



**Issue Date: 19 December 2014**

Case No.: 2015-ACA-00001  
*In the Matter of:*

MICHELLE PORTER,  
Complainant.

v.

THE HOUSING AUTHORITY OF COLUMBUS GEORGIA,  
Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S MOTION  
FOR  
SUMMARY DECISION**

This complaint has been brought under Section 1558 of the Patient Protection and Affordable Care Act (ACA), P.L. 111-148 (March 23, 2010), codified at section 18C of the Fair Labor Standards Act, 29 U.S. § 218c, 29 C.F.R. Part 1984. The Complainant, Michelle Porter, filed the complaint with the Occupational Safety and Health Administration (OSHA) on August 19, 2014. She asserted that she was terminated in retaliation for having inquired about benefits under the ACA. OSHA dismissed the complaint, and Ms. Porter appealed that determination.

Ms. Porter was employed by the Respondent, Housing Authority of Columbus, Georgia (HACG) as a Family Self-Sufficiency Coordinator. Her employment was terminated on January 16, 2014. She filed her complaint with OSHA on August 19, 2014. OSHA found that the complaint was untimely, having been filed more than 180 days after her termination. *See* 29 U.S. § 218c(b), 15 U.S.C. § 2087(b). Ms. Porter appealed the OSHA determination to the Office of Administrative Law Judges on October 10, 2014.

On December 1, 2014, HACG moved for summary decision. On December 9, 2014, Ms. Porter responded to the motion.

Summary decision may be granted where it is shown that the non-moving party cannot prove an essential element of the claim, so that there is no genuine issue of fact to be determined at trial. 29 C.F.R. §18.41. A genuine issue of material fact is presented when the record, taken as a whole, could lead a rational trier-of-fact to find for the non-moving party. In determining whether there is a genuine issue of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

## STATUTE OF LIMITATIONS

The statute of limitations for filing a complaint under the ACA is 180 days. Ms. Porter filed her complaint with OSHA more than 7 months after she was terminated and OSHA accordingly dismissed it as untimely.

Within the statutory time period Ms. Porter contacted the Office of the Inspector General (OIG) of the Department of Housing and Urban Development (HUD), which manages the grant program under which she had been employed. When she did not receive a response from the HUD OIG she contacted the White House to request assistance. This contact was within the 180 day statutory period. The White House forwarded her concerns to the Atlanta office of the Equal Employment Opportunity Commission (EEOC). She filed a complaint with the EEOC alleging a number of forms of discriminatory treatment that are outside the jurisdiction of the Department of Labor. During her research into the appropriate agencies from which to seek redress, she learned of the Department of Labor's jurisdiction over whistleblower complaints that arise under the ACA.

The doctrine of equitable tolling of the statute of limitations may excuse untimely filing of a complaint. A plaintiff or complainant seeking to relax the statute of limitations has the burden of justifying the application of these doctrines. *Rzepiennik v. Archstone Smith, Inc.*, 2004-SOX-26, at 20 (ALJ) (Feb. 23, 2007).

Equitable tolling may apply in three situations: (1) where a respondent actively misled the complainant respecting the cause of action; (2) where the complainant has in some extraordinary way been prevented from asserting his or her rights; or (3) where a complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *School District of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3rd Cir. 1981).

Ms. Porter raised her allegations within the statutory period with the White House and with the EEOC. In dismissing the complaint OSHA noted that "the White House is the official residence and principle workplace of the President of the United States of America, and is not considered an agency." The description of the White House as the President's residence and principle workplace is, of course, correct. However, in modern usage the White House, like the Pentagon, is generally understood to have a significance beyond the merely architectural and structural. News media routinely report that "the White House announced" something and although everyone understands that that is not literally true, everyone also understands what is meant.

The White House maintains a website that encourages contact from citizens, and has a staff that responds to citizen inquiries. The same service is provided for mail and telephone inquiries, as it was for decades before the internet existed. The White House is a building, but has a staff that performs functions similar to those performed by many government agencies. It supports the President by, among other things, being an information clearinghouse for citizens seeking assistance with operations of the federal government.

I have not found any precedent on the narrow issue involved here, and the parties have not cited any. For purposes of this motion I will assume, without deciding, that Ms. Porter's inquiries to the White House staff constituted presenting her ACA whistleblower claim to the wrong forum for purposes of the doctrine of equitable tolling. Accordingly, I will treat the complaint as timely.

### **STATUTORY PROVISION**

The ACA specifies five categories of protected activity that can give rise to whistleblower protection:

- (a) No employer shall discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee (or an individual acting at the request of the employee) has-
  - (1) received a credit under Section 36B of title 26 or a subsidy under section 18071 of title 42;
  - (2) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title (or an amendment of this title);
  - (3) testified or is about to testify in a proceeding concerning such violation;
  - (4) assisted or participated, or is about to assist or participate, in such a proceeding; or
  - (5) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this title (or amendment), or any order, rule, regulation, standard or ban under this title (or amendment).

29 U.S.C. 218c(a).

There has been no allegation of any activity within the scope of subsections (1), (3), (4), or (5). With regard to subsection (2), Ms. Porter has not alleged that she reported any violation of the ACA to any government agency before she was terminated. That leaves the provision concerning providing information of a violation to the employer.

In her original complaint to OSHA Ms. Porter wrote:

In May 2013 our team of coordinators was unable to attend the Benefit Open Enrollment meeting due to Service Coordinators training. There was an attempt by the coordinators to reschedule but unfortunately our team wasn't given the opportunity to meet nor ask questions.

In September 2013 the complainant asked questions about the letter concerning compensation, health insurance benefits (Affordable Care Act/ACA) and other concerns. The letter contained information that I didn't agree with; therefore, I didn't sign the questionable letter.

The complainant received a letter from Benefit first in October 2013 with incorrect information listed.

In November 2013 the complainant received a "not so good" performance evaluation (1<sup>st</sup> unsatisfactory evaluation) followed by a significantly lower bonus.

In her December 12, 2014 reply to the motion for summary decision Ms. Porter said that she was retaliated against "because she inquired about benefits under the Affordable Care Act."

The September 2013 letter to which Ms. Porter referred (Exhibit A to Respondent's motion) was a form letter sent to all durational employees. "Durational employees" are defined as those whose "employment and compensation are funded by a grant received by the Housing Authority, which is limited in duration." It went on to state that "presently, durational employees are not eligible to participate in the various employee benefit plans offered by the Housing Authority to its regular full-time employees. Group health insurance is one of those benefits that is not offered to durational employees." The letter requested that she sign and return it "If you understand and agree to the above." As she noted in her complaint, Ms. Porter did not agree and therefore did not sign the letter.

The Employer Shared Responsibility Payment (ESRP), commonly called the employer mandate, was a widely publicized feature of the ACA when it was enacted in 2010. It is codified at 26 U.S.C. §4980H. As originally enacted, the ESRP was to take effect in 2014. It required employers with over 50 full-time equivalent employees either to provide health insurance for full-time employees or make a per-employee payment to the government.

On July 2, 2013, Valerie Jarrett, Senior Advisor to the President, wrote a blog post on whitehouse.gov headlined "We're Listening to Businesses about the Health Care Law." This post stated:

As we make these changes [to reporting requirements], we believe we need to give employers more time to comply with the new rules. Since employer responsibility payments can only be assessed based on this new reporting, payments won't be collected for 2014. This allows employers the time to test the new reporting systems and make any necessary adaptations to their

health benefits while staying the course toward making health coverage more affordable and accessible for their workers.<sup>1</sup>

After the White House announcement, the delay in the employer mandate was widely reported in the news media. It was formalized by the Internal Revenue Service on July 29, 2013. On that date an Internal Revenue Bulletin provided notice of transition relief for 2014 for several ACA provisions, including Section 4980H. 2013-31 I.R.B. 116. This notice delayed the information reporting requirements mentioned in the White House blog until 2015, and stated that the reporting delay “is expected to make it impractical to determine which employers owe shared responsibility payments for 2014 under the Employer Shared Responsibility Provisions. Accordingly, no employer shared responsibility payments will be assessed for 2014.” 2013-31 I.R.B. 117.

An attachment to Ms. Porter’s response to the motion briefly sums up the situation. It is a printout of a page from the healthcare.gov website. The opening paragraph reads:

Do I have to offer health coverage to my employees?  
No employer has to offer coverage. Some large businesses that don’t offer coverage meeting certain standards may have to make a shared responsibility payment in 2015.

Complainant’s motion response, Tab 5.

Section 218c(a)(2) prohibits employers from retaliating when an employee provides “information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of” the ACA. Ms. Porter alleges that HACG retaliated because she asked about ACA benefits, but has never stated what violation she believes HACG committed. Neither her initial claim, nor her appeal of the OSHA decision, nor her response to the motion, alleges any violation of the statute.

The closest that she comes to alleging an ACA violation is her statement that she did not agree with the September 2013 letter from HACG and therefore did not sign it. She said that she “asked questions “concerning compensation, health insurance benefits (Affordable Care Act/ACA) and other concerns.” The September 2013 letter said that, as a durational employee, she was not entitled to health insurance. Although she does not say so, it appears from her statement that she means to assert that HACG violated the ACA by not providing her with health insurance.

Ms. Porter has also complained to the HUD OIG, the EEOC, and the Wage and Hour Division of the Department of Labor about working conditions and her termination. She may be entitled to relief under one of the statutes administered by those agencies. I express no opinion about any such statute. The Office of Administrative Law Judges only has jurisdiction over her complaint under the ACA.

---

<sup>1</sup> <http://www.whitehouse.gov/blog/2013/07/02/we-re-listening-businesses-about-health-care-law>

As a result of the executive branch's action noted above, there was then and is now no mandate under the ACA for employers to provide health insurance (or pay the ESRP) in calendar year 2014. Before there can be whistleblowing about a violation of the ACA, there must first be a violation of the ACA. Ms. Porter has not alleged any violation of the ACA.

### **ORDER**

The Respondent's motion for Summary Decision is **GRANTED**.

KENNETH A. KRANTZ  
Administrative Law Judge

KAK/mrc

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time 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 the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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 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. § 1979.110. 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. §§ 1979.109(c) and 1979.110(a) and (b).