

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 11 December 2014**

Case No.: 2015-SOX-00004

In the Matter of

**JESSICA R. MCKINNON**

Complainant

v.

**METLIFE**

Respondent

**DECISION AND ORDER OF DISMISSAL**

The above captioned matter arises under Section 806 (i.e., the employee protection provision) of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (“SOX” or the “Act”), 18 U.S.C.A. § 1514A (West 2005), and its implementing regulations. 29 C.F.R. Part 1980. The Act prohibits discriminatory actions by publicly traded companies against their employees who provide information to their employer, a federal agency, or Congress that the employee reasonably believes constitute violations of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission or any provisions of federal law relating to fraud against shareholders.

**BACKGROUND AND PROCEDURAL HISTORY**

On May 28, 2009, Jessica R. McKinnon (“Complainant”) timely filed a claim under the Act against Metlife, Inc., (“Respondent”) with the Occupational Health and Safety Administration (“OSHA”). The complaint alleged that, in retaliation for whistleblowing activities, Respondent wrongfully stopped Complainant’s weekly “reserve account” pay, and ultimately terminated her employment on March 4, 2009. *See Complaint Dated May 28, 2009.*

On July 21, 2014, OSHA issued a Determination Letter outlining the Secretary’s findings. In the Determination Letter, OSHA found that Respondent had shown by clear and convincing evidence that it terminated Complainant for non-retaliatory reasons, specifically for her failure to adhere to her contractual employment agreement, and dismissed the complaint. *See OSHA Determination Letter Dated July 21, 2014.*

In a letter dated and post-marked on October 14, 2014, 85 days after the OSHA Determination Letter was issued, Complainant requested “reconsideration” of her case. Although addressed to the Office of Administrative Law Judges (“OALJ”), in Washington, D.C., Complainant’s October 14, 2014 letter was apparently sent to in-house counsel for Respondent, Gloria Spiak, who then forwarded it, along with Respondent’s letter dated October 21, 2014, to the OALJ in Washington, D.C. Both letters were received by the OALJ in Washington, D.C., on October 23, 2014. Thereafter, the case was referred to the OALJ District Office in Cherry Hill, New Jersey, and assigned to me.

On October 30, 2014, I issued an Order to Show Cause, directing Complainant to show cause, in writing, as to why her complaint should not be dismissed as untimely, for her failure to file a request for reconsideration within 30 days of the issuance of the Determination Letter. The Order to Show Cause outlined the applicable law on equitable tolling of the statutory time limits, as detailed below.

Complainant submitted a letter in response to the Washington, D.C., OALJ on November 3, 2014, but failed to certify service to Respondent. Accordingly, on November 14, 2014, I issued a Notice and Order acknowledging Complainant’s letter dated November 3, 2014, and providing notice that any future submission lacking proper certification will be returned without action. In a letter received on November 21, 2014, Complainant timely responded to my October 30, 2014 Show Cause Order. On November 19, 2014, Respondent timely submitted its response, and this matter is now ripe for decision.

## POSITION OF THE PARTIES

### Complainant’s Position

Complainant requests a hearing and reconsideration of the Secretary’s July 21, 2014 determination of her May 28, 2009 retaliation claim. Additionally, she requests an extension of time in her case due to medical and health issues, and because she is in the process of securing an attorney to handle her claim. In her letter dated November 3, 2014, Complainant indicates that she has been “dealing with some medical emergencies over the last eleven months that did not allow me to respond within your time deadline.” *See Complainant’s Letter Dated November 3, 2014.*

In her November 21, 2014 correspondence, Complainant enclosed a letter from her Internist, Dr. Theresa Mack, as evidence of her medical conditions. Dr. Mack’s letter indicates that she currently treats Complainant for “stress related medical issues,” and that Complainant has been treated twenty-one (21) times from August 16, 2012 until the present. *See Dr. Mack’s Letter Dated November 10, 2014.* Additionally, Dr. Mack provides a list of treatment dates with the corresponding medical issue addressed. The most recent treatment visit described in Dr. Mack’s correspondence occurred on May 13, 2014, when Complainant was treated for “Foot Pain and Stress Incontinence.” *Id.*

Complainant additionally asserts that she requests more time to obtain an attorney. In her November 21, 2014 letter, she states that she is in the process of securing a specialized attorney.

### Respondent's Position

Respondent asks that Complainant's request for a hearing be denied as untimely. Initially, Respondent notes that Complainant does not dispute that she timely received a copy of the findings. *See Respondent's Letter Dated November 19, 2014*. Additionally, Respondent avers that Complainant fails to offer an explanation as to why she did not timely request reconsideration of her claim. Respondent asserts that Complainant's medical documentation does not support a finding that Complainant was unable or otherwise prevented from timely requesting reconsideration within the 30 day time-frame. Specifically, Respondent notes that Complainant's medical evidence does not show treatment during the appeal period, and fails to show why she was unable to request consideration over that period.

## LAW AND DISCUSSION

The regulations governing SOX require an appeal from a determination by OSHA to be filed within 30 days of issuance of the determination. 29 C.F.R. 1980.106(a).<sup>1</sup> However, the time limits for filing complaints and requesting appeals in whistleblower cases are not jurisdictional, and may be subject to application of the doctrine of equitable tolling. *See, e.g., Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114 and 115, ALJ Nos. 2004-SOX-20 and 36, at 16 (ARB June 2, 2006).

When deciding whether to relax the limitations period in a particular case, the Administrative Review Board ("ARB") has been guided by the discussion of equitable tolling of statutory time limits in *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981). The Third Circuit recognized three situations in which tolling is proper:

- (1) the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

*Id.*, 19-20 (citation omitted).

The ARB has held that the restrictions on equitable tolling must be scrupulously observed, and it is not an open-ended invitation to disregard limitation periods merely because they bar what may otherwise be a meritorious claim. *See, e.g., Doyle v. Alabama Power Co.*,

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<sup>1</sup> "Any party who desires review, including judicial review, of the findings and preliminary order, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to paragraph (b) of Sec. 1980.105."

1987 ERA 53 (Sec’y, Sept. 29, 1989). When an appeal is untimely, the complainant bears the burden of justifying the application of equitable tolling principles. *See, e.g., Santamaria v. EPA*, ARB No. 05-023, ALJ No. 2004-ERA-25, at 4 (ARB Mar. 31, 2005).

As Complainant is proceeding pro se in this matter, it bears emphasis that the ARB has stated that administrative law judges must “construe complaints and papers filed by pro se complainants ‘liberally in deference to their lack of training in the law’ and with a degree of adjudicative latitude.” *Wyatt v. Hunt Transport*, ARB No. 11-039, ALJ No. 2010-STA-69, slip op. at 2 (ARB Sept. 21, 2012), quoting *Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-3, at 6 (ARB Apr. 25, 2003).

Complainant filed her request for reconsideration on October 14, 2014, which is 85 days after OSHA’s Determination Letter was issued.<sup>2</sup> Accordingly, her petition for hearing is untimely in light of the 30 day requirement under the Act. 29 C.F.R. 1980.106(a). Therefore, Complainant bears the burden of proving that one of the three bases for tolling the statute, as stated in *Marshall*, exists in the current claim. 657 F.2d 16, 19-20 (3d Cir. 1981). With respect to the first basis for tolling the statute, Complainant has not asserted, or put forth any evidence, that the Respondent actively misled her respecting the cause of action. Similarly, regarding the third basis, Complainant has not articulated an argument, or presented any evidence, that she filed her claim in the wrong forum.

Claimant’s argument appears to lie in the second basis for tolling the statute, that her health has provided an extraordinary prevention of her asserting her rights under the statute. More specifically, Complainant requests an “extension” due to her “medical and health” issues, as outlined in a letter from her physician, Dr. Mack. The Board has recognized that a medical condition that prevents a complainant from timely pursuing her legal rights can be an “extraordinary” circumstance justifying equitable tolling. *Prince v. Westinghouse Savannah River Co.*, ARB No. 10-079, ALJ No. 2006-ERA-001, at 4 (ARB Nov. 17, 2010) (citing *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999)). However, the complainant bears the burden of proving that her medical condition constitutes extraordinary circumstances to toll the statute. *Romero v. The Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-021, at 4-5 (ARB Sept. 30, 2010); *Salsbury v. Edward Hines Jr. Veterans Hosp.*, ARB No. 05-014, ALJ No. 2004-ERA-007, slip op. at 7 (ARB July 31, 2007).

Here, Complainant fails to meet her burden of establishing that her medical condition constitutes an extraordinary circumstance which prevented her from timely pursuing her legal rights. Complainant’s only medical evidence, a letter from Dr. Mack, merely indicates that Complainant has been treated for stress related medical issues. Moreover, there is no indication that Complainant was treating for any medical ailment over the relevant appeal time period, from

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<sup>2</sup> Complainant does not appear to contest that her appeal is untimely. Under the OALJ’s Rules of Practice and Procedure, service of all documents is deemed effective at the time of mailing and five (5) days shall be added to the prescribed period after such service for the party to take the required action. *See* 29 C.F.R. § 18.4(c)(1)-(3). The determination letter was served on Complainant on July 21, 2014 and she had 30 days from its receipt to file objections and request a hearing. Adding five days and excluding Saturday, Sunday, or any Federal holiday, any objection and hearing request in the instant matter should have been received by August 27, 2014. 29 C.F.R. § 18.4(a)

July 21, 2014 to August 14, 2014. The most relevant, although temporally attenuated, treatment note is from May 13, 2014, when Claimant was treated for “Foot Pain and Stress Incontinence.” This is the final treatment note for Complainant, and occurred more than two (2) months before the Determination Letter was issued. Even if the treatment were to have taken place during the relevant appeal period, there is no indication that the disorders referenced would bar Complainant from filing a petition for appeal. Accordingly, while Complainant may have legitimate medical ailments, I find that she has not met her burden in establishing that her health has presented an extraordinary circumstance such to justify equitable tolling.

Complainant’s response my Order to Show Cause also addresses that she “was in the process of securing a duly licensed attorney.” However, there is no assertion or evidence that Complainant misunderstood her legal rights, or faced any other extraordinary hardship hindering her from obtaining an attorney. Moreover, failure to secure counsel in order to pursue a claim under the Act is an insufficient reason, in and of itself, to justify equitable tolling of the limitations period for filing a complaint. *See Barker v. Perma-Fix of Dayton, Inc.*, 2006-SOX-1 (ALJ Jan. 11, 2006); *Rose v. Dole*, 945 F.2d 1331, 1336 (6th Cir. 1991) (failure to retain counsel within the statutory filing time frame, in and of itself, is not enough to warrant equitable tolling). Accordingly, Complainant’s failure to obtain counsel is not an extraordinary circumstance which justifies equitable tolling.

Based on the foregoing, I find that Complainant’s appeal from OSHA’s determination is untimely, and that she has failed to present probative evidence that equitable tolling of statutory time limits is appropriate in this case. As Complainant failed to provide good cause for relaxation of the time limitations imposed by the Act, I hereby dismiss the hearing request as untimely. The findings in the OSHA determination letter dated July 21, 2014 shall become the final decision of the Secretary of Labor.<sup>3</sup>

**IT IS SO ORDERED.**

**LYSTRA A. HARRIS**  
Administrative Law Judge

Cherry Hill, New Jersey

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<sup>3</sup> 29 C.F.R. § 1980.106(b)(2).