U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

JOSEPH THIBEAUX,

COMPLAINANT,

v.

EDWARD JONES INVESTMENTS,

RESPONDENT.

ARB CASE NO. 2021-0008

ALJ CASE NO. 2017-SOX-00056

DATE: April 6, 2021

Appearances:

For the Complainant:
J. Owen Murrin, Esq.; *Murrin Law Firm*; Long Beach, California

For the Respondent:
George C. Freeman, III, Esq.; Christine M. Calogero, Esq.; *Barrasso Usdin Kupperman Freeman & Sarver, L.L.C.*; New Orleans, Louisiana

Before: James D. McGinley, Chief Administrative Appeals Judge; Thomas H. Burrell and Randel K. Johnson, Administrative Appeals Judges

DECISION AND ORDER

PER CURIAM. This case arises under 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 (2010) (SOX), as amended, and its implementing regulations at 29 C.F.R. Part 1980 (2020). Respondent Edward Jones Investments employed Complainant Joseph Thibeaux until he resigned on September 13, 2012. On July 11, 2014, he filed a complaint by telephone with the Occupational Safety and Health Administration (OSHA) alleging that Edward Jones had retaliated against him in violation of the SOX, and the

following day OSHA informed him by letter that his complaint was untimely. On August 23, 2017, he filed another SOX complaint with OSHA alleging that he had been denied benefits, harassed, intimidated, and denied rehire by Edward Jones. OSHA also denied that complaint as untimely.

Thibeaux requested a hearing on his August 23, 2017 complaint before an Administrative Law Judge (ALJ). The ALJ conducted a hearing and on May 8, 2020, issued a Decision and Order (D. & O.) in which he concluded that Thibeaux did not file the August 23, 2017 complaint within the required 180 days of any alleged adverse action and that no grounds for equitable tolling existed. Thibeaux appealed the ALJ's ruling to the Board.

The Secretary of Labor has delegated to the Board his authority to review ALJ decisions under the SOX.[1] In SOX cases the Board will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo.[2]

Upon review of the record and briefs on appeal we conclude that the ALJ properly concluded that Thibeaux did not file a timely SOX complaint and is not entitled to equitable tolling. The D. & O. is a well-reasoned decision based on the undisputed facts and the applicable law. As a result, we **ADOPT** and **ATTACH** the ALJ's D. & O and, accordingly, **DISMISS** Thibeaux's complaint.

SO ORDERED.

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[1] 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).

[2] 29 C.F.R. § 1980.110(b); *Burns v. The Upstate Nat'l Bank*, ARB No. 2017-0041, ALJ No. 2017-SOX-00010, slip op. at 2 (ARB Feb. 26, 2019) (citation omitted).

U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, Louisiana 70433-2846

(985) 809-5173
(985) 893-7351 (FAX)

Issue Date: 08 May 2020

CASE NO.: 2017-SOX-56

JOSEPH THIBEAUX,
Complainant,

v.

EDWARDS JONES INVESTMENTS *ET AL*,
Respondent

APPEARANCES:

J. OWEN MURRIN, ESQ.
For Complainant

CHRISTIN CALOGERO, ESQ.,
For Respondent

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION & ORDER

PROCEDURAL BACKGROUND

This matter involves a complaint under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX)[1] and regulations promulgated thereunder[2] brought by Complainant against Respondent. On 23 Aug 17, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent had denied him employment in violation of SOX. The OSHA investigation resulted in a report on 5 Sep 17 that dismissed the complaint as untimely. Complainant filed his objections to the report and requested a hearing before an administrative law judge. The case was assigned to me and I directed Complainant to file a Bill of Particulars specifying his alleged protected activity and adverse action. The parties

[1] 18 U.S.C. § 1514A.
[2] 29 C.F.R. § 1980.

agreed that judicial efficiency would be best served by first addressing the timeliness issue, before expending substantial litigation resources on the rest of the case.

For the purposes of the relevant issues, Complainant's Bill of Particulars can be distilled into a highly truncated summary. In relevant part, Complainant alleged that:

> He was employed by Respondent, engaged in protected activities, and suffered adverse actions that resulted in his resignation on 13 Sep 12. Eight or nine months later, he was encouraged by his former coworker and mentor to apply for a different position with Respondent. He did so, with the help of his former supervising manager. After 3 or 4 weeks, he inquired about the status of his application. Respondent informed him on 17 Jul 13 that there were other candidates who were a better match for the job and it was unable to give him any further consideration at that time. He filed multiple whistleblower complaints with the Department of Labor beginning on 9 Sep 13. He filed a separate complaint with the Financial Industry Regulatory Authority (FINRA) on 30 Sep 13, seeking damages for wrongful termination. His FINRA complaint was settled.

Respondent then filed a Motion to Dismiss the complaint based on its argument that, even if the Bill of Particulars was accepted as true, his complaint to OSHA on 23 Aug 17 came more than four years after his application was rejected and is untimely.

Complainant opposed the motion, arguing that he filed a timely complaint by calling OSHA on multiple occasions within 60 days of the rejection of his application. Complainant submitted that he is entitled to equitable tolling because of the complaint that he filed with FINRA within 180 days of the rejection of his application. Complainant's final argument was that the 180 day period has not even yet begun to run as to the application rejection, because it would not be final until Respondent explains to him why he no longer fits the criteria for employment.

I found that the evidence showed that Respondent's rejection of Complainant's application was not equivocal or indefinite, the adverse action had taken place on 17 Jul 13, and the 180 day deadline for filing with OSHA began on that date. I also rejected Complainant's argument that equitable tolling applies because of the filing of his FINRA complaint, noting that his Bill of Particulars specifically disavowed that retaliation was included in that complaint. However, I found that the Bill of Particulars adequately alleged facts that could be found to make his complaint timely. I directed the parties to prepare for a hearing to address whether Complainant filed his complaint with OSHA within 180 days of 17 Jul 13.

On 11 Oct 18 and 3 Dec 18, I held a hearing at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and

submit post-hearing briefs. My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony of

Complainant
Anthony Incristi

Exhibits[4]

Complainant Exhibits (CX): 2, 10-12, 15, 17-18, 24A, 26-27, 31, 33-38[5]
Respondent Exhibits (RX): 1-4

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

ISSUES IN DISPUTE & POSITIONS OF THE PARTIES

During the hearing, Complainant noted that his testimony and the documentary evidence were contrary to the statement in his Bill of Particulars that whistleblower retaliation was not a part of his FINRA complaint. Complainant further requested as a corollary that I vacate that part of my previous ruling that equitable tolling did not apply. Respondent opposed the motion and I told the parties that I would hold my ruling on the motion in abeyance and they should fully address it in their post hearing briefs.

In his post hearing brief, Complainant suggested a number of alternative reasons that his complaint was timely. First, he argued that he made an oral complaint to OSHA by phone

[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

[4] Counsel were cautioned that counsel must cite during the hearing or in their post hearing briefs to the specific page of any deposition transcript of any witness who also testifies live for that page to be considered a part of the record upon which the decision will be based.

[5] There is a fundamental factual dispute concerning Complainant's alleged telephone complaint to OSHA on 9 Sep 13. In an attempt to obtain evidence to corroborate and/or impeach Complainant's and Incristi's testimony, both sides attempted to obtain records from OSHA and were still in the process of doing so at the end of the hearing, so the record was not closed. Indeed, Complainant in particular voiced significant frustration with what he argued was OSHA's inadequate response to his requests. Complainant attached to his brief a number of documents related to his FOIA requests and appeal and his telephone records from June and July 2014. The telephone records in particular could have and should have been offered at the hearing and did not fall within the materials for which I intended to keep the record open. Nonetheless, I have considered those documents as part of the evidentiary record. However, none of the documents offered any additional and particularly persuasive evidence, since there is no real dispute as to the existence of the phone calls in 2014 and the absence of any OSHA records relating to them.

on 9 Sep 13. Second, he submits that his deadline for tolling was equitably tolled as of his filing of his FINRA complaint on 30 Sep 13. Third, he raised a new argument that an additional period of equitable tolling began with his filing of an SEC whistleblower claim on 10 Jun 16.

Respondent disputes that the evidence is sufficient to find that Complainant made oral complaints to OSHA on 9 Sep 13. It urges that I deny the Motion to Amend, noting that Complainant's theory of the case has morphed into a number of different forms over time and should not be allowed to reinvent itself once again. However, Respondent further noted that, even if the Motion to Amend were granted, Complainant's argument for equitable tolling must fail as the tolling period would have expired too soon for his OSHA complaint to be timely.

APPLICABLE LAW

SOX creates a private cause of action for employees of publicly traded companies who are retaliated against for engaging in certain protected activity. It protects employees who provide information regarding any conduct that the employee reasonably believes constitutes a violation of mail fraud,[6] wire fraud,[7] bank fraud,[8] securities fraud,[9] any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders.[10]

A person alleging a violation under this provision must file a complaint with the Department of Labor not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.[11] The Secretary of Labor has delegated to the Assistant Secretary for OSHA responsibility for receiving and investigating complaints.[12] Complaints may be filed with any OSHA officer or employee.[13] Complaints need not be in writing and OSHA will reduce oral complaints to writing.[14]

The 180 day limitation period commences on the date "the discriminatory decision has been both made and communicated to the complainant."[15] That happens when an employee receives "final, definitive, and unequivocal notice"[16] by means of a

[6] 18 U.S.C. § 1341.
[7] 18 U.S.C. § 1343.
[8] 18 U.S.C. § 1344.
[9] 18 U.S.C. § 1348.
[10] 18 U.S.C. § 1514A.
[11] 18 U.S.C. § 1514A(b)(2)(D).
[12] 29 C.F.R. § 1980 n.1.
[13] 29 C.F.R. § 1980.103(c).
[14] 29 C.F.R. § 1980.103(b).
[15] 29 C.F.R. § 1980.103(d).
[16] *Corbett v. Energy East Corp*., ARB 07-044, 2006-SOX-65 (ARB Dec. 31, 2008).

communication that is not ambiguous, but decisive or conclusive and leaves no further chance for action, discussion, or change.[17]

The 180 day period is not jurisdictional and may be equitably tolled when (1) the respondent actively misled the complainant respecting the cause of action, (2) extraordinary circumstances prevented the complainant from asserting his rights, (3) complainant raised the precise statutory claim in issue but mistakenly did so in the wrong forum, or (4) the respondent did not actively mislead the complainant, but instead through its acts or omissions lulled the complainant into foregoing prompt action to vindicate his rights.[18] Where equitable tolling applies because the complainant chose the wrong forum, it ends when the complainant realizes he has filed in the wrong forum.[19]

A complainant's ignorance of the applicability of the filing period or definition of adverse action under SOX is simply not an extraordinary circumstance that justifies application of the doctrine of equitable tolling. Such ignorance must be a function of circumstances beyond the complainant's control (e.g. mental incapacity).[20]

The complainant bears the burden of justifying the application of equitable tolling principles.[21]

EVIDENCE

Complainant's testimony hearing[22] and affidavit[23] state in pertinent part:

> He currently lives in New Orleans. He grew up in Lafayette and graduated from what is now the University of Louisiana with a degree in marketing. His first job was with Gallo Winery. Then he worked in telephone directory advertising for years. By 2005, he was 45 years old and needed to find a sustainable career.
>
> He accepted a position with Respondent and at first wondered what he had gotten himself into. He had no clients and essentially did nothing but make cold calls.

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[17] *Coppinger-Martin v. Nordstrom, Inc.*, ARB 07-067, 2007-SOX-19 (ARB Sept. 25, 2009).
[18] *DeFazio v. Sheraton Steamboat Resorts & Villas*, ARB No. 11-063, 2011-SOX-35 (ARB Oct. 23, 2012).
[19] *Hillis v. Knochel Bros. Inc.*, ARB Nos. 03-136, 04-081, -148 (ARB Mar. 31, 2006); *McCloskey v. Ameriquest Mortgage Co.*, ARB No. 08-123 (ARB Aug. 31, 2010).
[20] *Cf. e.g.*, Stoll v. Runyon, 165 F.3d 1238, 1242 (9th Cir. 1999) (mental incapacity warranted equitable tolling) *with Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (pro se party lack of knowledge of limitation period insufficient to warrant equitable tolling); See also *Hemingway v. Northeast Utilities*, ARB No. 00-074 (ARB Aug. 31, 2000).
[21] *Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114 and 115 (ARB June 2, 2006), *citing Wilson v. Secretary, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995).
[22] Tr. 43-218.
[23] RX-1.

However, Respondent taught him wonderful lessons and by the time he got to his fifth year, he felt like he had made it.

That all changed when he moved into Respondent's Mandeville office. He concluded that Respondent was doing things that were wrong. He communicated those conclusions and concerns to Respondent. He did not understand why no one was investigating the things he was reporting and eventually he resigned on 13 Sep 12. He did not want to be involved in the illegal activity, so he quit instead of being fired so that he would still be eligible to be rehired.

He really had not wanted to leave Respondent, so when his former trainer, Frank Fincham, recommended that he apply for a job opening with Respondent, he did so. There was an oral and electronic application process. He called Bryan Sester, his former Regional Leader in Lafayette, who was unaware of the problems he had had in Mandeville. Sester arranged for him to talk to New Orleans manager Bryan Hatrel. He met with Hatrel sometime in June 2013 and they completed an online application in Hatrel's office.

He kept waiting for some sort of answer from Respondent, but none came, which surprised both him and Hatrel. Eventually, he contacted Anita Rath, who was one of Respondent's clerks who would intake and process applications. He does not recall whether he communicated with her by phone or by email, but within an hour or two, he received an email letter declining his application.[24] He sent her an email the next day asking for specifics, but received no reply. He was totally demoralized and became determined that the truth had to get out, because there was a much bigger story.

He began his crusade to start telling his story. He had been told by friends that he had to make sure that he contacted the Department of Labor within one year. At that point, he was within a couple months of the one-year anniversary from having left the Mandeville office. So, the weekend before that one-year anniversary, he looked up the Department of Labor on his computer, found a phone number, and called them on Monday, 9 Sep 13. It was probably a toll-free 1-800 number.

He is not sure which agency he specifically talked to or what office they were in, but the call was very disappointing. He went through a couple of people before he finally started talking to a male. He told the individual that he wanted to make sure that he got his call in before the one-year time ran out. The DOL employee told him that it's not a one-year time limit, it's six months, but to tell him about what happened anyway. He told the DOL employee that he had uncovered illegal

[24] CX-31.

activity, reported it, was forced to resign from his job, later reapplied, and his application was rejected.

The DOL employee then told him that he was sorry, but they had passed the time limit. It was a short call. He doesn't recall whether he gave his name and address to DOL at that time. He doesn't know if he ended up getting anything in the mail about it or not. He was never provided a transcript or recording of his call. He didn't have anyone with him when he made the call and didn't take any notes. He does not recall ever receiving any communication back from OSHA after that call. He thinks maybe he did get the undated letter at CX-36, page 2, after that call.

He was angry that he had missed his deadline and decided he was going to take his information to FINRA. At that time, the place he was working was being audited and he told the auditor what had been happening with Respondent. The auditor told him that he should document everything in writing. He did that and on 30 Sep 13, he delivered it by hand to the New Orleans FINRA office.[25] He told FINRA what was going on, that he was a whistleblower, and wanted to be reinstated to the job he was forced to leave. They asked him for more information which he provided by mail.[26] By then it was October 2013.

He never heard anything back, so he decided to start looking for attorneys. He was still looking in February 2014, when he decided to go online and request mediation. He wanted someone to order Respondent to rehire him. That prompted FINRA to send a letter inviting Respondent to participate in mediation.[27] However, Respondent declined mediation.

Eventually, he was contacted by Bonnie Simon, who was the FINRA case coordinator. She asked if he was going to have an attorney, because Respondent was going to have attorneys. He told her no and they set the case for arbitration. On 14 Jun 14, he filed a formal complaint with FINRA.[28] He included whistleblowing and retaliation in that complaint.

He received a letter from FINRA informing him that his complaint was deficient. He then entered into a combination of phone calls and emails with FINRA to try to remedy any deficiency.[29] However, nothing was happening and he began getting angry and realizing that FINRA was blocking his case and dodging his calls.

[25] CX-33.
[26] CX-34.
[27] CX-26.
[28] CX-35.
[29] CX-27.

Eventually, he did enter into a settlement with Respondent on his FINRA complaint. He believes the settlement included his wrongful termination.

In the meantime, he called the National Whistleblower Center and spoke with a lady who asked if he had an attorney and gave him some suggestions on finding information. She also asked if he had filed a complaint with OSHA. He told her he had, but she said to file another and gave him a phone number.

He called that number on 11 Jul 14 and after going through a number of individuals, ended up with Anthony Incristi. CX-11 is an accurate transcript that represents their conversation, but does not include their entire conversation. At the point in the transcript on page 2 that indicates there was a long pause, he could hear what sounded like a keyboard tapping. In addition to the information on CX-11, Incristi offered to send him a receipt certifying the call. Other things may not be included in the transcript, but he cannot recall.

Sometime after 12 Jul 14, he received a letter informing him his complaint was not filed within 180 days and untimely.[30] He did not appeal that determination. On 25 Jul 14, he hired Kim Breese, an attorney from one of the websites suggested by the Whistleblower Center. They filed a whistleblower claim with OSHA on 23 Aug 17.

He also went to his Congressman's Chief of Staff to complain, and was advised to enter his complaint into whistleblowers.gov, which he did. The original reason he went there for help was his SEC fraud complaint. They also called the Baton Rouge OSHA office to report his complaint while he was there, but were only able to leave a voicemail recording. He followed up that visit with an email[31] and left another message with the Baton Rouge office, but never received a response.

He knows how Respondent runs its hiring policies. They hire between 250 and 300 individuals each month. Respondent still has his application on file. Every time Respondent hires somebody else it is rejecting him again. Hatrel continues to support his efforts to be rehired.

It never occurred to him that Respondent's refusal to rehire him might be a new adverse action and give him more time to file a complaint until sometime after September 2014. He had no communications with the Department of Labor or OSHA about his case in 2015 or 2016.

[30] CX-36.
[31] CX-15.

On 5 Oct 17, he submitted a FOIA request for notes resulting from any phone calls or other contact with OSHA. The same day, he both called and emailed Incristi.[32] He never received a transcript or recording of that phone call. He called in the morning while he was driving. He called because he was coming to the realization about the timeliness issue in that his attorney should've never taken out the facts about Respondent refusing to rehire him. He wanted Incristi to provide him information about their prior call so he could fill in the blanks. The only thing Incristi sent him was materials related to his most recent OSHA complaint in August 2017. He did not send the transcript of the July 2014 telephone call.

On 13 Apr 18, he submitted a FOIA request to OSHA in an attempt to get records related to his complaints.[33] OSHA responded that it found no documents in the Baton Rouge area related to his request. In all, he filed 3 FOIA requests.

RX-1 is an affidavit he executed on 20 Aug 18. In it, he stated that Incristi has knowledge of his first phone call to OSHA and may have been the first person to whom he reported his complaints about his rehire scenario. He believed that to be true when he said it. RX-3 is a document that he wrote and signed.

He recalls having been deposed and having testified that the purpose of the second phone call was basically the same as the first and he reported that he found and uncovered illegal information, had been dismissed or constructively terminated, and had applied for his job and was not rehired.

Antony Incristi testified at hearing[34]***and stated by affidavit***[35] ***in pertinent part***:

He is the Assistant Regional Administrator for the Whistleblower Protection Program for OSHA Region Six, which is the Dallas region. He is not an attorney. He started with OSHA in April 1990 as an investigator in the Cleveland, Ohio office. He is also worked in Dallas, Atlanta, and Austin. He also worked in Baton Rouge and has been the supervisor for whistleblower protection for Region Six since 2007. His region includes Louisiana. He is the primary person to take whistleblower phone calls from his region.

His region has twelve area offices. Each office has an officer of the day who receives information and then forwards it to the region headquarters. They can receive information by fax, phone call, email, online, or walk-in complaint. Baton Rouge is the only OSHA office in Louisiana. Ultimately, all whistleblower

[32] CX-37.
[33] CX-12, 24A.
[34] Tr. 242-300.
[35] CX-2.

information filters to him. During the relevant period, he was the only manager and had ten investigators. His field investigators conducted fact-finding investigations and made recommendations to him. If a complaint didn't have standing because of no jurisdiction or the wrong venue, they would not have a field investigation. However, there would still be a communication back to the complainant to inform them of the decision.

In other words, the field offices gather the initial information and forward it to him. Then he decides if it needs a field investigation and assigns it out. If someone files a complaint with the field office, that complaint would be forwarded to him. When someone calls with questions, it depends. Typically, the officer in the field office would not answer questions because they are not whistleblower compliance employees. They would direct inquiries to him. Employees in area offices do have a form to fill out in the event they take a whistleblower call. Those forms are then forwarded to him.

If a caller to a field office has significant questions, those calls would be referred to him. If the caller simply wants to report facts and make a complaint, the form would be completed and forwarded to him.

He has had a chance to review the transcript of his phone call on 11 Jul 14 with Complainant.[36] He has also listened to the recording. He independently recalls very little about the conversation. He also received an online complaint that evening around 11:00 PM. He issued his investigative finding the next day.[37] He doesn't have a copy of the online complaint and does not recall the last time he saw it. He is sure there was an online complaint, because he mentions 667 days, whereas he and Complainant on the phone discussed 666 days. He does not recall whether 12 Jul 14 was a Saturday. He does not regularly work on Saturdays, but as a manager it is possible that he could've worked on a Saturday to try to catch up. The online complaint would come to him from the computer. He would have gotten a notification email and then accessed the system to look at the actual complaint. He does recall getting an online notification and looking at the complaint following up on the earlier phone conversation. His recollection is that the online complaint came in the evening. He could have processed it from home.

He has not recently listened to the recording of a telephone call. When he did listen to it, he believed it was a full and accurate representation of a call. It included everything; nothing was edited out or cut off. He does believe he would have been doing some typing while he was on the phone. At that time he was

[36] CX-11.
[37] CX-36.

treating it as an informational call, which is why he was referring Complainant to the ability to make an online complaint. He did not complete his findings while he was on the phone. The information that was in the transcript of the telephone call that ended up in his decision came from the online complaint. He believes that the online complaint mentioned that the adverse employment happened in 2013. At the end of the call, he did not believe Complainant had filed a complaint by telephone and there was no need to investigate anything. Once he got the online complaint, he considered the information and wrote the decision. He is not aware of Complainant having appealed his decision.

He has no recollection of ever talking to Complainant before that phone call or anyone forwarding to him information about Complainant. If Complainant did call the Baton Rouge office and had a conversation, there would be a record of that. There would not necessarily be a recording of the call. If the caller complained about Edwards Jones that would be put into the computer system for review later.

He went back and tried to find any information like that and found nothing. He took over the section in 2007 and since then, they have kept a diary of every complaint and inquiry. He personally searched the records and found nothing. He does not necessarily send out something every time he talks to someone, particularly if they decide they don't want to file anything, don't want to record, or are worried about OSHA reaching out to their employers.

He had trained the staff to ensure that they sent information related to whistleblower communications to one central email address that he created. Field offices were supposed to take whatever information a caller gave them and send it to him. Callers with questions that they could not answer would be referred to him. He typically filed those emails by respondent name and complainant. He went back and looked for Respondent and Complainant and found nothing prior to 11 Jul 14.

Much later, after filing another online complaint in 2017, Complainant sent him an email stating that he believed he had filed a complaint in 2013. He searched, but found no record of any such complaint. Complainant sent another such email in 2018. He does not recall, but the emails indicate that he had another brief conversation with Complainant around the same time. He does not have a recording of that conversation. Generally speaking, he decides to record if he's taking a complaint over the phone. He would still make a written record of the call, however.

Rob Swick works in the national office. That office generally does not conduct investigations and when they receive a communication they refer the caller to the appropriate region.

Financial Industry Regulatory Authority (FINRA) records show in pertinent part:[38]

On 30 Sep 13, Complainant wrote FINRA to report acts of illegal trading activity, violation of industry standards, and unethical conduct. He also related that he had been forced to resign as an unwilling whistleblower. He requested that he be reinstated.

On 17 Oct 13, Complainant sent to FINRA an extensive exposition of his alleged facts concerning Respondent's illegal and unethical activities. He again notes that he was forced to resign and that although he was encouraged to reapply later, respondent rejected his application.
On 18 Feb 14, FINRA wrote to Respondent to notify them that Complainant had indicated he was willing to mediate his complaint. FINRA included the nature of his complaint, which included loss of an appointment based on constructive discharge. On 4 Mar 14, FINRA notified Complainant that Respondent had declined its invitation to mediate.

On 3 Jul 14, Complainant asked FINRA if he could respond to the deficiencies via email or was required to submit hard copies.

On 16 Jun 14, Complainant submitted his statement of claim for arbitration. He included as part of his claim his constructive termination and the rejection of his application to be rehired.

On 8 Jul 14, Complainant emailed FINRA to clarify that his claim of employment discrimination is in violation of the statute, citing Louisiana law and the Dodd-Frank Act Section 1057. On 11 Jul 14, Complainant emailed FINRA again to inquire about the status of his case.

On 17 Jul 14, Complainant emailed FINRA to provide a citation to Louisiana law whistleblowers and attached copies of application rejection from Respondent.

Department of Labor records show in pertinent part:[39]

On 11 Jul 14, Complainant had a telephone conversation with Anthony Incristi during which:

[38] CX-26-35.
[39] RX 3-4; CX-10-12, 17-18, 24A.

Complainant stated that:

> He had been referred by Rob Swick from the Department of Labor. He used to work for a large brokerage firm and uncovered illegal activity. After he reported the illegal activity, the firm started committing more illegal activity to cover it up. He was representing himself in an arbitration against the brokerage and needed to know what statutes had been violated. He had not understood that he should have filed with the Department of Labor, even though he talked to a number of attorneys. The adverse action had taken place between July 2011 and his resignation on 13 Sep 12.

Incristi informed him that he was welcome to file a complaint with the Department of Labor but the complaint would be untimely and the legal precedent in that regard was unforgiving. He also informed Complainant that the important date was not the protected activity but the adverse action, which appeared to be a constructive discharge. Complainant agreed that constructive discharge was exactly what he is claiming.

Incristi then noted that:

> It was 666 days since the time of his discharge, which makes it untimely, but simply telling him that did not make it an investigation and denial closing the case, so Complainant was entitled to file the complaint, at which point he could object to the findings and request a hearing in front of an Administrative Law Judge. Having said that, he could pretty much guarantee that the company would file a summary judgment motion based on timeliness and would probably win.

Complainant responded that he had applied and been turned down in June or July 2013, so that would take some of the time off of the 666 days. Incristi agreed, but noted that the complaint would still be untimely. He reminded Complainant that he could take his chances in the arbitration in court or was more than welcome to file in DOL, but should do so soon. When Complainant asked how to file, he recommended Complainant go online and told him that if the case was in his region it would come to him and he would address it accordingly.

Complainant explained that the arbitration was not in court, but with FINRA. He then stated that he intended to go ahead and file online and gave his last name to Incristi, so he would recognize the online complaint.

On 12 Jul 14, Anthony Incristi issued a decision dismissing Complainant's complaint that Respondent discharged him as untimely.

On 23 Aug 17, Complainant filed an online complaint against Respondent. He alleged that he had been denied benefits, harassed, intimidated, and denied rehire. He noted the dates of the adverse action was 15 Jun 13. He noted that he anticipated OSHA would respond based on statute of limitations, but was following the advice of the Chief of Staff of his congressman.

On 5 Sep 17, Angela Fisher issued a decision dismissing the complaint as untimely. She emailed her decision the same day to the Office of Administrative Law Judges (OALJ). OALJ received that document by mail on 13 Sep 17, along with an additional page of a different complaint decision signed by Anthony Incristi.

On 5 Oct 17:

- At 10:30 AM, Incristi emailed Complainant to thank him for their earlier conversation and send him a copy of the investigative findings, UPS receipt, and delivery confirmation
- At 1:12 PM, Complainant emailed Incristi to note that he had not received the initial report from 2013
- At 2:07 PM, Incristi emailed Complainant and informed him that he would not be able to send any more documents without a Freedom of Information Act request and that the document he had was dated September 2017, not 2013.
- At 3:30 PM, Complainant emailed Incristi to apologize for any confusion, attach the generic letter he received in 2013 and requesting the same shipping label from 2013 as he received from 2017.
- At 4:10 PM, Incristi emailed Complainant to tell him he would need the entire document in order to fully research Complainant's request.
- At 5:58 PM, Complainant emailed to OSHA a FOIA request seeking his file since 2012.

On 13 Apr 18, Complainant filed on online FOIA request for all OSHA records relating to him.

On 7 May 18, the OSHA regional director sent Complainant a letter notifying him that they had searched their files and found no documents responsive to his request.

On 31 Aug 18, Respondent's counsel wrote the solicitor to request her cooperation and assistance in making Anthony Incristi available to provide information either via affidavit or testimony. Counsel included a draft affidavit, but suggested that it be revised as necessary to best reflect the witness's recollection.

Security and Exchange Commission records show in pertinent part:[40]

Complainant submitted a whistleblower complaint on 10 Jun 16.

DISCUSSION

Given the parties' agreement to bifurcate the hearing, at this stage I assume that there was protected activity and adverse action. The timing of the protected activity is not relevant, so long as it was before the adverse action. The timing of the adverse action is highly relevant. There are two relevant adverse actions in this case. The first is an alleged constructive discharge on 13 Sep 12. There is no serious suggestion that Complainant filed any sort of complaint with OSHA within 180 days of that adverse action.

The second is a rejection of an application for rehire. Complainant received his notification of that rejection on 17 Jul 13. Complainant offered two alternative arguments that the period for filing as to that adverse action had not yet begun to run. First, it argued that the filing period did not begin to run until Respondent answered his request for an explanation of its refusal to rehire him. Complainant's second argument was that since Respondent retained his application (assuming it did), every time it hired someone other than him, it essentially created a new adverse action. I considered both arguments when I granted Respondent summary decision on that issue. Even if I were willing to reconsider that decision, nothing adduced at hearing or provided in the evidentiary record would change my ruling.

As a result, the only remaining question is whether Complainant filed a timely complaint with OSHA within the 180 day deadline of Respondent's refusal to rehire him on 17 Jul 13. Complainant offers two arguments that he did. The first is that he made an oral complaint to OSHA by telephone in September of 2013, well within the 180 day limit. His alternative argument is that his filings with FINRA and the SEC operated to toll the 180 day limit until his telephone call with Incristi and online complaint in July 2014.

Oral Communications to OSHA in September 2013

The parties have a fundamental dispute over whether Complainant actually called OSHA in September of 2013 and the actual contents of any call that may have been

[40] CX-38.

made. Complainant testified he made the call and Respondent notes the absence of any corroborating testimony or OSHA records as evidence that the call was not made. Implicit in both parties' positions is an argument that the evidence submitted by the other side is not reliable. Respondent relies on Incristi's testimony to argue that, had Complainant made the call he alleges, there would be some OSHA record of it. Complainant (and Respondent, to a lesser extent) attempted to obtain all relevant OSHA records and were frustrated by the answer that no relevant records existed.[41] Respondent attacks the reliability of the OSHA record system and the credibility of Incristi's testimony.

Obviously, Complainant's credibility in particular is crucial in evaluating the evidence relating to the alleged phone call in September 2013. In that regard, I note that I found both Complainant and Incristi to be generally credible witnesses. They both gave the impression that they were giving the most accurate testimony they could. Any inaccuracies or inconsistencies were not a consequence of an intent to deceive, but rather the result of trying to recall matters that occurred years ago. In the case of Incristi, those matters would have been relatively mundane, making it even more difficult to accurately recall. In the case of Complainant, his emotional attachment to his case makes it more likely that his recollection could be subject to describing things as he hopes or wishes they were, rather than how they actually happened.

In any event, the circumstantial evidence in the case is sufficient to conclude that the OSHA recordkeeping process is not foolproof. It is unlikely that every call to the toll-free number is fully documented. Thus, I credit Complainant's testimony that he made the call in September 2013. However, it is not enough that Complainant simply made a call. He must have said enough in his call to constitute a complaint.

Some of the most probative evidence on this point comes from Complainant himself. He testified that he probably used a toll-free 1-800 number to tell someone what had happened to him. He noted it was a short call and most significantly conceded that he did not remember whether he gave his name or address. That would be consistent with the conversation he subsequently had with Incristi, during which he never identified Respondent and only as an afterthought identified himself at the end of the call. It would also be consistent with the absence of any OSHA records, since it would be more likely that the call would not be documented if the caller did not identify himself or the retaliating party.

Consequently, I find that the preponderance of the evidence establishes that although Complainant called OSHA in September 2013, he neither identified himself nor

[41] Indeed, although Complainant's attempts continue through the FOIA appeals process, he elected to proceed.

Respondent. He did not file an oral complaint and the call did not satisfy the 180 day filing deadline.

Motion to Amend/Equitable Tolling

Complainant's alternative argument is that his OSHA filing time was equitably tolled by his FINRA and SEC filings. I previously granted Respondent's Motion to Dismiss Complainant's equitable tolling argument, since the Bill of Particulars specifically excluded retaliation as a basis for the FINRA complaint. The Bill of Particulars did not even mention an SEC complaint.

Complainant moves that I vacate that ruling and allow him to amend the Bill of Particulars to comply with the evidence adduced at hearing. At the outset, I note that Complainant was not proceeding *pro se* at the time he filed his Bill of Particulars. Moreover, none of the evidence that Complainant now cites as a basis for amending his Bill of Particulars was unavailable at the time he filed that Bill. The primary purpose behind filing a Bill of Particulars is to avoid last-minute theory shifting and Respondent's opposition to the Motion to Amend is well-founded. At best, the flawed Bill of Particulars demonstrates Complainant's lack of attention to detail. At worst, it reflects a failure to fully understand his own case.[42] Nonetheless, it does not appear that granting the motion and allowing Complainant to modify and supplement its argument for equitable tolling will significantly prejudice Respondent's ability to litigate that issue on its merits. Therefore, I grant the motion and consider Complainant's argument that the 180 day filing period was equitably tolled by his FINRA and or SEC filings.

At the outset, I note that the SEC filing was made on 10 Jun 16. Clearly, that filing has no independent relevance in terms of equitable tolling, except and to the extent that the FINRA filing tolled the running of the time and would bring 10 Jun 16 within the 180 day limit. That leaves only the question of whether Complainant's filing of the FINRA complaint equitably tolled the deadline for filing his OSHA complaint.

Equitable tolling would apply if (1) Respondent actively misled Complainant respecting the cause of action, (2) Extraordinary circumstances prevented Complainant from asserting his rights, (3) Complainant raised the precise statutory claim in issue but mistakenly did so in the wrong forum, or (4) Even though Respondent did not actively mislead Complainant, it lulled him into foregoing prompt action to vindicate his rights. The evidence does not suggest and Complainant does not argue either that equitable tolling exists because he was somehow misled by Respondent or that extraordinary

[42] In some cases, in order to save time and resources, counsel will rely on the client to prepare draft documents for filing. Even in those cases, counsel remains responsible for the accuracy and completeness of the filing.

circumstances prevented him from asserting his rights. Instead, Complainant cites his FINRA filing as the grounds for equitable tolling.

In order to avail himself of equitable tolling, Complainant must show that he mistakenly filed the precise statutory claim in the wrong forum. Specifically, the evidence must establish that it is more likely than not that (1) he was alleging that Respondent took adverse action against him at least in part because of his actions and those actions constituted protected activity under SOX (precise claim) and (2) he mistakenly filed those allegations with FINRA, rather than OSHA (wrong forum).

Complainant's letter to FINRA on 30 Sep 13 primarily addresses the wrongdoing by Respondent, although it does mention he was forced to resign and asks to be given back the job from which he was forced to step down. Thus, to the extent Complainant filed his complaint in the wrong forum, it was already time-barred. On the other hand, his supplemental letter that was received on 22 Oct 13, does note that his application for rehire was rejected. Thus, that communication satisfies the precise claim requirement. In other words, the evidence shows that the FINRA complaint at that point reflects Complainant's allegation that Respondent had refused to rehire him because he engaged in protected activity under SOX.[43]

However, the evidence falls far short of establishing that Complainant mistakenly filed those allegations with FINRA, rather than OSHA. His own credible testimony contradicts any suggestion that he somehow believed he was to file his complaint with FINRA. He testified that friends told him to contact the Department of Labor and on 9 Sep 13, he called the DOL 1-800 number. He further testified that he told the person at the other end he had reported illegal activity, been forced to resign, reapplied, and then rejected for rehire. Significantly, his description of their conversation includes nothing to indicate that the DOL representative gave him any reason to believe he should be taking his complaint to FINRA, or any agency other than DOL, for that matter. Complainant testified only that he was told that the time limit for filing a complaint was not one-year, but six months, so he would be too late. Perhaps the most significant part of Complainant's testimony was that at the end of the phone call, he was angry that he had missed the deadline and decided he was going to take his information to FINRA. The weight of the evidence establishes that Complainant's filing with FINRA does not entitle him to equitable tolling.[44]

[43] I need not reach an ultimate conclusion as to the precise statutory claim issue because of my findings related to mistaken/wrong forum. However, I do note that to the extent Complainant's claim was accepted by and settled before FINRA, it could not be the same precise statutory claim, since FINRA has no authority to adjudicate SOX whistleblower complaints. Assuming arguendo that for some reason it was the same precise statutory claim, the settlement between Complainant and Respondent would at least arguably extinguish any rights Complainant is attempting to vindicate in this case.

[44] The same analysis would apply to the SEC filing.

Claimant also testified that it never occurred to him that Respondent's refusal to rehire him might be a new adverse action and give him more time to file a complaint until sometime after September 2014. There was some discussion as to whether Complainant did indeed mention the rejection of his application in his September 2013 phone call, what he may have been advised by the DOL representative, and what impact that might have on the timeliness of his complaint. Had Complainant filed a complaint with OSHA concerning his rejected application in September 2013 it may well have been timely. But he did not file a complaint and there is simply insufficient evidence to establish the type of extraordinary circumstances that might justify equitable tolling.[45]

In conclusion, the weight of the evidence establishes that Complainant did not file a complaint with OSHA within the required 180 days of being constructively discharged or having his application for rehire rejected. The weight of the evidence further establishes that no grounds for equitable tolling exist. The complaint is untimely and is denied.

[45] Even if that were the case, those extraordinary circumstances and the tolling would have ceased at the point he realized the time limit started anew with the rejection of his application, which, according to his to testimony, took place sometime after September 2014. By that time he had already filed his 2014 complaint, had it denied, and did not object to the findings. Moreover, given any reasonable contextual interpretation of the phrase "sometime after September 2014," the 180 day time limit would still have run out long before he filed his next (and instant) OSHA complaint in August 2017.

SO ORDERED.

Patrick M. Rosenow
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(a). Your Petition should identify the legal conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

When you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. *See* 29 C.F.R. § 1980.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings

from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party§s supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party§s legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).