett that he was unhappy with Corbett’s performance as Director of Human Resources. R. D. & O. at 3; Respondents’ Motion for Summary Decision, Laurito Affidavit, Attachment A. At that time, Laurito placed Corbett on a performance improvement plan and told him that, if he did not improve significantly, he would be relieved of his responsibilities. R. D. & O. at 3; Laurito Affidavit, Attachment A.

A few months later, Laurito, by letter dated March 3, 2005, informed Corbett that he was not satisfied with his progress and requested a meeting on March 8 to discuss the issue. R. D. & O. at 3; Complainant’s Response to Show Cause Order, Exhibit (CX) 10. During a teleconference on March 8, Corbett informed Laurito that he would not work on any of Laurito’s performance concerns. R. D. & O. at 3; Laurito Affidavit at 5. Following the telephone conference, Laurito wrote a letter to Corbett dated March 21, 2005. R. D. & O. at 3; CX 1. Laurito’s letter gave Corbett an option allowing him to continue as Director, but Corbett had to inform him of his election to do so by March 23 and meet with Laurito on March 28 to work on the performance deficiencies specified in the letter. R. D. & O. at 3; CX 1.

In the event that Corbett declined to comply with the stated conditions for retaining his employment as Director of Human Resources, Laurito included a Separation Agreement, General Release and Waiver with the letter. R. D. & O. at 4; Respondents’ Response to Show Cause Order, Exhibit (RX) 1A. The Agreement provided that Corbett would resign his position as Human Resources Director effective April 1, 2005; that he would perform such duties as the company assigned working off site at a salary of \$115,000 a year for a period not to exceed November 30, 2005; and that he would then be eligible to take early retirement effective December 1, 2005. RX 1A. The March 21 letter required acceptance or rejection of the Separation Agreement by April 15. R. D. & O. at 4; CX 1.

The March 21 letter also discussed the consequences if Corbett were to take no action: “[i]n default of an assurance from you that you want to work with me on improving your performance, you will be relieved of your responsibilities as Director of Human Resources on April 1, 2005. You will have until April 15, 2005 to consider, sign and return the enclosed

Separation Agreement. If I do not have a signed Separation Agreement from you by April 15, 2005, your employment will terminate on that date.” R. D. & O. at 3-4; CX 1.

On March 31, Laurito sent Corbett another letter. Laurito informed Corbett that, because he failed to contact him by March 23 and to meet with him by March 28, he assumed that Corbett had elected not to work with him to improve his performance and that Corbett was considering the Separation Agreement. R. D. & O. at 4; CX 3. The letter also informed Corbett that Laurito had suspended Corbett’s access to the building and computer network pending resolution of the Separation Agreement. R. D. & O. at 4; CX 3. In response to a voice mail message Corbett left Laurito on March 29 suggesting that he wanted to make a counterproposal to the Separation Agreement, Laurito wrote that he was not inclined to change any of the economic components. R. D. & O. at 4; CX 3. Finally, Laurito’s March 31 letter warned Corbett, “[I]f I do not receive a signed Agreement from you by April 15, 2005, the Company’s proposal will be withdrawn as indicated in my March 21st letter.” R. D. & O. at 4; CX 3. Corbett received the letter on April 1. RX 1D.

Thus, as of April 1, 2005, Corbett knew that his employment with RGS Energy Group would terminate, either on or before November 30, 2005, if he accepted the terms of the Separation Agreement, or on April 15, 2005, if he did nothing. Corbett chose to do nothing. On April 26, Laurito sent Corbett another letter, confirming events. R. D. & O. at 4; CX 4. Corbett had missed the March 23 deadline to agree to work with Laurito on a performance improvement plan, and he missed the April 15 deadline to accept the terms of the Separation Agreement. As forewarned, Laurito terminated Corbett’s employment effective April 15, 2005. R. D. & O. at 4; CX 4.

Shortly after the ALJ issued her order, Corbett filed a motion for reconsideration arguing for tolling the statute of limitations under SOX because he filed a claim with the National Labor Relations Board (NLRB) on April 29, 2005. The ALJ denied Corbett’s motion on the ground that filing with the NLRB did not toll the limitations period for filing a claim under SOX. Order Denying Reconsideration and Request for Hearing (Order on Reconsideration) at 6. Corbett then appealed to the Administrative Review Board (ARB or Board).

JURISDICTION AND STANDARD OF REVIEW

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

The ARB reviews the ALJ’s factual determinations under the substantial evidence standard. 29 C.F.R. § 1980.110(b) (2007). In reviewing the ALJ’s conclusions of law, the ARB, as the Secretary’s designee, acts with “all the powers [the Secretary] . . . would have in making the initial decision” 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ’s conclusions of law de novo. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 8 (ARB June 29, 2006).

DISCUSSION

Section 806 of the Sarbanes-Oxley Act of 2002 prohibits a “company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company” from discharging, demoting, suspending, or in any other manner discriminating against an employee in the terms and conditions of employment because that employee engaged in protected activity under Section 806. 18 U.S.C.A. § 1514A(a). Protected activity includes providing information or assisting in an investigation regarding activity the employee reasonably believed constituted listed categories of fraud or securities violations. 18 U.S.C.A. § 1514A(a)(1)-(2).

OSHA determined, and the Respondents did not contest, that each of the Respondents had a class of securities registered under Section 12 or is required to file under Section 15(d) and thus each qualified as a covered employer under Section 806. OSHA Order at 1. Nor do we need to address whether Corbett’s alleged refusal to participate in defrauding a union and reporting of accounting irregularities were protected activities under SOX. The question before us on appeal from the ALJ’s R. D. & O. and Order on Reconsideration is whether Corbett’s complaint to OSHA under SOX was timely filed.

An employee alleging retaliation in violation of Section 806 must file his complaint within 90 days of the alleged violation. 18 U.S.C.A. § 1514A(b)(2)(D) (“An action ... shall be commenced not later than 90 days after the date on which the violation occurs.”); 29 C.F.R. § 1980.103(d) (An employee may file “[w]ithin 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).”).

In whistleblower cases, statutes of limitation, such as § 1514A(b)(2)(D), run from the date an employee receives “final, definitive, and unequivocal notice” of a discharge or other discriminatory act. *See, e.g., Sneed v. Radio One*, ARB No. 07-072, ALJ No. 2007-SOX-018, slip op. at 6-7 (ARB Aug. 28, 2008); *Jenkins v. U.S. Env’tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 14 (ARB Feb. 28, 2003). The date that an employer communicates to the employee its intent to implement the discharge or other discriminatory act marks the occurrence of a violation, rather than the date the employee experiences the consequences. *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3-4 (ARB Aug. 31, 2005); *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-053, slip op. at 36 (ARB Apr. 30, 2001). *See Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become apparent); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (limitations period begins to run when the decision to deny tenure is made and communicated rather than on the date employment termination is effective).

In this case, the ALJ properly found that Corbett had unequivocal notice of his discharge on April 1, 2005. R. D. & O. at 6-7, 9. As of March 21, Corbett still had the option of agreeing to improve his performance, notifying Laurito by March 23 and meeting with him on March 28, or executing the Separation Agreement included in the letter. When March 23 and March 28 came and went with no response, Laurito wrote another letter on March 31. Retaining his employment was no longer an option. Corbett would be discharged from his employment, but if he executed the Separation agreement by April 15 his employment could continue until November 30 under the terms of the agreement. If he did not execute the agreement, his discharge would be effective on April 15.

Thus, under the line of cases cited above, April 1, the date of unequivocal notice of discharge, and not April 15, the date the discharge took effect, was the date the 90-day SOX limitations period began to run. Because Corbett did not file his complaint with OSHA until more than 90 days later, July 13, 2005, his complaint was untimely.

On appeal, Corbett repeats several arguments made below. For instance, he contends that his removal as Director of Human Resources effective April 1 was not an adverse action, because he did not want the position. R. D. & O. at 5; Br. 13-14, 19. Whether he did or did not consider his removal from that position an unfavorable personnel action is not at issue. The issue before us is whether Corbett had definitive notice of his discharge at a future date (whether April 15 or November 30) as of April 1. Further, according to Corbett, Laurito failed to contact him with details concerning what his human resources advisor assignment would entail if he were to agree to the proposal in the Separation Agreement. Br. 15, 20. The agreement itself provided for off-site duties as assigned. Laurito made it clear that the terms were not negotiable. Either Corbett executed the agreement as is by April 15 or he would be discharged as of that date. That Corbett may have wanted to know more about his assigned duties does not alter the fact that Laurito gave him unequivocal notice on April 1 that his employment with the company would end. If Corbett wanted to assert unlawful discharge for engaging in protected activity, April 1 is the date his cause of action accrued.

Corbett's motion for reconsideration, which is also before us on appeal, argued that his filing a claim with the National Labor Relations Board (NLRB) on April 29, 2005 tolled SOX's limitations period. Order on Reconsideration at 5. SOX's limitations period is not jurisdictional and therefore is subject to equitable modification. *Accord Ubinger v. CAE Int'l*, ARB No. 07-083, ALJ No. 2007-SOX-036, slip op. at 5 (ARB Aug. 27, 2008); *Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-050, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. Tennessee Valley Auth.*, ARB No. 98-011, ALJ No. 98-128, slip op. at 40-43 (ARB Apr. 30, 2001). 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*, 657 F.2d 16, 19-21 (3d Cir. 1981). In that case, the court articulated three principal situations in which equitable modification may apply: the defendant has actively misled the plaintiff regarding the cause of action; the plaintiff has in some extraordinary way been prevented from filing his action; and "the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum." *Marshall*, 657 F.2d at 20 (internal quotations omitted).

The ALJ concluded that Corbett's filing with the NLRB was not the precise statutory claim filed in the wrong forum because it was not a request for SOX relief based on accounting irregularities, but instead a request specifically directed to the NLRB based on negotiation and execution of a labor agreement, and requesting a remedy from the NLRB. Order on Reconsideration at 4-5. Because Corbett did not file the precise statutory claim in the wrong forum, we concur with the ALJ's conclusion that he did not meet the criteria for tolling the statute.

Because Corbett filed his complaint outside of the statute of limitations and the limitations period was not tolled, we **AFFIRM** the ALJ and hereby **DISMISS** Corbett's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge