



Reply to the attention of:

JAN 28 2016

**MEMORANDUM FOR: REGIONAL ADMINISTRATORS;
WHISTLEBLOWER PROGRAM MANAGERS**

THROUGH: 
DOROTHY DOUGHERTY
Deputy Assistant Secretary

THROUGH: 
JORDAN BARAB
Deputy Assistant Secretary

FROM: 
MARYANN GARRAHAN
Director, Directorate of Whistleblower Protection Programs

**SUBJECT: Tolling of Limitation Periods under OSHA Whistleblower
Laws by Private Agreements and for Other Reasons**

The whistleblower statutes that OSHA enforces generally require an employee to file a whistleblower complaint within 30 to 180 days, depending on the statute, of the adverse action alleged in the complaint. This memorandum clarifies that OSHA will accept an otherwise untimely whistleblower complaint where the complainant and respondent have made a private agreement that tolls (extends) the deadline for filing a whistleblower complaint. The memorandum also describes other situations in which equity may permit OSHA to accept an untimely filing.

Private Agreements

OSHA will recognize private agreements that expressly toll (extend) the filing deadline. This policy is consistent with recent Administrative Review Board (ARB), administrative law judge (ALJ), and federal court cases. Accepting such agreements may encourage private resolution of disputes, and the whistleblower laws offer no reason to reject such agreements.

As a general rule, statutory limitations periods can be tolled by the parties or modified by the adjudicator (often termed "equitable modification"), unless Congress clearly indicates to the contrary. The common forms of modification are equitable tolling, where the employee's excusable ignorance of the facts underlying the claim lead the adjudicator to toll the deadline, and equitable estoppel, where the employee understands his or her rights but misses the deadline

due to reasonable reliance on confusing or misleading statements or conduct by the employer. The parties may also simply agree to waive the statute of limitations.

The ARB has recognized equitable modification in past cases, and has suggested that parties can toll the 180-day deadline for filing a SOX complaint by private agreement. In *Turin v. AmTrust Financial Svcs., Inc.*, ARB No. 11-062, ALJ No. 2010-SOX-018 (ARB March 29, 2013), the ARB accepted an untimely filing in a SOX whistleblower case where the former employer and employee had made a “standstill” agreement. The agreement prohibited either party from filing a complaint or initiating any action until the earlier of a) ten days after delivering written notice, or b) 30 days from the date of agreement. Though the ARB had not explicitly accepted such an agreement in the past, it likened the standstill agreement to other equitable modification situations in which the defendant’s conduct induces the complainant to refrain from filing within the limitations period (see below). Though the ARB limited its decision in *Turin* to the facts of that case, and offered no blanket statements concerning private tolling agreements, the decision’s rationale indicates that the ARB is open to extensions of the filing deadline based on private agreements.

In reaching its decision the ARB considered “the totality of the undisputed facts surrounding the standstill agreement,” and emphasized that the agreement “clearly demonstrates that both parties affirmatively negotiated a moratorium on litigation.” In order to justify equitable modification, a private agreement must actually operate to extend the deadline to file a whistleblower complaint, and must reflect the mutual assent of the signatories. Also, such an agreement will only toll the limitations period with respect to the parties that are actually covered by the agreement. See *Hammond v. Citrix Systems, Inc.*, ALJ No. 2008-SOX-00037 (June 11, 2008) (dismissing claims against named individual and “Doe” defendants because tolling agreement only covered corporate entities).

Existing whistleblower regulations and OSHA guidance reinforce the ARB’s position in *Turin*. They generally recognize that equitable principles, as developed case by case, may justify tolling a filing deadline. See, e.g., 29 CFR § 1980.103(d) (in SOX cases, “[t]he time for filing a complaint may be tolled for reasons warranted by applicable case law”); § 24.103(d)(1) (environmental statutes); § 1978.103(d) (STAA); § 1982.103(d) (NTSSA and FRSA); § 1983.103(d) (CPSIA); § 1986.103(d) (SPA). See also OSHA Whistleblower Investigations Manual, Section 2-7.

Equitable Modification without a Private Agreement

As explained in Chapter 2 of OSHA’s whistleblower investigations manual, ARB and federal cases identify a number of situations that may justify equitable modification, even where there is no explicit agreement to toll the statute of limitations. In *Turin*, the ARB described four situations that might justify equitable modification, though it emphasized that the list is not exclusive. Paraphrased, they appear below:

- (1) the employer actively misleads or conceals information such that the employee is prevented from making out a prima facie case;
- (2) some extraordinary event prevents the employee from filing on time;

- (3) the employee timely files the complaint, but with the wrong agency or forum; and
- (4) the employer's own acts or omissions induce the employee to reasonably forego filing within the limitations period.

Note that the mere occurrence of settlement negotiations is not enough to justify equitable modification. *Beckman v. Alyeska Pipeline Servs. Co.*, ARB No. 97-057, ALJ No. 1995-TSC-016 (ARB Sept. 16, 1997). However, repeated assurances that the employee will be reinstated, compensated, or made whole, with or without any bad faith on the employer's part, could induce a reasonable employee to forego filing a complaint, and thus justify equitable modification. *Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020 (ARB Mar. 31, 2010). OSHA will have to draw the line between settlement negotiations, in which the parties presumably hope to reach a resolution, and employer promises of the type that would cause a reasonable employee to refrain from filing a complaint. In doing so, OSHA should consider what exactly the employer communicated to the employee, in what context, and whether it can fairly be said that the parties reached an agreement final enough to persuade a reasonable employee that filing a complaint would be unnecessary.

Finally, there are several situations in which equitable modification is not appropriate. Ignorance of the statute of limitations, on the part of the employee or counsel, will not justify equitable modification. Neither will participation in the employer's internal complaint or grievance process, unless the employer actively conceals or misleads during that process, or otherwise induces the employee to reasonably forego filing. Finally, an employee's ignorance of the employer's retaliatory motive generally will not justify equitable modification.

2013 WL 1494460 (DOL Adm.Rev.Bd)

Administrative Review Board

United States Department of Labor

IN THE MATTER OF: BENTZION S. **TURIN**, COMPLAINANT

v.

AMTRUST FINANCIAL SERVICES, INC.; MAIDEN HOLDINGS, LTD.; MAIDEN INSURANCE COMPANY LIMITED, MAIDEN HOLDINGS NORTH AMERICA, LTD.; AND ART RASCHBAUM, INDIVIDUALLY; GEORGE KARFUNKEL, INDIVIDUALLY; BARRY KARFUNKEL, INDIVIDUALLY; MICHAEL KARFUNKEL, INDIVIDUALLY; AND BARRY ZYSKIND, INDIVIDUALLY, RESPONDENTS

ARB CASE NO. 11-062

ALJ CASE NO. 2010-SOX-018

March 29, 2013

***1 Appearances:**

For the Complainant:

Edward S. Rudofsky, Esq., *Zane and Rudofsky*, New York, New York

For the Respondents:

A. Michael Weber, Esq.; Meredith L. Bronfman, Esq., *Littler Mendelsohn, P.C.*, New York, New York

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*. Judge Edwards *concurring*.

FINAL DECISION AND ORDER OF REMAND

This case arises under the employee protection provision of the Sarbanes-Oxley Act of 2002 (Section 1514A or SOX) and its implementing regulations.¹ Bentzion Turin filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondents terminated his employment in retaliation for engaging in protected activity. On June 30, 2011, a Labor Department Administrative Law Judge (ALJ) granted summary decision² in the Respondents' favor, finding that Turin failed to create a genuine issue of material fact that he filed a timely complaint. We reverse and remand for further proceedings.

BACKGROUND³

Bentzion Turin was hired as general counsel of AmTrust Financial Services, Inc. (AmTrust) for U.S. operations in March 2007. Turin held this position until June 2007. The parties do not dispute that AmTrust is a publicly traded company and a covered "company" as defined under SOX Section 1514A(a). Majority shareholders in AmTrust are also significant shareholders and founders of another company, Maiden Holdings (Maiden), also publicly traded and based in Bermuda. Decision and Order (D. & O.) at 3; Turin Opp. to Mot. to Dis. at 18. Maiden is the parent company of Maiden Insurance Company and Maiden Holdings North America.

Turin signed an employment contract on July 3, 2007, to serve as the Chief Operating Officer, General Counsel, and Secretary of both Maiden and Maiden Insurance Company. D. & O. at 3. According to the contract, Turin's initial employment term ran from July 3 through December 31, 2007, and, in the absence of a more permanent contract, automatically renewed for one renewal period through June 30, 2008. *Id.* at 3. Under the agreement, Turin reported to Maiden's Chief Executive Officer (CEO) and served at the pleasure of the Maiden Board of Directors. *Id.* Turin and the Respondents agree that Turin also reported to Barry Zyskind, the President and CEO of AmTrust and Chairman of Maiden's Board. Respondent's Br. 3; April 2, 2009 Compl. at 3. After June 30, 2008, Turin would be an at-will employee unless a more permanent agreement had been executed. Turin Opp. to Mot. to Dis., Ex. A; D. & O. at 3. For purposes of this motion,

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we accept that Turin and Maiden entered into a second employment agreement in April 2008 that was in effect in December 2008 (the 2008 Contract). D. & O. at 6. The 2008 contract required any notice of termination by Maiden to be submitted to Turin in writing, delivered via certified or registered mail.

*2 In February 2008, Turin became a director of AmTrust's subsidiaries, AII Insurance and AII Insurance Management (collectively, AIIM).⁴ AIIM is not publicly traded. Turin asserted that he was "hired to serve as a director [of AIIM]," "hired to work for AIIM," was "paid a salary of \$5,000 per month for his services," and "received paychecks from AmTrust." June 11 Supp. Letter to OSHA, at 9. Allegedly, Zyskind (AmTrust's CEO) "directed Turin as to his responsibilities at AIIM," Zyskind approved AIIM's "material payments," and "Zyskind managed AIIM directly from his office in N[ew] Y[ork]." Turin Opp. to Mot. to Dis. at 62-63. Turin asserted in his statements to OSHA that "AmTrust and AIIM were, for purposes of SOX, 'so intertwined as to represent one entity,'" and he listed his reasons. *Id.* at 10-11. Turin essentially argues that AmTrust and AIIM were his joint-employer and that he suffered monetary losses as a result of allegedly unlawful discrimination under SOX.

In the summer of 2008, Maiden sought to acquire GMAC Re. Turin was concerned about the acquisition because the majority owners of AmTrust and partial owners of Maiden were carrying out the deal to their best interests without making the terms or opportunities known to Maiden and its shareholders. According to Turin, on Monday, December 15, 2008, he emphasized this conflict to Zyskind. Turin stated that the reason for the meeting was to inform Zyskind of his fiduciary duties to shareholders and to have the transaction reviewed by Maiden's Board. Later on December 15, 2008, Zyskind told Turin, "You're fired." April 2 Compl. at 11; D. & O. at 3-4.

The following day, December 16, 2008, Turin flew to Bermuda, where Maiden is based, to remove some of his personal items from his desk. D. & O. at 4. Turin indicated to Art Raschbaum, Maiden's President and Chief Executive Officer, that he was going to continue to carry out his duties until further notice. D. & O. at 4; Turin Opp. to Mot. to Dis., Ex. G. Turin informed Zyskind of his conversation with Raschbaum and his continued efforts to work things out. D. & O. at 4. During this period after Turin's termination, Zyskind offered Turin alternative employment opportunities.

On December 31, 2008, Turin and Raschbaum exchanged a series of additional e-mails. Turin questioned Raschbaum on the status of an interview with the Audit Committee and noted his status as a SOX whistleblower. Turin Opp. to Mot. to Dis., Ex. G. Raschbaum reiterated that the company had communicated a decision to terminate him, which Raschbaum said was effective that day. Turin then asked Raschbaum whether he had Board of Director minutes to confirm the termination. Based on the terms of the 2008 employment contract, Turin believed that Board action and written notice of the Board's decision were required to terminate his employment with Maiden. D. & O. at 11.

*3 On January 8, 2009, Maiden's Board decided to remove Turin from his positions at Maiden for good cause. Turin Opp. to Mot. to Dis., Ex. H. Maiden's Board, through Raschbaum, sent Turin a letter on January 15, 2009, stating that Turin's filing a document with the Securities and Exchange Commission (SEC) was a breach of a fiduciary duty and that he was terminated effective that day. Turin Opp. to Mot. to Dis., Ex. I. Raschbaum sent Turin a second letter also dated January 15 that removed Turin from his positions at Maiden Insurance. Turin Opp. to Mot. to Dis., Ex. J. On January 20, 2009, Maiden filed a Form 8-K with the SEC indicating that Turin was no longer with the company and the date of termination was January 15, 2009. Turin Opp. to Mot. to Dis., Ex. L. Turin was to remain on AIIM's Board until a vote could be taken; Turin was removed from that Board on February 2, 2009. D. & O. at 5.

As reflected by an exchange of e-mails on March 12, 2009, eighty-seven days after Zyskind's initial attempt to fire Turin on December 15, 2008, the parties agreed, effective that date, to a temporary moratorium on legal action. Turin Opp. to Mot. to Dis. Ex. M. In one e-mail, James Zane, Esq., representing Turin, wrote to Jay J. Miller, Esq., asking Miller to confirm that, among other things: (1) Miller was representing and had the ability to bind "Maiden Holdings, Ltd., Maiden Insurance Company Limited, Maiden Holdings North America, Ltd., and AmTrust Financial Services, Inc." (collectively, "Maiden/AFSI"); (2) "the employment of Turin by Maiden/AFSI shall be deemed for all purposes to have been terminated on January 15, 2009;" and (3) "Neither Turin nor Maiden/AFSI shall take any action nor file any complaint or proceeding against the other prior to the earlier of (a) ten (10) days after written notice of the intention to take such action or file such complaint, or (b) April 12, 2009." Miller responded, "Your e-mail of this date reflects our understanding." Turin Opp. to Mot. to Dis. Ex. M. The parties engaged in settlement negotiations to resolve the dispute without litigation. Those negotiations failed, and on March 23, 2009, Turin informed the Respondents that he intended to file suit. After ten days,

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Turin filed a complaint with OSHA on April 2, 2009.⁵ On December 31, 2009, OSHA denied the complaint as untimely filed. The ALJ, too, found that Turin's complaint was untimely because Turin received "final, definitive and unequivocal" notice of his termination on December 15, 2008, more than ninety days before filing his complaint on April 2, 2009. Turin filed this appeal.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the employee protection provisions of SOX. Secretary's Order No. 2-2012 ([Delegation of Authority and Assignment of Responsibility to the Administrative Review Board](#)), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. Part 1980.

*4 To determine whether there is any genuine issue of a material fact, the ALJ must examine the elements of the complainant's claims to sift the material facts from the immaterial.⁶ Once materiality is determined, the ALJ next must examine the arguments and evidence the parties submitted to determine if there is a genuine dispute as to the material facts. Drawing from the federal law pertaining to summary judgment motions in federal court, we adopt the principle that a "genuine issue" exists if a fair-minded fact-finder (the ALJ in whistleblower cases) could rule for the nonmoving party after hearing all the evidence — recognizing that in hearings, testimony is tested by cross-examination and amplified by exhibits and presumably more context.⁷ The ALJ must view the evidence the parties submitted in the light most favorable to the nonmoving party, the complainant in this case.⁸ The moving party must come forward with an initial showing that it is entitled to summary decision.⁹ The nonmoving party must rebut that showing by identifying the specific facts and/or evidence that create a genuine issue of material fact. The burden of producing evidence "is not onerous and should preclude [an evidentiary hearing] only where the record is devoid of evidence that could reasonably be construed to support the [complainant's] claim." *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008); *Anderson*, 477 U.S. at 252.

In ruling on a motion for summary decision, neither the ALJ nor the Board weighs the evidence or determines the truth of the matters asserted.¹⁰ Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense.

DISCUSSION

SOX Section 1514A(a) provides whistleblower protection for employees of publicly traded companies who report certain acts that they reasonably believe to be unlawful. 18 U.S.C.A. § 1514(A)(a). To prevail in a SOX proceeding, an employee must prove by a preponderance of the evidence that he: (1) "engaged in activity or conduct that the SOX protects; (2) the respondent took an unfavorable personnel action against ... him; and (3) the protected activity was a contributing factor in the adverse personnel action." *Sylvester v. Parexel Int'l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 9 (ARB May 25, 2011). If the employee proves these elements, the employer may avoid liability if it can prove "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of the [protected] behavior." 29 C.F.R. § 1980.104(c); see also *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009).

*5 When Turin filed his complaint, an employee alleging retaliation under SOX was required to file the complaint with OSHA "not later than 90 days after the date on which the violation occurred."¹¹ The OSHA regulations specified at the time that:

[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) an employee who believes that he or she has been discriminated against in violation of the Act may file ... a complaint alleging discrimination ...

29 C.F.R. § 1980.103(d).

1. When the Statute of Limitations Commenced

The time limitation for a SOX complaint begins to run from the date that the complainant "knows or reasonably should know that the challenged act has occurred." What the complainant knew or should have known is measured against an objectively

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“reasonable person” with the same experience and training, facing the same circumstances as the complainant.¹² The limitations period begins to run when the employee receives “final, definitive and unequivocal” notice of the unfavorable employment action forming the basis for the unlawful whistleblower discrimination.¹³ Such a determination necessarily depends on the facts and surrounding circumstances of each case. As previously stated, to support a summary decision, the moving party must demonstrate that material facts are undisputed.

In this case, we think there are genuine issues of material fact precluding a summary decision on the issue of the timeliness of Turin’s complaint. Critical is whether the 2008 employment contract was in effect in December of 2008, thereby creating objectively reasonable expectations in Turin’s mind that a “final and definitive” notice of employment termination required Board action and a written notice of termination sent by certified mail.¹⁴ There is also a material issue as to Zyskind’s authority in his capacity as non-Executive Chairman of the Maiden Board to unilaterally terminate Turin’s employment as he professed to do on December 15, 2008. Moreover, in spite of substantive contrary arguments, the record also raises fact questions about how “definite” the alleged termination notice was on December 15 and 31, 2008. After those dates, and viewing the record in Turin’s favor, the record demonstrates that the Respondents discussed on January 8, 2009, whether to remove Turin from all of his positions in the Respondents’ companies, and then “summarily fired” him on January 15, 2009, later confirmed by a Form 8-K filing on January 20, 2009. These later conversations arguably suggest that the initial termination decision may not have been “final” or “definitive.” However, we need not resolve whether Turin received final, definitive, and unequivocal notice in December 2008 because there is a more concrete basis for accepting Turin’s complaint as timely filed.

2. Equitable Modification of SOX’s 90-Day Statute of Limitations

*6 The clearer issue is whether Turin has established that he is entitled to equitable modification. Even if we assumed that the December 15 notice was adequate, the evidence of record convinces us to accept Turin’s OSHA filing on April 2 as timely in light of the specific circumstances of this case. As we discuss more fully below, we base our conclusion on a “standstill” agreement the parties reached on March 12, 2009.

Similar to other whistleblower statutes, SOX’s ninety-day limitations period is not jurisdictional, and therefore it is subject to equitable modification, i.e., equitable tolling and equitable estoppel. *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 4 (ARB Aug. 31, 2005).¹⁵ As we have said before, equitable tolling and equitable estoppel provide different bases for equitable modification. *Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020 (ARB Mar. 31, 2010).

In determining whether the Board should equitably modify a statute of limitations, we have recognized four principal situations in which equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum; and (4) where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his or her rights.¹⁶ In describing the fourth situation in *Hyman*, we quoted the 5th Circuit Court of Appeals and identified the issue as “whether the defendant’s conduct, innocent or not, reasonably induced the plaintiff not to file suit within the limitations period.” *Hyman*, ARB No. 09-076, slip. op. at 7, quoting *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 865-66 (5th Cir. 1993). We do not find these situations to be exclusive of other grounds for equitable modification.¹⁷ In looking at the undisputed facts of this case, we find that this case sufficiently correlates to the fourth situation to justify equitable modification.

In Turin’s response to the Respondents’ motion for summary decision, Turin argued that the parties entered into a “standstill” agreement. Turin attached the agreement in his response to the Respondents’ motion to dismiss. As we noted above, on March 12, 2009, the parties agreed that “the employment of Turin by Maiden/AFSI shall be deemed for all purposes to have been terminated on January 15, 2009.”¹⁸ More importantly, the standstill agreement expressly provided that the parties would refrain from initiating legal proceedings unless the parties gave ten days’ notice or until the moratorium ended on April 12, 2009. On March 23, 2009, Turin served a ten-day notice of his intention to file suit and then filed the OSHA complaint ten days later on April 2, 2009.

*7 The ALJ determined that the March 23 communication did not create a situation or misrepresentation for equitable estoppel. The ALJ concluded that the March 23 notice, and agreed upon date of termination, did not rise to the level of a

misrepresentation to constitute a ground for tolling the statute of limitations. D. & O. at 13. The ALJ noted that the notice was not in the record and that “nothing prohibited Complainant from giving such notice and filing his Sarbanes-Oxley complaint.” *Id.* at 13 n.7. Without much more discussion, the ALJ ruled that equitable estoppel was “discretionary” and that this case “is not an appropriate situation in which to apply it.” *Id.* We disagree. It is not the March 23rd communication that is relevant, but the March 12th “standstill” agreement of the parties.

Viewing the totality of the undisputed facts surrounding the standstill agreement, we find sufficient grounds exist for equitable modification of the statute of limitations. The standstill agreement clearly demonstrates that both parties affirmatively negotiated a moratorium on litigation for a minimum of ten days and potentially thirty days. It is undisputed that the parties agreed to the standstill agreement on March 12, 2009, which was 87 days after December 15, 2008 (the day that Zyskind said to Turin, “you are fired”). Consequently, even under the Respondents’ view of the facts, Turin still had three days to file an OSHA claim. But this agreement committed Turin to forestall filing an OSHA complaint until more than ninety days after December 15, 2008. Then, after Turin complied with the terms of the standstill agreement, the Respondents raised the limitations bar, essentially arguing that Turin should have filed the OSHA complaint within three days after agreeing to the standstill agreement. Arguably, filing an OSHA complaint without a ten-day notice would have violated the standstill agreement. If the statute of limitations began to run on December 31, 2008, as the Respondents alternatively argue, then Turin had to file an OSHA complaint on March 31, 2009. This would have given the parties about nine days to negotiate before Turin had to serve a ten-day notice. As it turned out, Turin served a ten-day notice on March 23, 2009, and filed the OSHA complaint ten days later as permitted by the precise terms of the standstill agreement.¹⁹ Having considered the totality of the circumstances, we find that equity requires that we hold the Respondents to the terms of their agreement with Turin and accept as timely the April 2nd filing of the OSHA complaint.²⁰

3. Dismissal of AmTrust as a Party

The Respondents moved for dismissal of AmTrust on the grounds that AmTrust was not a covered employer with respect to Turin. Mot. to Dis. at 15. The Respondents state that for SOX liability, the employer must be the actual employer of the employee and have the ability to affect the employee’s employment. *Id.* According to the Respondents, Turin’s employment with AmTrust ended in June 2007. Furthermore, the Respondents state that Turin did not name AIIM in the complaint and that AmTrust did not control or influence employment decisions at AIIM. *Id.* at 16. The parties do not dispute that the whistleblower protections in the SOX whistleblower statute apply to AmTrust.

*8 Turin’s bases for asserting claims against AmTrust were unclear in his OSHA complaint, but he supplemented his OSHA complaint with a letter dated June 11, 2009 (Supplementation Letter) to OSHA and in documents filed before an ALJ. In his OSHA complaint, he listed AmTrust as a party, referred to AmTrust throughout the OSHA complaint and then included AmTrust, Maiden, and several other parties in his “Request for Relief,” “jointly and severally.” Turin’s request for relief asked that he be reinstated to his positions with Maiden Holdings, Ltd., and Maiden Insurance Company, Limited. While he did not expressly identify AIIM in his initial OSHA complaint, he certainly did so in his Supplementation Letter to OSHA and his submissions to the ALJ’s pre-hearing order. In the Supplementation Letter, Turin argued that AmTrust was a proper party because (1) AIIM was a wholly owned subsidiary of AmTrust; (2) AmTrust was directly involved with “hiring” him at AIIM and with AIIM’s business operations; and (3) he was terminated from his position at AIIM “in blatant retaliation for claimant’s whistleblowing at Maiden.” See June 11, 2009 Letter, at 9-10. In his opposition brief before the ALJ, Turin twice expressly referenced his Supplementation Letter to OSHA.²¹ See Turin Opp. to Mot. to Dis. at 2 n.1, 64. In his opposition to the Respondents’ motion to dismiss, and his briefs on appeal, Turin argues only that AmTrust was responsible for his lost directorship and “de facto” employment with AIIM and so our review focuses solely on that claim as to AmTrust.

The ALJ addressed Turin’s claim against AmTrust as resting on two separate legal theories: direct liability and vicarious liability. He rejected both theories and dismissed AmTrust as a party, citing only two reasons. As to direct liability, noting that this theory was vague, the ALJ ruled that Turin did not assert in his OSHA complaint that he was an employee of AmTrust and, therefore, “his employment there could not have been terminated in retaliation for whistleblowing.” D. & O. at 7. The ALJ then considered whether AmTrust could be vicariously liable as a parent company of AIIM for Turin’s lost position at AIIM. The ALJ rejected the vicarious liability claim because Turin failed to “plead” the issue of AIIM’s retaliatory removal from his director position with AIIM. *Id.* at 8. The ALJ held that an OSHA investigation was a prerequisite to the ALJ’s adjudication. *Id.* The ALJ and the Respondents cite no statutory or regulatory language to support their “failure to exhaust” argument but do cite one Board decision for support, *Coates v. Southeast Milk, Inc.*, ARB No.

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05-050, ALJ No. 2004-STA-060 (ARB July 31, 2007), a case which materially differs from this case.²² In the end, it is a mistaken understanding of the record that requires us to reverse the ALJ's dismissal of the claim against AmTrust.

*9 As to the claim against AmTrust as a parent company, the ALJ erred by relying solely on the OSHA complaint to determine whether Turin sufficiently asserted a claim of retaliatory discharge from AIIM. We agree with the ALJ that Turin said nothing in his complaint about his employment position with AIIM. But the OSHA regulations expressly allow for "supplementation" of the complaint, which Turin did. See 29 C.F.R. § 1980.104(a)(1) and (2).²³ Turin filed his Supplementation Letter with the ALJ after he requested a hearing and he twice referenced this letter in opposing the Respondents' motion to dismiss. To determine what Turin asserted before OSHA, the ALJ should have considered the complaint and supplementary information referenced in Turin's brief. Notably, Turin also referenced the Supplementation Letter in his submissions to the ALJ's own pre-hearing order. The OSHA complaint listed AmTrust as a party and repeatedly referenced AmTrust throughout the complaint, including in the Request for Relief. The complaint's focus was Turin's loss of employment with Maiden, but the Supplementation Letter added the loss of employment at AIIM. In his briefs, Turin's claim against AmTrust focused solely on a claim that AmTrust caused his lost directorship and/or employment with AIIM. Given this procedural history, we conclude the ALJ erred in dismissing the claim against AmTrust as to the allegedly retaliatory loss of employment at AIIM. We note that the ALJ questioned whether a position as "director" at AIIM was covered by SOX, but understandably the ALJ opted not to address this issue. We find it more prudent to return this SOX coverage issue to the ALJ to first consider. In addition, Turin asserts that he was actually "hired to work" as an employee of AIIM, which is a factual issue that we are not permitted to resolve. See Turin's June 11 Supp. Letter at 9 (he was hired at AIIM); Turin Opp. to Mot. to Dis. at 11 (he was "hired to work for AIIM).

Turning to the ALJ's dismissal of Turin's direct liability claim against AmTrust, we cannot decipher from the ALJ's opinion how Turin's failure to allege in his OSHA complaint he was an employee of AmTrust was dispositive. We appreciate that the ALJ found Turin's claims to be "vague." But the Board has never ruled that SOX prohibits covered companies only from unlawfully discriminating against their direct employees.²⁴ More importantly, the ALJ repeated the error of failing to consider the Supplementation Letter. In the Supplementation Letter, Turin asserted that he was "hired to serve as a director," "hired to work for AIIM," was "paid a salary of \$5,000 per month for his services" and "received paychecks from AmTrust." June 11 Supp. Letter at 9. In his arguments to the ALJ, and citing to deposition testimony, Turin claimed that Zyskind (AmTrust's CEO) "directed Turin as to his responsibilities at AIIM," Zyskind approved AIIM's "material payments," and "Zyskind managed AIIM directly from his office in N[ew] Y[ork]." Turin Opp. to Mot. to Dis. at 62-63. Turin argued that "AmTrust and AIIM were, for purposes of SOX, 'so intertwined as to represent one entity,'" and he listed his reasons. *Id.* at 10-11. Turin essentially argues that AmTrust and AIIM were his joint-employer and that he suffered monetary losses as a result of allegedly unlawful discrimination under SOX. Because the ALJ did not consider the Supplementation Letter, he erroneously dismissed Turin's joint-employer claim. Therefore, in light of the ALJ's incomplete view of the record, we reject both of the ALJ's reasons for dismissing the whistleblower claims against AmTrust for the lost position at AIIM.

CONCLUSION

*10 We **REVERSE** the ALJ's finding of untimeliness and dismissal of the claims against the Respondents. We also **REVERSE** the ALJ's dismissal of Turin's claim against AmTrust for the allegedly retaliatory dismissal from his position at AIIM. We **REMAND** this matter for further proceedings consistent with this order

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge
E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

Lisa Wilson Edwards, Administrative Appeals Judge, concurring.

I agree with the majority decision to remand this case on grounds that the ALJ erred in failing to equitably modify the statute of limitations in this SOX case, and dismissing AmTrust as a party. *Supra* at 7-12. I write separately, however, because I

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think that there is no genuine issue of material fact as to the timeliness of Turin's complaint. See *supra* at 6-7. Absent equitable modification of the statute of limitations, Turin's complaint would have to be dismissed as untimely.

When Turin filed his complaint, an employee alleging retaliation under SOX was required to file the complaint with OSHA "not later than 90 days after the date on which the violation occurred." 18 U.S.C.A. § 1514A(b)(2)(D). D. & O. at 1 & n.1. The OSHA regulations specified at the time that:

[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) an employee who believes that he or she has been discriminated against in violation of the Act may file ... a complaint alleging discrimination

29 C.F.R. § 1980.103(d) (emphasis added). The statute of limitations in whistleblower cases begins to run when an employee receives "final, definitive and unequivocal notice of an adverse employment decision." *Rollins v. American Airlines*, ARB No. 04-140, ALJ No. 2004-AIR-009 slip op. at 3 & n.9, (ARB Apr. 3, 2007) (citing *Chardon v. Fernandez*, 454 U.S. 6 (1981) and *Delaware State College v. Ricks*, 449 U.S. 250 (1980)); *Snyder v. Wyeth Pharms.*, ARB No. 09-008, ALJ No. 2008-SOX-055, slip op. at 6 (ARB Apr. 30, 2009).

It is well established that in determining the triggering event for the limitations period in a discriminatory discharge case such as this, the "proper focus ... is on the time of the discriminatory act, not the point at which the consequences of the fact become painful." *Chardon*, 454 U.S. at 8 (1981); see also *Ricks*, 449 U.S. at 257-259 (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated). "The date that an employer communicates a decision to implement such a decision, rather than the date the consequences of the decision are felt, marks the occurrence of the violation." *Overall v. Tenn. Valley Auth.*, ARB Nos. 98-111, -128; ALJ No. 1997-ERA-053, slip op. at 36 (ARB Apr. 30, 2001); see also *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1141 (6th Cir. 1994) (three letters warning of further discipline did not constitute final notice of employer's intent to discharge complainant). "Complaints that employment termination resulted from discrimination can present widely varying circumstances" and "the application of the[se] general principles ... necessarily must be made on a case-by-case basis." *Ricks*, 449 U.S. at 258 n.9.

*11 The undisputed facts show that on December 15, 2008, Turin met with Barry Zyskind, President and CEO of AMTrust and Chairman of Maiden, about the company's acquisition of GMAC RE. D. & O. at 3. Turin stated that he sought to advise Zyskind to "comply with his fiduciary duties to shareholders and have the transaction reviewed by the Board of Directors of Maiden." *Id.* at 3-4. Later that day, Zyskind informed Turin verbally that his "employment with Maiden was being terminated." *Id.* at 4. A series of e-mail conversations followed. *Id.* at 4. In an e-mail to Zyskind, Turin stated that he had talked to Arturo Raschbaum, CEO of Maiden, and told him that "it might be naïve of me, but I still believe there is a good chance that we can repair things at Maiden, and that I will in fact continue to work for you in my current role." *Id.* On December 31, 2008, Turin e-mailed Raschbaum about interviewing with the company's Audit Committee and that "the termination, or attempted termination of a Sarbanes Oxley Whistleblower triggers significant duties on the board of directors under Sarbanes Oxley and other federal and state statutes." *Id.* at 4, citing CX-G. Raschbaum responded to Turin's e-mail, stating: "I communicated to you our decision to terminate your employment effective today. I also requested that you return all company property as soon as possible." *Id.* at 4-5.

"Determining the timeliness" of Turin's complaint requires the ARB to "identify precisely the unlawful employment practice of which he complains." *Ricks*, 449 U.S. at 257 (internal quotations omitted). Given the undisputed facts in this case, the statute of limitations for Turin's SOX complaint began to run as early as December 15, 2008, when, after a discussion about Zyskind's fiduciary duties Zyskind told Turin that he was fired, or December 31, 2008, when Raschbaum e-mailed Turin and told him that his employment was terminated "effective today." D. & O. at 4-5; see also *Miller v. International Tel. & Tel. Corp.*, 755 F.2d 20, 23 (2d Cir. 1985) (statute of limitations "starts running on the date when the employee receives a definite notice of the termination, not upon his discharge" and that "[t]he notice may be oral."). The unlawful action occurred during the time in which Turin purportedly was engaged in protected activity (e.g., complaining to Zyskind and Raschbaum about their fiduciary duties to the company) and when Zyskind and Raschbaum, on the same day of these conversations, fired Turin.

Turin argued that his firing by Zyskind and Raschbaum was not final for purposes of triggering the SOX statute of limitations, because the discharge had not been voted on by the Maiden Board of Directors. However, notice of termination

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“is based upon an objective standard, focusing upon when the employee knew, or reasonably should have known, that the adverse employment decision had been made.” *Phillips v. Leggett & Platt, Inc.*, 658 F.3d 452, 456 (5th Cir. 2011) (internal quotations omitted). The notices given by Zyskind and Raschbaum in this case do not show any equivocation in their decision that Turin be discharged. *See, e.g., Poli v. Jacobs Engineering Grp*, ARB No. 11-051, ALJ No. 2011-SOX-027, slip op. at 7 (ARB Aug. 31, 2012) (employee’s receipt of CCL letter “which outlines a plan to provide for the continuation of employee benefits and states a project date of return, and subsequent email exchange [did] not state unequivocally that Complainant was or would be terminated.”); *Avlon v. American Express*, ARB No. 09-089, ALJ No. 2008-SOX-051, slip op. at 11-14 (ARB May 31, 2011) (series of e-mails and discussions after September 6, 2008, e-mail “undoubtedly extended the possibility that [Complainant] would not be terminated, and that her employment at AMEX would continue in some fashion.”). Under the facts here, Turin should have known, or reasonably been aware, that the verbal and e-mail discharge notices from Zyskind and Raschbaum, which were given in the context of Turin’s alleged protected activity, constituted an adverse action. The limitations period begins to run when the employee is notified of an adverse action, not when the employment ends. *Ricks*, 449 U.S. at 258. Here, Turin was clearly notified verbally and by e-mail by two superiors in the corporate structure in December 2011, that his employment was terminated. Even though Turin remained employed with the company until the Maiden Board of Directors voted on his discharge, the “[m]ere continuation of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.” *Id.* at 257.

*12 For these reasons, I think that the statute of limitations on Turin’s SOX claim began to run as early as December 15, 2011, when Turin was fired verbally by Zyskind, or as late as December 31, 2011, when the termination decision was reaffirmed by Raschbaum in an e-mail. In any event, Turin’s SOX complaint is not foreclosed from review since the limitations period was subject to equitable modification.

LISA WILSON EDWARDS
Administrative Appeals Judge

Footnotes

¹ 18 U.S.C.A. § 1514A (West Supp. 2009); 29 C.F.R. Part 1980 (2009). In 2010, Congress amended Section 1514A. See the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act). As we explain *infra*, the amendments do not affect our decision.

² The Respondents filed a motion to dismiss. The parties attached deposition testimony, sworn declarations, and other evidentiary exhibits. Under the Department of Labor’s Administrative Rules of Practice and Procedure, the ALJ evaluated the motion under the same standard as that of a motion for summary decision. No party has raised an objection to the resolution of the Respondents’ motion as a motion for summary decision. For purposes of the remand order, and consistent with the parties’ briefing, we will treat the motion to dismiss as a motion for summary decision and employ the summary decision standard. 29 C.F.R. §§ 18.40, 18.41 (2012).

³ For this factual background, we view the facts in the light most favorable to Turin, the party responding to a motion for summary decision. We do not suggest that any of these facts have been decided on the merits.

⁴ D. & O. at 3. Turin’s statements about AmTrust’s relationship with AIIM are relevant only to demonstrate that, contrary to the ALJ’s dismissal order, he did explain before OSHA and the ALJ the basis for asserting a claim against AmTrust.

⁵ OSHA used the date of April 3, 2009. OSHA concluded that Turin had received notice of termination on December 19, 2008, but did not file his complaint until April 3, 2009. OSHA Order at 2. The parties and the ALJ used April 2, 2009, as the filing date. No one raised the issue of April 3 on appeal, and thus we will use April 2, 2009, as the filing date.

⁶ *See Hasan v. Enercon, Servs., Inc.*, ARB No. 10-061, ALJ Nos. 2004-ERA-022, -027; slip op. at 4 (ARB July 28, 2011). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“Only disputes over facts that might affect the outcome of the suit” preclude summary judgment.).

⁷ *Anderson*, 477 U.S. at 252 (“whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”).

⁸ *Siemaszko v. First Energy Nuclear Operating Co. Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29,

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2012).

⁹ 29 C.F.R. § 18.40(d); *Pickett v. Tenn. Valley Auth.*, ARB No. 00-076, ALJ No. 2000-CAA-009, slip op. at 3 (ARB Apr. 23, 2003). See also *Am. Int'l Group, Inc. v. London Am. Int'l Corp. Ltd.*, 664 F.2d 348, 351 (2d Cir. 1981).

¹⁰ *Siemaszko*, ARB No. 09-123, slip op. at 3. See also *Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027; slip op. at 6 (ARB May 29, 2009) (citation omitted).

¹¹ 18 U.S.C.A. § 1514A(b)(2)(D). Sections 922(c) of the Dodd-Frank Act, P.L. 111-203 (July 21, 2010), amended Section 806 of SOX, 18 U.S.C.A. § 1514A, to lengthen the time for filing a complaint to 180 days. The ALJ found that Dodd-Frank's 180-day limitations amendment was not retroactive, but the ALJ provided no legal analysis or authority for this conclusion. D. & O. at 1 & n.1. Regardless, we need not review this determination given our ruling today.

¹² *Snyder v. Wyeth Pharms.*, ARB No. 09-008, ALJ No. 2008-SOX-055, slip op. at 6 (ARB Apr. 30, 2009).

¹³ *Avlon v. Am. Express Co.*, ARB No. 09-089, ALJ No. 2008-SOX-051, slip op. at 12 (ARB May 31, 2011); *Snyder*, ARB No. 09-008, slip op. at 6.

¹⁴ The ALJ viewed the existence of the 2008 contract as immaterial to the issue of when Turin received notice. D. & O. at 6, 11. Significantly, however, for purposes of analyzing the Respondents' motion for summary decision, the Respondents and the ALJ assumed that the 2008 Contract was in effect. D. & O. at 6; Resps. Brief at 11, n. 7. This issue is material because the contract required written notice of termination by certified mail providing details about the "for cause" basis for termination of employment. It is undisputed that no such notice was sent in December 2008. We agree with Turin, that the ALJ and the Respondents incorrectly argued that the contract was only relevant for a contract dispute. To the contrary, it is relevant in deciding the effect such contract would have on a similarly situated, reasonable person as to what constituted "final" and "definitive" notice where the contract set out the requirements for a proper notice, especially a corporate attorney with Turin's professional experience.

¹⁵ In two recent cases, the United States Supreme Court reaffirmed that, absent a clear legislative intent to the contrary, claim-processing deadlines generally are not jurisdictional. See *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824-25 (2013); *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011).

¹⁶ *Selig v. Aurora Flight Sci.*, ARB No. 10-072, ALJ No. 2010-AIR-010, slip op. at 3-4 (ARB Jan. 28, 2011).

¹⁷ *Id.* at 4.

¹⁸ We agree with the ALJ and the Respondents that the effective date of the termination is not the same as deciding the date that "notice" was given. But, giving Turin all favorable inferences, as we must in deciding a motion for summary decision, the phrase "for all purposes" does support an inference that the intent was that this applied to any statute of limitations.

¹⁹ We note that the March 23, 2009 notice was attached as an addendum to Turin's Reply Brief but was not a part of the record below. We find this fact immaterial in this case. First, we primarily focus on the express terms of the March 12th standstill agreement. Second, as Turin pointed out in his reply brief, it appears undisputed that Turin served a ten-day notice on or about March 23 or 24, 2009, and filed the OSHA complaint ten days later. Turin Reply Br. at 6-7. Finally, even if Turin had not served a ten-day notice, it would only mean that he violated the standstill agreement by failing to wait until the expiration of the standstill agreement on April 12, 2009, before initiating litigation. Such a scenario returns us to the very question we face: whether requiring the Complainant to delay litigation justifies equitable modification in light of the totality of circumstances in this case.

²⁰ We note that our focus is not whether standstill agreements or tolling agreements are enforceable against OSHA. See, e.g., *Hunter-Boykin v. George Washington Univ.*, 132 F.3d 77, 79-82 (D.C. Cir. 1998) (discussing the validity of tolling agreements); *Davis-Bell v. Columbia Univ.*, 851 F. Supp. 2d 650, 680 (S.D.N.Y. 2012) (district court determined timeliness of Title VII claim "[t]aking the tolling agreement between the parties into consideration."). We only determine that there is sufficient basis for us to equitably modify the statute of limitations in this case based on the record as a whole.

²¹ While the June 11, 2009 letter is in the appellate record, it is not clear to us whether Turin attached the June 11, 2009 letter to the opposition brief he filed with the ALJ. Turin may have wrongly assumed that the ALJ received from OSHA a copy of all the parties' submissions to OSHA. See 29 C.F.R. § 1980.105(b) (OSHA required to provide the OALJ only with a copy of the "original" complaint and the Secretary's findings). Because parties often supplement the OSHA investigation with additional correspondence that is not transferred to the OALJ, the ALJ file "may not necessarily contain the full articulation of the complainant's claim," which militates against deciding motions to dismiss "until it is clear that the complainant has filed a

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document that articulates the claims presented to the OALJ for hearing following OSHA's findings." *Evans v. U.S. Envtl. Prot. Agency*, ARB No. 08-059, ALJ No. 2008-CAA-003, slip op. at 8 (ARB July 31, 2012).

²² In *Coates*, as the Board explained in a footnote, OSHA investigated the claim under one whistleblower statute and then, in the proceedings before the ALJ, the complainant attempted to add a claim under an entirely different whistleblower statute. See *Coates*, ARB No. 05-050, at 8 n.3. In this case, Turin relies on the same statute to claim additional retaliation.

²³ We appreciate that the exact language of the regulation allows for supplementation through interviews, but we find it immaterial that supplementation in this case occurred through a letter rather than an interview.

²⁴ The ALJ's opinion did not reconcile his ruling with the broad language found in the SOX statute. For example, the SOX whistleblower statute provides that covered companies, among other entities, may not discriminate against "an employee," rather than using the phrase "their employees." The enforcement provision of the SOX whistleblower statute permits SOX claims from "a person" who alleges unlawful discrimination by "any person" who violates SOX. Also, in discussing SOX cases, the Board has acknowledged that whistleblower statutes are remedial statutes and should be interpreted broadly. See, e.g., *Spinner v. David Landau & Assoc., LLC*, ARB Nos. 10-111, -115; ALJ No. 2010-SOX-029 (ARB May 31, 2012) ("The legislative history of the SOX 'demonstrates that Congress intended to enact robust whistleblower protections for more than employees of publicly traded companies.'"); *Klopfenstein v. PCC Flow Tech. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011 (ARB May 31, 2006) (the Board remanded to allow the ALJ to consider the application of common-law agency theory under SOX).

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