



Issue Date: 09 February 2018

Case No: 2017-SOX-00040
OSHA No.: 3-0050-17-087

In the Matter of:

ED TUVIN,
Complainant,

v.

WELLS FARGO & CO.
Respondent.

ORDER DISMISSING COMPLAINT

This matter arises under the Sarbanes-Oxley Act of 2002, as amended (“SOX” or “the Act”), codified at 18 U.S.C. § 1514A, and the implementing regulations at 29 C.F.R. § 1980, *et seq.* Respondent filed a Motion to Dismiss and Temporarily Stay Discovery (“Motion”) in this matter on the grounds that Complainant’s complaint was untimely filed.

Procedural History

Mr. Tuvin filed a complaint with Occupational Safety and Health Administration (“OSHA”) in this matter on April 17, 2017, 520 days after Complainant was terminated by Respondent. Secretary’s Findings at 1.¹ On May 23, 2017, OSHA issued the Secretary’s Findings in this matter. *Id.* The Secretary’s Findings explained that, since Claimant contended that he last suffered an adverse employment action on November 4, 2015, Claimant’s complaint was untimely. *Id.* The Secretary dismissed the complaint due to untimeliness. *Id.*

On June 7, 2017, the Office of Administrative Law Judges received Complainant’s request for administrative hearing (“Request”). Request at 1.² On June 22, 2017, this case was assigned to my office. On June 28, 2017, I issued an initial Prehearing Order and Notice of Hearing (“Prehearing Order”), outlining the prehearing procedure and setting this matter to be heard in Washington D.C. *See* Prehearing Order.

¹ Pages unnumbered in original.

² Pages unnumbered in original.

On July 11, 2017, Complainant filed an “Unopposed Motion for Extension of Time to the Schedule of Prehearing Procedures” (“Extension Motion”). In that Motion, Complainant requested a thirty day extension to the time allotted in which to hold an initial conference. Extension Motion at 1. My law clerk reached out to the parties to ensure that the Extension Motion was indeed unopposed. After confirming that the motion was unopposed, I granted the extension telephonically.

On August 15, 2017, Respondent filed its Motion and Memorandum in Support of its Motion to Dismiss (“Memo”). On August 24, 2017, Complainant filed a Consent Motion for Extension of Time to respond to the Motion to Dismiss. I granted Complainant’s motion telephonically. On September 12, 2017, Complainant filed his Opposition to the Motion to Dismiss (“Opposition”).

On September 18, 2017, Respondent filed a Consent Motion for Leave to File Reply to Complainant’s Opposition (“Request to Reply”). In that document, the parties requested that Employer be allowed to file a reply brief, contingent upon Complainant receiving the opportunity to file a surreply brief. *See* Request to Reply. My law clerk reached out to the parties and confirmed their consent to the motion. I granted the request telephonically, allowing Respondent fourteen days in which to file a reply, and Complainant fourteen days thereafter in which to file his surreply.

On September 29, 2017, I received Respondent’s Reply Memorandum in Support of its Motion (“Reply”). On October 17, 2017, I received Claimant’s Surreply in Further Opposition to the Motion to Dismiss (“Surreply”).

On November 3, 2017, I received the parties’ Joint Motion to Continue Hearing and Extend all Related Deadlines (“Joint Motion”). On November 6, 2017, I issued an Order Continuing the Hearing, Scheduling Conference Call, and Staying Discovery (“November 6 Order”). In that Order, I determined that I needed additional information before I was able to address the Motion to Dismiss. November 6 Order at 2. I scheduled a conference call for November 14, 2017, to allow Complainant the opportunity to provide more information regarding the issues of timeliness and equitable tolling. *Id.* Due to an issue on the fourteenth, the conference call was rescheduled to November 28, 2017.

On November 28, 2017, the parties were allowed to submit evidence and elicit testimony from Complainant regarding the timeliness issue. *See* November 28, 2017 Transcript (“Tr.”). The next day, on November 29, 2017, I issued a Notice Regarding Wells Fargo giving the parties the opportunity to *voir dire* me if they so desired. As of the date of issuance of this order, neither party has requested to do so.

Background

Employment

Complainant was terminated from his employment with Respondent on November 4, 2015. *See* Tr. at 7. Complainant also testified that he received unsolicited phone calls from

Respondent's employees after his termination, which potentially extended into "the beginning of 2016." *Id.* at 14-15.³

Complainant applied to multiple jobs in the months after his termination. *Id.* at 24. Though Complainant received multiple interviews, he was not immediately able to find employment. *Id.* Complainant eventually found a new job on "the very last day" of August, 2016. *Id.* at 23. Complainant was hired as a "lender" evaluating loan applications for City First Bank of D.C. *Id.* at 24-25. Complainant is still employed in that position. *Id.* at 23.

Complainant called OSHA and filed his claim on April 17, 2017. He testified that sometime thereafter ("three months" prior to the November 28 Conference Call) his former boss called him. Tr. at 22-23. Complainant asserted that the nature of the call was to check in on Complainant's status (Complainant characterized the call as: "how you doing, man?"). *Id.* at 23.

Anxiety and Stress

Complainant asserted that he felt increased physical symptoms of anxiety and stress when thinking about Respondent after his termination. *Id.* at 11-15. Complainant asserted in his Request and testimony that he was so upset at one point after his termination that he "literally shook." Request at 1; Tr. at 22. Due to these symptoms, Complainant testified that he was hospitalized for one night, though he could not provide a date for the hospitalization. Tr. at 22.

Complainant also stated that he went to the doctor multiple times due to various physical symptoms, which one of his reviewing physicians diagnosed as stress related. Tr. at 11-12. Complainant provided a letter, dated November 14, 2017, from Dr. Laura Brown stating that Claimant had been seen initially in November 2015 for "transient chest pain and lightheadedness[,]" and later had been seen on February 17, 2016 for "right lower quadrant pain." Dr. Brown Letter ("Letter" at 1). Dr. Brown confirmed that Claimant was hospitalized overnight on February 17, 2016. *Id.* Dr. Brown stated in her letter that many of Complainant's symptoms persisted, and she concluded that Complainant's symptoms "were due to PTSD, stress[,] and anxiety from his work environment." *Id.*

Moreover, Complainant asserted that just thinking about Respondent and the case "makes me sick." Tr. at 8. He testified he felt ill even at the time of the conference call. *Id.* at 7-8. Despite his sickness, he was still able to testify. Complainant also admitted that he was able to take care of his personal business affairs and do things like prepare and file his taxes post termination. *Id.* Complainant asserted, however, that he "could not handle" and "couldn't deal" with the issues in this matter until April 17, 2017. *See* Tr. at 9.

³ Even assuming that these later phone calls from the beginning of 2016 were additional retaliatory action by Respondent, Complainant's April 17, 2017 filing would still have been filed outside the 180-day deadline.

Discussion

I. Legal Standards

A. Motion to Dismiss

Under 29 C.F.R. § 18.70(c), a party “may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness.” The Act and the regulations at 29 C.F.R. § 1980.101, *et seq.*, do not clarify the procedure for addressing a motion to dismiss. However, the Administrative Review Board (“ARB”), the Circuit Courts of Appeal, and the Federal Rules of Civil Procedure⁴ provide insight into this issue.

Rule 12(b) addresses motions to dismiss. Specifically, Rule 12(b) covers, *inter alia*, motions to dismiss for lack of subject-matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(1-2, 6). In this case, Respondent asserts that Complainant failed to timely file his complaint.

A motion to dismiss is a facial challenge, focusing “*solely* on the allegations in the complaint, its amendments, and the legal arguments the parties raised – not whether evidence exists to support such allegations.” *Id.* at *6 (*citing Neuer v. Bessellieu*, No. 07-036, ALJ No. 2006-SOX-00132, slip op. at 4 (ARB Aug. 31, 2009)). In fact, the consideration of evidence marks the material difference between a motion to dismiss a complaint based on a “facial challenge at the initial stages of litigation and a motion for summary decision.” *See id.*; *compare also* 29 C.F.R. § 18.70(c) *with* 29 C.F.R. § 18.72(a, c).

B. Untimely Filing

The Act at 18 U.S.C. § 1514A(b)(2)(d) requires that a complainant must file a complaint within 180 days. *See also* 20 C.F.R. § 1980.103(d) (requiring a complainant to file a complaint “[w]ithin 180 days after an alleged violation of the Act occurs or after the date on which the employee became aware of the alleged violation of the Act[.]”) This filing period under SOX is not a jurisdictional requirement; it may thus be equitably tolled. *Moldauer v. Canandaigua Wine Co.*, No. 04-22 (ARB Dec. 30, 2005); 20 C.F.R. 1980.103(d) (“[t]he time for filing a complaint may be tolled for reasons warranted by applicable case law.”); *see also Socop-Gonzalez v. INS*, 272 F.3d 1176, 1188 (9th Cir. 2001) (*quoting Holmberg v. Ambrecht*, 327 U.S. 392, 397 (1946)) (“[w]e take as our starting place the presumption, read into ‘every federal statute of limitation,’ that filing deadlines are subject to equitable tolling.”). Equitable tolling, “[a]s a general matter, . . . pauses the running of, or ‘tolls,’ a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from a timely action.” *Lozano v. Montoy Alvarez*, 134 S. Ct. 1224, 1231-32 (2014).

⁴ “The Federal Rules of Civil Procedure . . . apply in any situation not provided for or controlled by [the 29 C.F.R. Part 18] rules, or a governing statute, regulation, or executive order.” 29 C.F.R. § 18.10(a).

The ARB recognizes “four principal situations in which equitable modification of filing deadlines may apply. *Brown v. Synovus Fin. Corp.*, No. 17-037, 2017 WL 2838094 at *1 (ARB May 17, 2017). The ARB lists these situations as follows:

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 defendant’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.”

Id. (citing *Selig v. Aurora Flight Sciences*, No. 10-072, ALJ No. 2010-AIR-00010, slip op. at 3 (ARB Jan. 28, 2011)). “[Complainant] bears the burden of justifying the application of equitable tolling principles.” *Id.* at *2 (citation omitted).

The ARB’s standards are largely identical to the standards for equitable tolling recognized in federal courts. Federal courts typically allow tolling “where the Claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period,” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990) (listing cases), and “where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.” *Id.* (listing cases). Federal courts are generally much less forgiving in “receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights[,]” *id.* (citing *Baldwin County Welcome Ctr. V. Brown*, 466 U.S. 147, 151 (1984)), though they recognize that certain extraordinary circumstances may still warrant tolling. *Holland v. Florida*, 560 U.S. 631, 649 (2010).

These patterns of equitable tolling were formulated into a succinct doctrine by the Supreme Court. In federal practice, a party is “entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.’” *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 755 (2016) (citing *Holland*, 560 U.S. at 649). A party seeking equitable tolling in the federal courts bear the burden of proving both elements. *Id.* at 756 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Equitable tolling is a discretionary doctrine; it “turns on the facts and circumstances of a particular case . . . [and] does not lend itself to bright-line rules.” *Harris v. Hutchison*, 209 F.3d 325, 330 (4th Cir. 2000) (quoting *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999)). However, “any invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes.” *Id.* Generous application of equitable tolling “would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation.” *Id.* Accordingly, any resort to equitable tolling is reserved for rare circumstances where enforcing the limitation period would be unconscionable and gross injustice would result. *Id.*; *Stoll v. Runyon*, 165 F.3d 1238 (9th Cir. 1999) (citing *Alvarez-Machain v. United States*, 107 F.3d 696, 700 (9th Cir. 1996)).

Attempting to balance the equity of tolling with the interests of statutory and regulatory integrity is difficult. The analysis is further complicated where a party seeks equitable tolling due to mental incapacity. The federal case law provides some insight into what level of mental incapacity serves to support tolling a deadline.

“Mental incapacity warrants equitable tolling when, ‘extraordinary circumstances beyond the plaintiff’s control made it impossible to file a claim on time.’” *Tatum v. Schwartz*, 405 Fed. App’x 169, 171 (9th Cir. 2010) (quoting *Stoll*, 165 F.3d at 1242). This determination is “highly case specific.” *Boos v. Runyon*, 201 F.3d 178, 184 (2d Cir. 2000).

For example, where a plaintiff alleging mental incapacity “was able to file paperwork, converse with doctors, write a letter detailing her claim, and hire legal counsel, her circumstances [did] not rise to the extraordinary level required.” *Id.* Moreover, the burden of demonstrating incapacity lies with the complainant. *Id.* at 185 (citation omitted). Where a plaintiff “offers no more than a statement that she suffers from ‘paranoia, panic attacks, and depression[,]’ . . . without a particularized description of how her condition adversely affected her capacity to function generally or in relationship to the pursuit of her rights,” that conclusory information is “manifestly insufficient to justify any further inquiry into tolling.” *Id.*

Other courts have noted that “tolling on insanity has been recognized under very rigorous tests.” *See, e.g., Nunally v. MacCausland*, 996 F.2d 1, 5 (1st Cir. 1993). Such tests “eschew reliance solely on a diagnosis[; r]ather they analogize to state standards for determining incompetence[.]” *Id.* In such instances, the inquiries revolve on whether the plaintiff’s illness “rendered him ‘unable to protect his legal rights because of an overall inability to function in society,’” *id.* (quoting *Decrosta v. Runyon*, 1993 WL 117583 at *3 (N.D.N.Y. 1993), or “whether plaintiff is unable to manage his own business affairs, or to comprehend his legal rights and liabilities,” *id.* (listing cases).

Overall, equitable tolling due to mental capacity is a case-specific determination that is reliant on the reviewing court’s “sound discretion.” *Arrington v. United Parcel Serv.*, 384 Fed. App’x 851, 852 (11th Cir. 2010) (citing *Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006)).

II. Arguments of the Parties

Respondent argues that Complainant’s complaint is untimely because it was not filed within the 180 days mandated by the statute and the regulations. Memo at 3-5. Respondent asserts that equitable tolling does not apply in this case, because there is no evidence that Respondent took any active steps to prevent Complainant from bringing his claim. *Id.* at 6-7. Moreover, Respondent argues that Complainant has identified no affirmative misconduct by Respondent to delay his filings. *Id.* at 7. Respondent also argues that Complainant did not raise any legitimate ground to excuse his late filing within his Request. *Id.* at 8-9.

Complainant argues that the Respondent’s motion is premature. Opposition at 1. Complainant relies on the assertion that he was unable to timely file a complaint with OSHA because Respondent’s abuses “caused him to suffer medical and psychological incapacities” that justify equitable tolling. *Id.* at 2. Complainant quotes his Request:

Where there occur extenuating circumstances such as this, . . . where the employee[] suffered horrific mental and physical and financial stress and may not have been of sound mind to even think about a filing due to the extent of the abuse [he] suffered by the coordinated plan of attack by [Respondent's] managers and H[uman] R[esources team, I seek to request that [the] 180 day period for . . . filings should be severely relaxed if not eliminated. . . . In my case, I received . . . calls after being dismissed from [Respondent's] personnel [who] continue[d] to harass me, [and] looked in my calendar and canceled appointments causing damage to my reputation and to my income, and I literally shook from it, ended up in the hospital, I was placed under my physician[']s care with a prescription to calm me down and this was what Wells did in my mind intentionally as a means of perpetrating their inhumane acts . . . against their own employees. So for all whistleblowers, I am taking a stand to appeal the decision and ask for a scenario for anyone so impacted to be given much more than the 180 day period provided based on reasonable extenuating circumstances

Id. (quoting Request at 2) (internal brackets and ellipses in original; emphasis omitted). Complainant argues that his assertions show that he was not of sufficient mental capacity to bring his claim. *Id.* at 3. Moreover, Complainant argues that, as this is a motion to dismiss, I must take all of Complainant's allegations regarding his mental capacity as true. *Id.* at 3-4.

In Respondent's Reply, it states that Complainant's complaint "[did] not allege that he suffered mental incapacitation or otherwise was prevented from timely filing with OSHA during the relevant period." Reply at 1. Accordingly, Respondent argues that Complainant has waived any equitable tolling argument. *Id.* Respondent further argues that I "need not accept inferences drawn by [Complainant]" as true where "such inferences are unsupported by the facts set out in the complaint" or where the Complainant has set forth "legal conclusions cast in the forms of factual allegations." *Id.* at 2 (citations omitted). As the complaint appears to lack any information regarding mental capacity, Respondent concludes that Complainant's assertions regarding mental capacity are insufficient to establish tolling. *Id.* at 2-3.

Respondent argues further that Complainant did not allege sufficient mental incapacity to justify equitable tolling. *Id.* at 3-4. Respondent explains that "[i]mpaired judgment by itself does not excuse a plaintiff's untimely filing." Reply at 4 (citation omitted). Moreover, Respondent argues that mental incapacity only justifies tolling for individuals that lack the capacity to handle their own affairs, or who are unable to function or take care of themselves. *Id.* at 4-5. Essentially, Respondent asserts that mental incapacity may only support equitable tolling where a complainant is essentially "*non compos mentis*." *Id.* at 5.

In his surreply, Complainant provided a copy of an email that he sent on April 26, 2017. Surreply at 2. In that email, Complainant stated that "I was physically and mentally unable to make the claim" in a timely fashion." *Id.* (quoting April 26, 2017 Email). Complainant further asserted that he had been placed on medication. *Id.* Complainant argues that this email demonstrates that Complainant requested tolling. *Id.* at 3.

In addition to his prior arguments regarding presumptions of the veracity of allegations in a motion to dismiss, Complainant further argued that his mental capacity could not be determined until there had been discovery on that issue. *Id.* Complainant concluded that the issue of equitable tolling could only be addressed via summary judgment after evidentiary development. *Id.* at 3-5.

Complainant was given the opportunity to present some evidence and testify at the November 28, 2017 conference. Complainant submitted a letter from Dr. Brown and he provided testimony as to his capacity. Afterwards, the parties were given the opportunity to present oral argument. *Tr.* at 29.

Respondent argued at conference that “there’s no such thing in equitable tolling as selective incapacity[.]” *Id.* Further, Respondent asserted that for Complainant to receive equitable tolling, he had to establish that he was incapacitated from the end of the 180-day time period: October 20, 2016. *Id.* at 30. Moreover, it argued that Complainant’s testimony and the Doctor Brown letter did “not rise to the level of incapacity[.]” *Id.* Respondent specifically noted that since Complainant’s termination, he had obtained a high level job, he was able to handle his affairs and taxes, and “he simply ha[d] not presented evidence that rises to the level of incapacity to grant equitable tolling.” *Id.* at 30-31.

Complainant again contested that discovery was required regarding the issue of capacity, and that the matter could only be addressed via summary judgment. *Tr.* at 31. Complainant also asserted that Respondent caused his illness, which should “count[] heavily against the employer.” *Id.* Complainant cited the *Stoll* case in support of that argument. *Id.* at 31-32. Complainant asserts that the sickness caused by Respondent led to Complainant’s inability to bring the case. *Id.* Complainant stated that I would be required to draw the line on this issue, and that such line drawing should only be done “after full discovery, including depositions of [the] medical professionals[.]” *Id.* at 34.

III. Analysis

Upon review of the record as it stands, the facts do not warrant equitable tolling. Claimant relies on the argument that extraordinary circumstances prevented him from filing his action. However, the case law on equitable tolling plainly demonstrates that “extraordinary circumstances” mean, at least, that Complainant was so incapacitated that he was unable to bring his claim. *See, e.g., Nunnally*, 996 F.2d at 5 (citations omitted), *Tatum*, 405 Fed. App’x at 171, *Stoll*, 165 F.3d at 1241-42; *see also Chavez v. Carranza*, 559 F.3d 486, 493-94 (6th Cir. 2009) (allowing equitable tolling due to political unrest in plaintiff’s country and threats of reprisals for filing). The record – most notably, Claimant’s own statements – does not establish that Complainant was so incapacitated.

A. Complainant Has Not Established Incapacity

Complainant asserts that, due to his increased physical symptoms of anxiety and stress post termination, he was unable to file his complaint until April 17, 2017. *Tr.* at 9, 22. However, this anxiety and stress was clearly not incapacitating; Complainant admits that he filed his taxes,

undertook regular business, and even eventually was rehired to work as a lender. *Id.* at 7-8, 24-25. As Complainant could perform complex intellectual duties without undue hardship, he clearly was not mentally incapacitated in a traditional sense.

Complainant relies on the novel argument that he was only incapacitated so far as it pertained to filing his complaint in this matter. That argument is unsupported by the record.

Complainant does not sufficiently explain how his alleged sickness rendered him unable to file his complaint. Complainant states that he “literally shook” from how upset he was over the situation. Tr. at 22. However, Complainant took a job at a bank as a lender, in a very similar position to his prior employment. He has kept that job for over a year, despite his alleged incapacity. *Id.* at 23. Complainant clearly can think about, and deal with, complex financial and even legal issues. Complainant was not so traumatized that he can no longer perform similar financial work.

Nor was Complainant so traumatized that he could not apply for a job in his prior field, or answer questions regarding his prior employment. *See id.* at 18-19. In fact, Complainant attests that he spoke a great deal about Respondent in at least one job interview. Tr. at 20. This shows, at the very least, that Complainant was not so incapacitated with stress that he could not broach the subject of his time with Respondent. Complainant does not explain how he could state his prior employment issues during his employment search, but not with OSHA.

Complainant also apparently was placed on medicine to help with his stress. *See* Letter at 1. Though Complainant does not provide an exact date for the prescription, it could not be later than January 2017. Tr. at 10, 12; *see also* Dr. Brown November 24, 2017 Letter (noting Dr. Brown saw Claimant through January 2017). Complainant does not assert that he went to another physician for stress after this time. Thus, even were I to assume that Complainant was incapacitated until January 2017, Complainant does not explain why, after the latest possible period in which he could have been provided medicine for his stress, he delayed a further three months before filing his claim.

Additionally, Complainant asserts that he still feels stressed and anxious about this matter, and that he felt sick during his testimony. Tr. at 7-8. However, his symptoms did not prevent Complainant from testifying or speaking in detail about his alleged prior traumatic experiences. Complainant may have been uncomfortable or even physically ill, but that was not a barrier to testifying in a situation that is far more formal than a call to OSHA.

Finally, Complainant fails to explain how he became able to contact OSHA. I asked Complainant whether, “for the entire time period, every day between November 4th, 2015 and when [he] picked up the phone and called OSHA on April 17, 2017, [he was] prevented from calling OSHA because of what [Respondent] did to [him.]” Tr. at 8. Complainant’s response was “I obviously was because I didn’t do it. That’s the only thing I can say.” *Id.* That explanation is insufficient. I have no sense, and Complainant’s allegations provide no evidence, of how he went from being incapacitated to being capable of calling OSHA. Without such evidence, I cannot determine when Complainant’s alleged period of incapacity actually ended. Complainant’s allegations offer me no help, and are merely conclusory on this issue.

Considering the above information, Complainant's actions do not support a determination of incapacity as to his ability to file a complaint. As an initial matter, Complainant's allegations of incapacity are contradicted by his own testimony and evidence. Moreover, even were I to find that Complainant was actually mentally incapacitated, I cannot determine when he ceased being incapacitated. Complainant's mere conclusory and vague assertion that his incapacity ended when he filed his complaint is manifestly insufficient to establish the end of any such incapacity.

B. Complainant's Misplaced Reliance on *Stoll v. Runyon*

Complainant also analogizes his situation to the situation in *Stoll v. Runyon*, specifically as it pertains to incapacity caused by an employer's bad acts. In *Stoll*, the plaintiff was repeatedly sexually assaulted and raped during her employment with the Post Office. *Stoll*, 165 F.3d at 1239-40. Plaintiff was diagnosed with major depression, somatic form pain disorder, and anxiety disorder due to her abuse. *Id.* at 1240. Plaintiff's symptoms rendered her unable to open or read the mail without experiencing a panic attack, and she became so androphobic that she could not even communicate directly with her male attorney. *Id.* *Stoll's* psychiatrist explained in that matter that plaintiff was simply "too psychiatrically disabled to comply with relevant time periods and deadlines." *Id.* at 1241.

Given these circumstances, the Ninth Circuit determined that the Post Office was not entitled to benefit from the fact that its employees had so brutalized the plaintiff that she was no longer mentally capable of bringing a claim. *Id.* at 1242. The Ninth Circuit therefore determined that Complainant's mental incapacity was due to an "extraordinary circumstance beyond her control." *Id.* (citation omitted). However, the Ninth Circuit specifically added that the plaintiff had established "she was completely psychiatrically disabled during the relevant limitation period." *Id.*

Stoll does not help Complainant. Specifically, the wrongdoing by the Post Office in *Stoll* was considered when determining whether the circumstances were extraordinary, *i.e.* whether the circumstances were outside of plaintiff's control. *Stoll*, 165 F.3d at 1242. The Ninth Circuit had to find, in addition to the extraordinariness of the circumstances, that the plaintiff was completely psychologically incapacitated to justify equitable tolling.

For *Stoll* to apply, I must find that Respondent is responsible for Complainant's alleged sickness, and that this sickness amounts to incapacity. Though Respondent's responsibility for Complainant's incapacity would clearly support equitable tolling, that support is predicated on Complainant actually being incapacitated. Unfortunately for Complainant, Complainant's own allegations simply do not support such a finding of incapacitation. *See* Analysis Part II.A, *supra*.

C. Conclusion

Complainant's symptoms are insufficient to justify tolling this matter. Complainant remained capable of performing complex and difficult financial work of the same type he performed for Respondent. He was able to speak of his prior experiences in job interview settings, which are typically high stress situations. Additionally, as part of his job search, he undoubtedly would have been exposed to memories of his prior employment (whether by

preparing and reviewing his resume or completing job applications). Moreover, even were Complainant incapacitated, he does not state why or how he was suddenly able to file a complaint on April 17, 2017, and not at any time before that. *See* Tr. at 8. Complainant's conclusory statement that his incapacity ended when he filed his complaint is "insufficient to justify any further inquiry . . ." *Boos*, 201 F.3d at 185.

Complainant has not met his burden of establishing that equitable tolling is warranted. Complainant has only provided vague and conclusory assertions that are undermined and contradicted by Complainant's own testimony. This information is simply not enough to justify equitable tolling, even at this early stage of the case.

ORDER

Based on the foregoing, Employer's Motion is **GRANTED**. Complainant's untimely complaint in this matter is **DISMISSED**.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge