



**In the Matter of:**

**ANTHONY LUGG,**

**ARB CASE NO. 2022-0008**

**COMPLAINANT,**

**ALJ CASE NO. 2021-SOX-00022**

**v.**

**DATE: May 19, 2022**

**LEAR CORP.,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Anthony Lugg; *pro se*; Wonersh Common, Guildford, United Kingdom**

***For the Respondent:***

**Michael P. Roche, Esq. and Kara E. Cooper, Esq.; *Winston & Strawn LLP*; Chicago, Illinois**

**Before: James D. McGinley, *Chief Administrative Appeals Judge*,  
Thomas H. Burrell, and Stephen M. Godek *Administrative Appeals Judges***

## **DECISION AND ORDER**

PER CURIAM. This case arises under the whistleblower protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act (SOX), and its implementing regulations.<sup>1</sup> Anthony Lugg (Complainant) filed a whistleblower complaint against Lear Corp. (Respondent) for alleged retaliation. The ALJ issued a Decision and Order Dismissing Complaint as Untimely Filed (D. & O.). Complainant appealed the ALJ's decision. We affirm.

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<sup>1</sup> 18 U.S.C. § 1514A (2010); 29 C.F.R. Part 1980 (2021).

## BACKGROUND

Complainant worked for Respondent Lear Corp. as the Director of Asia Logistics Purchasing in Shanghai, China, from May 2014, until Respondent fired him on November 11, 2019. On November 29, 2019, a Chinese law firm representing Complainant sent Respondent a demand letter seeking, in part, reinstatement and damages. Complainant alleges Respondent fired him for reporting violations of Chinese law, the Foreign Corrupt Practices Act, and Securities and Exchange Commission's Rules and Regulations. On June 17, 2020, Complainant's counsel sent a second demand letter to Respondent.<sup>2</sup>

On September 18, 2020, Complainant, representing himself, filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging he was fired in retaliation for reporting fraud and corruption within the company. On September 25, 2020, OSHA dismissed the complaint because it was not filed within the statutory deadline and determined there was no reasonable cause to justify equitable tolling.<sup>3</sup>

On October 1, 2020, Complainant requested a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Law Judges (OALJ).<sup>4</sup> On July 2, 2021, the ALJ issued an order to show cause as to why the complaint should not be dismissed for failure to file it within SOX's 180-day filing limitation period.<sup>5</sup> Both parties filed responses. Complainant contended that he was prevented from filing a timely complaint because of mental and physical health illnesses, as well as complications due to the COVID-19 pandemic, including his family's relocation to the Philippines and his inability to return to Shanghai to gather documentation supporting his claim.<sup>6</sup> On October 25, 2021, the ALJ determined that Complainant did not establish a basis for equitable tolling of the filing deadline, concluding there were no extraordinary circumstances that prevented him from timely filing his OSHA complaint and dismissed the complaint. The ALJ found that Complainant's illness did not rise to the level of an impairment preventing him from filing within the deadline. The ALJ also found that, while Complainant was treated for a cough and heavy chest infection, there was no evidence of a lengthy period of hospitalization or incapacitation that prevented him from filing either an online or mail complaint with OSHA.<sup>7</sup>

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<sup>2</sup> D. & O. at 3.

<sup>3</sup> *Id.* at 1.

<sup>4</sup> OALJ did not issue a Notice of Docketing until June 15, 2021, due to a miscommunication among OALJ staff. *Id.* at n.1.

<sup>5</sup> 18 U.S.C. § 1514A(b)(2)(D).

<sup>6</sup> *Id.* at 2-3.

<sup>7</sup> *Id.* at 4.

In addition, the ALJ found that Complainant's inability to return to Shanghai to gather documentation was not an extraordinary circumstance because such documentation is not necessary to file an OSHA complaint. The ALJ noted that, throughout the COVID-19 pandemic, OSHA remained open to accepting complaints, including via the online form Complainant later used.<sup>8</sup>

The ALJ concluded Complainant was not reasonably diligent in pursuing his rights throughout the ten-month period from the termination of his employment to when he filed his OSHA complaint. Rather, the ALJ found that "he did effectively nothing on this case."<sup>9</sup> In addition, the ALJ noted Complainant hired a Chinese law firm to sue Respondent shortly after he was fired, launched the Supply Chain Innovation Network, and posted podcasts. The ALJ also found that the two demand letters Complainant's counsel sent Respondent were not evidence of diligently pursuing his rights under the SOX. The ALJ concluded that, if Complainant were able to engage in these activities, he could have filed a timely whistleblower complaint on-line.<sup>10</sup>

Complainant filed a timely appeal to the Administrative Review Board (ARB). Both parties filed briefs.

#### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the Board the authority to issue agency decisions under the SOX, as amended.<sup>11</sup> The ARB reviews an ALJ's grant of summary decision de novo.<sup>12</sup> This includes other pre-hearing dismissals based on timeliness.<sup>13</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.*

<sup>11</sup> Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

<sup>12</sup> *Elias v. Celadon Trucking Servs., Inc.*, ARB No. 2012-0032, ALJ No. 2011-STA-00028, slip op. at 3 (ARB Nov. 21, 2012).

<sup>13</sup> *Edmund v. Metro. Transit Auth.*, ARB No. 2009-0034, ALJ No. 2009-STA-00003 (ARB Nov. 19, 2009).

## DISCUSSION

A SOX complaint must be filed no later than 180 days after the date of the alleged violation of the Act, or after the date on which the employee became aware of the violation.<sup>14</sup> However, the limitations period for filing a complaint under the SOX is not jurisdictional and is subject to equitable modification.<sup>15</sup> Equitable tolling is granted sparingly and only upon a showing that extraordinary circumstances prevented a timely filing.<sup>16</sup>

The Board recognizes four principal situations in which a party may be entitled to equitable tolling: (1) respondent has actively misled the complainant regarding the cause of action; (2) complainant has in some extraordinary way been prevented from filing his or her action; (3) complainant has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) respondent's own acts or omissions have lulled the complainant into forgoing prompt attempts to vindicate his or her rights.<sup>17</sup> However, the Board has not found these situations to be exclusive, and an inability to satisfy one of them is not necessarily fatal to a claim.<sup>18</sup>

When a plaintiff invokes equitable tolling, the claim must be brought "within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information."<sup>19</sup> Complainant bears the burden of justifying the application of equitable tolling.<sup>20</sup> In addition, "courts have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."<sup>21</sup>

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<sup>14</sup> 18 U.S.C. § 1514A(b)(2)(D); 29 C.F.R. § 1980.103(d).

<sup>15</sup> *Swinney v. Fluor Corp.*, ARB No. 2015-0044, ALJ No. 2014-SOX-00041, slip op. at 2 (ARB June 11, 2015).

<sup>16</sup> *Sidney Hillman Health Ctr. of Rochester v. Abbott Lab'ys, Inc.*, 782 F.3d 922, 930 (7th Cir. 2015) (quoting *Simms v. Acevedo*, 595 F.3d 774, 781 (7th Cir. 2010)).

<sup>17</sup> *See Brown v. Synovus Fin. Corp.*, ARB No. 2017-0037, ALJ No. 2015-SOX-00018, slip op. at 2 (ARB May 17, 2017).

<sup>18</sup> *Woods v. Boeing-South Carolina*, ARB No. 2011-0067, ALJ No. 2011-AIR-00009, slip op. at 8 (ARB Dec. 10, 2012) (citations omitted).

<sup>19</sup> *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990).

<sup>20</sup> *See Jaludi v. Citigroup, Inc.*, ARB No. 2021-0053, ALJ No. 2021-SOX-00014, slip op. at 3 (ARB Aug. 25, 2021).

<sup>21</sup> *Lubary v. El Floridita*, ARB No. 2010-0137, ALJ No. 2010-LCA-00020, slip op. at 6 (ARB Apr. 30, 2012) (quoting *Wakileh v. Western Ky. Univ.*, ARB No. 2004-0013, ALJ No. 2003-LCA-00023, slip op. at 4 (ARB Oct. 20, 2004) (quotation omitted)).

Complainant contends extraordinary circumstances prevented him from filing his claim. He first contends that depression, stress, and treatment for suspected COVID-19 prevented him from filing a timely complaint. He also contends that it is implausible to expect a hospitalization in the Philippines to address his medical issues. He further contends that he was unable to manage his affairs and that his wife performed some of the factors the ALJ and Respondent listed in support of his ability to file, such as renewing his visa to the Philippines, acquiring housing, and arranging schooling for his elder children and care for his younger children.

The Board has recognized that a medical condition that prevents a complainant from timely pursuing his legal rights may be an “extraordinary” circumstance justifying equitable tolling.<sup>22</sup> For example, the Board has held that “mental illness tolls the limitations period only if the illness in fact prevents the petitioning party from managing his affairs and thus from understanding his legal rights and acting upon them.”<sup>23</sup>

We agree with the ALJ’s conclusion that Complainant has not established extraordinary circumstances to justify equitable tolling based on a debilitating injury for the reasons stated by the ALJ.<sup>24</sup> In addition, although Complainant contends it is implausible to expect a hospitalization in the Philippines to assist with his medical needs, he acknowledges that hospitals and outpatient clinics were vacated in anticipation of a surge of COVID-19 patients.<sup>25</sup> Further, Complainant acknowledges that he obtained Chinese legal counsel, travelled to the Philippines, worked in an unpaid position with the Supply Chain Innovation Network, and posted “ready-made content” onto LinkedIn.<sup>26</sup>

Second, Complainant contends the COVID-19 pandemic is a major disaster that prevented him from timely filing his complaint. He argues that he was displaced from his home in China and had to relocate his family to the Philippines and was in day-to-day survival mode, which prevented him from returning to Shanghai to gather documents supporting his claim. In addition, he contends OALJ’s eight-month delay in docketing his appeal weakened his position because, by the time his complaint was docketed, the United States had forgotten what it

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<sup>22</sup> *Reid v. The Boeing Co.*, ARB No 2010-0110, ALJ No. 2009-SOX-00027, slip op. at 4 (ARB Mar. 30, 2012) (citing *Prince v. Westinghouse Savannah River Co.*, ARB No. 2010-0079, ALJ No. 2006-ERA-00001, slip op. at 4 (ARB Nov. 17, 2010)).

<sup>23</sup> *Woods*, slip op. at 11 (ARB Dec. 10, 2012) (citing *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996)).

<sup>24</sup> D. & O. at 4.

<sup>25</sup> Comp. Reply Br. at 11-12.

<sup>26</sup> Comp. Br. at 8-10, Comp. Reply Br. at 11.

was like earlier in the pandemic. Complainant contends the ALJ failed to address the complexities in Asia during the pandemic.

Several Federal courts have held that the impact of the COVID-19 pandemic may constitute extraordinary circumstances for the purposes of equitable tolling under certain circumstances.<sup>27</sup> However, a petitioner seeking equitable tolling must still demonstrate fact-specific circumstances related to the pandemic that hindered their ability to file.<sup>28</sup> For example, the COVID-19 pandemic does not justify an otherwise untimely filing where the facts indicate that the petitioner had the means to file his complaint electronically throughout the pandemic.<sup>29</sup>

Although the COVID-19 pandemic may have created difficulties and stress for Complainant, he has not demonstrated the extraordinary circumstances necessary to warrant equitable tolling. Thus, we also agree with the ALJ's

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<sup>27</sup> See *Hager v. Warden*, No. 2:21-CV-2472, 2021 WL 2291319, at \*3 (S.D. Ohio June 4, 2021) (“The COVID-19 pandemic may qualify as an extraordinary circumstance justifying equitable tolling of the statute of limitations”), *adopted and aff'd*, No. 2:21-CV-2472, 2021 WL 2670622 (S.D. Ohio June 29, 2021); *Taylor v. Valentine*, No. 5:20-CV-00139-TBR, 2021 WL 864145, at \*2 (W.D. Ky. Mar. 8, 2021) (“The COVID-19 pandemic may very well qualify as an ‘extraordinary’ circumstance that warrants equitable tolling”), *mot. for relief from j. denied*, No. 5:20-CV-00139-TBR, 2021 WL 2043974 (W.D. Ky. May 21, 2021), *certificate of appealability denied*, No. 21-5616, 2021 WL 6201605 (6th Cir. Dec. 28, 2021), *cert. denied*, 142 S. Ct. 1400 (2022), and *certificate of appealability denied*, No. 21-5616, 2021 WL 6201605 (6th Cir. Dec. 28, 2021), and *cert. denied*, 142 S. Ct. 1400 (2022).

<sup>28</sup> See *Lewis v. Postmaster Gen. of the U.S.*, No. 21-2958, 2022 WL 109007, at \*2 (3d Cir. Jan. 12, 2022) (affirming the District Court’s determination that the appellant’s claims of age and disability-based discrimination were time barred because the appellant failed to connect the pandemic to his specific situation); *Katz v. U.S. Dep’t of Lab.*, 857 F. App’x 859, 863-64 (7th Cir. 2021) (finding that the petitioner did not show extraordinary circumstances warranting equitable tolling because he did not explain why the pandemic prevented him from filing a timely appeal); *Rush v. Sec’y, Fla. Dep’t of Corrections*, No. 21-10218-C, 2021 WL 3134763, at \*1 (11th Cir. June 22, 2021) (finding petitioner “could not show extraordinary circumstances, as his circumstances were not different than any other prisoner attempting to access legal resources, as they all were subject to COVID-19 protocols”); *U.S. v. Henry*, No. 2:17-CR-00180, 2020 WL 7332657, at \*4 (W.D. Pa. Dec. 14, 2020) (“[T]he COVID-19 pandemic does not automatically warrant equitable tolling for any petitioner who seeks it on that basis. The petitioner must establish that he was pursuing his rights diligently *and* that the COVID-19 pandemic specifically prevented him from filing his motion”), *certificate of appealability denied*, No. 21-1285, 2021 WL 3669374 (3d Cir. June 3, 2021); *Dragasits v. Covello*, No. 3:21-CV-1459-CAB-MDD, 2022 WL 207730, at \*7 (S.D. Cal. Jan. 24, 2022) (a petitioner seeking tolling based on the COVID-19 pandemic must still demonstrate fact-specific circumstances related to the pandemic that hindered his ability to timely file a petition).

<sup>29</sup> *Katz*, 857 F. App’x at 863-64.

conclusion that Complainant was not prevented from filing a timely complaint based on the impact of the COVID-19 pandemic for the reasons stated by the ALJ.<sup>30</sup>

Third, Complainant asserts that, as an overseas worker in China and a non-U.S. citizen, he is not familiar with U.S. legislation and OSHA's procedures. However, "ignorance of the law is neither a sufficient basis for granting equitable tolling nor by itself an independent ground establishing entitlement."<sup>31</sup>

Lastly, Complainant contends he exercised his due diligence during this period based on the two demands letters his Chinese counsel sent to Respondent. However, we agree with the ALJ's conclusion that Complainant did not exercise due diligence for the reasons stated by the ALJ.<sup>32</sup>

Therefore, we conclude that Complainant filed an untimely complaint and failed to establish any extraordinary circumstances that warrant an extension of the filing deadline under equitable tolling principles.

#### CONCLUSION<sup>33</sup>

Accordingly, we summarily **AFFIRM** the ALJ's Decision and Order dismissing the complaint as untimely filed.

**SO ORDERED.**

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<sup>30</sup> D. & O. at 4.

<sup>31</sup> *Tardy v. Delta Air Lines*, ARB No. 2016-0077, ALJ No. 2015-AIR-00026, slip op. at 5 (ARB Oct. 5, 2017).

<sup>32</sup> D. & O. at 5.

<sup>33</sup> In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor (not the Administrative Review Board).