



**Issue Date: 24 July 2017**

**CASE NO.: 2017-WPC-00002**

**IN THE MATTER OF**

**JUDITH CLIFFORD**

**Complainant**

**v.**

**CONOCO PHILLIPS**

**Respondent**

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

This proceeding arises under the employment protection provision of the Federal Water Pollution Control Act ("WPC"), 33 U.S.C. § 1367, and the regulations promulgated thereunder at 29 C.F.R. Part 24, *et seq.* The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees who are allegedly discharged or otherwise discriminated against by Employers with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the Act.

On April 28, 2017, Respondent moved for summary decision, contending dismissal of this matter is proper due to Complainant's failure to timely file her complaint under the WPC. For the reasons discussed below, Respondent's Motion for Summary Decision is granted.

**FACTUAL BACKGROUND**

Conoco Phillips Company ("Respondent") hired Judith Clifford ("Complainant") as a regulatory supervisor in its Mid-Continent Business Unit in July 2014. (Resp. Mtn. for Summary Decision, p. 2, EX-A). As a regulatory supervisor, Complainant's job duties entailed managing compliance with oil and gas regulations, ensuring uninterrupted drilling and production operations by overseeing the plugging and abandoning of wells, and informing Respondent of regulations meant to prevent safety and health hazards. (Comp. Resp., p. 3). During her time as regulatory supervisor, Complainant alleges she regularly informed Respondent of its intentional failure to plug and abandon wells. *Id.*

In October 2015, Complainant began reporting to Richard Brazier, her new manager. (Comp. Resp., p. 4). Complainant alleges Brazier had little concern for complying with other matters and complained to her about her insistence on obeying compliance matters and her

repeatedly telling him “no” to his requests. *Id.* Complainant contends she continued to advise Brazier of regulatory matters and safety concerns despite his protests and complete failure to comply with her recommendations. *Id.* Complainant further contends she was continuously told by Brazier that she was a bad manager, which she relayed to Respondent, and was harassed by Brazier as a result of her refusal to cease recommending compliance with regulatory and safety matters. *Id.*

On March 16, 2016, Brazier documented in writing that Complainant’s job performance was poor. (Comp. Resp., p. 5, EX-5). In response, Complainant stated she was surprised by these comments since she did not receive any feedback from him in her 2015 performance review. *Id.* Also, Complainant complained to Human Resources regarding Brazier’s conduct and alleged retaliation as a result of her insistence that he comply with the regulations pertaining to plugging and abandoning wells. (Comp. Resp., p. 5).

Thereafter, on April 7, 2016, Respondent met with Complainant and informed her that her employment would be terminated as a result of a layoff. (Resp. Mtn. for Summary Decision, p. 2, EX-A). Respondent also provided her with a letter signed by Brazier notifying her of her termination of employment. (Resp. Mtn. for Summary Decision, p. 2, EX-B). The letter states in pertinent part:

As a result of recent business decisions, this letter constitutes notification regarding your layoff from the company. Your employment will end by layoff on April 27, 2016. Please review the “Leaving Company Summary” for information on your pay and participation in employee benefit plans.

(Resp. Mtn. for Summary Decision, EX-B).

Complainant’s last day in the office was April 7, 2016. (Resp. Mtn. for Summary Decision, p. 2, EX-A). In addition, Respondent’s U.S. Employee Exit Checklist, also attached in EX-B and signed by Complainant on April 7, 2016, notes that Complainant was to return her security ID badge, corporate cards, keys, and company-issued equipment to Respondent. (Resp. Mtn. for Summary Decision, EX-B). Soon after, on April 12, 2016, Complainant began her search for new employment. (Resp. Mtn. for Summary Decision, p. 3, EX-C).

## **PROCEDURAL BACKGROUND**

On May 23, 2016, Complainant filed a complaint with the Occupational Safety and Health Administration (“OSHA”), alleging she was discharged in retaliation for alleged protected activity under the WPC. On September 29, 2016, OSHA issued its findings and stated Complainant failed to make a *prima facie* showing. In accordance with the regulations, Complainant timely objected to OSHA’s findings and requested a hearing before an administrative law judge. The matter was assigned to the undersigned, and a Notice of Hearing and Pre-Hearing Order was issued on November 9, 2016, scheduling a formal hearing in this matter on June 5-7, 2017.

On December 2, 2016, Complainant filed a complaint with the undersigned which outlined her allegations in detail and the nature of each and every violation by Respondent as well as the relief sought for each such alleged violation. On December 15, 2016, Respondent timely filed an answer to Complainant's OALJ complaint.

On April 21, 2017, Respondent filed a Motion for Protection, seeking an Order from the Court to prohibit Complainant from taking the depositions of Richard Brazier and Colleen Reda on April 24, 2017. Thereafter, Complainant filed an Opposed Motion to Extend Deadlines on April 24, 2017 in order to depose Brazier and Reda. Before the undersigned could rule on these two Motions, Respondent also filed a Motion for Summary Decision, alleging Complainant's complaint was barred by the statute of limitations in the Act.

On May 2, 2017, I held a conference call with the parties to discuss the status of this matter. During the call, I denied Respondent's Motion for Protection and granted Complainant's Opposed Motion to Extend Deadlines. In so doing, I extended the discovery deadline as well as the deadline for Complainant to respond to Respondent's Motion for Summary Decision. I also rescheduled the formal hearing in this matter from June 5-7, 2017 to October 11-13, 2017. Pursuant to this extension of deadlines, Complainant thereafter timely filed a response to Respondent's Motion for Summary Decision on June 12, 2017. On June 19, 2017, Respondent, without permission or leave of Court, filed its reply in support of its Motion as well as objections to Complainant's summary decision evidence. Also, on July 6, 2017, Complainant filed an additional exhibit to her response in opposition to Respondent's Motion.<sup>1</sup>

In support of its contentions, Respondent attached supporting documentation to its Motion, including (1) Complainant's deposition transcript; (2) April 7, 2016 correspondence from Respondent to Complainant regarding her layoff with the company; (3) Complainant's job search progress report; (4) copies of Complainant's OSHA and OALJ complaints; (5) a copy of OSHA's September 2016 findings; and (6) a table of authorities cited in support of dismissal of this matter. (Resp. Mtn. for Summary Decision, pp. 1-5; EX A-F).

Respondent contends that summary decision in its favor as a matter of law pursuant to 29 C.F.R. § 18.72 is proper and that Complainant's claim against Respondent should be dismissed. Specifically, Respondent contends Complainant failed to timely file her complaint with OSHA. Instead, Complainant filed her complaint with OSHA on May 23, 2016, forty-six days after being notified of her termination. (Resp. Mtn. for Summary Decision, pp. 1-5).

On the other hand, Claimant argues that summary decision should be denied as to each of Respondent's arguments in support of its Motion for Summary Decision. Specifically, Complainant asserts her complaint is timely filed since her effective date of separation was April 27, 2017. In the alternative, Complainant argues she is entitled to equitable tolling of her complaint in order to consider it timely filed. In support of this position, Complainant contends she was misled about the date of termination and whether she was terminated or laid off. (Comp. Resp., pp. 2-3).

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<sup>1</sup> This exhibit, Complainant's Exhibit 8, is a pension estimate dated June 27, 2017 wherein it states April 27, 2017 as Complainant's last day of employment.

In its Reply, Respondent argues there is no factual dispute regarding the date in which Complainant was notified of her termination. Specifically, Respondent contends Complainant does not dispute that she received notice of her termination on April 7, 2017. In addition, Respondent asserts Complaint failed to raise an issue of fact as to whether the limitation period should be tolled and failed to demonstrate any grounds for a discretionary waiver of the procedural requirements. (Reply, pp. 1-9).

In addition, Respondent objects to, and moves to strike, Complainant's summary decision evidence, contending Complainant failed to set forth competent summary decision evidence in her response. Rather, Respondent argues Complainant repeatedly failed to cite to particular facts or materials in the record and relies on subjective beliefs and conclusory statements and legal arguments. (Resp. Mtn. to Strike, pp. 1-7). After reviewing Respondent's Motion to Strike Complainant's Summary Decision Evidence, I deny its Motion but will nevertheless note its objections to Complainant's opposition.

Complainant's Exhibit 8 as well as Respondent's Reply were not permitted filings in accordance with the Pre-Hearing Order. However, after reviewing these filings, I will nonetheless consider these documents in determining whether to grant or deny Respondent's Motion as each gives the undersigned a more comprehensive understanding of the facts of this case as well as aid in determining whether summary decision is proper in this matter.

### **ISSUES PRESENTED**

Respondent's Motion for Summary Decision presents the following issue for resolution:

1. Whether genuine issues of material fact exist as to whether Complainant's complaint under the WPC is barred by the Act's statute of limitations

### **SUMMARY DECISION STANDARD**

The standard for granting summary judgment or decision is set forth at 29 C.F.R. § 18.72 (2015), which is derived from Federal Rule of Civil Procedure (FRCP) 56. Under Section 18.72, a party may move for summary decision, identifying each claim or defense on which summary decision is sought. An administrative law judge shall grant summary decision if the movant shows that there is no genuine issue of material fact and the movant is entitled to decision as a matter of law.

If movant meets the initial burden of showing no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate facts showing the existence of genuine issue(s) for trial with doubts and reasonable inferences resolved in favor of the non-moving party. *Reves v. Sanderson Plumbing Products Inc.*, 120 S. Ct. 2097, 2110 (2000); *Matsushita Elec. Indus. Co. Ltd., v. Zenith Radio Corp.*, 475 U.S. 574 587 (1986). *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 278 (5th Cir. 2004). An issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. A fact is material and precludes a grant of a summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a

defense asserted by the parties. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

When a motion for summary judgment or decision is made and supported by appropriate evidence, the non-movant or party opposing the motion may not rest upon mere allegations or denials of such pleading, but must set forth specific factors showing there is a genuine issue of material facts. As the Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), the non-movant must present affirmative evidence in order to defeat a properly supported motion for summary decision, even where the evidence is within the possession of the moving party, as long as the non-movant had a full opportunity to conduct discovery. In reviewing a request for summary decision, all evidence and inferences must be viewed in the light most favorable to the nonmoving party. *Id.* at 262.

The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324. The non-movant's evidence, if accepted as true, must support a rational inference that the substantive evidentiary burden of proof could be met. Where the non-movant presents admissible direct evidence such as affidavits, answers to interrogatories or depositions, the judge must accept the truth of the evidence set forth without making credibility or plausibility determinations. *T.W. Electric Service v. Pacific Electric Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). If the non-movant fails to sufficiently show an essential element of his case, there can be "no genuine issue as to any material fact," entitling the movant is entitled to summary judgment, since a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial." *Id.* at 322-323; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323.

The ALJ cannot summarily try the facts. Rather, the ALJ must apply the law to the facts that have been established by the parties. *See 10 A. Wright and Miller, Federal Practice and Procedure*, § 2725, at 104 (1983). A motion cannot be granted merely because the movant's position appears more plausible or because the opponent is not likely to prevail at trial. *Id.* at 104-5. In short, the trier of fact has no discretion to resolve factual disputes on a summary decision motion. *Id.* at § 2728, at 186. Accordingly, "if the evidence presented on the motion is subject to conflicting interpretations, or reasonable men might differ on its significance, summary judgment is improper." *Id.* § 2725, at 106, 109. Once it is determined that a triable issue exists, the inquiry is at an end and summary decision must be denied. *Id.* at 187.

### **THE FEDERAL WATER POLLUTION CONTROL ACT & ITS TIMELINESS REQUIREMENT**

The purpose of the governing statute, the Federal Water Pollution Control Act, is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251. Under the statute, Congress has implemented an extremely complex system of regulations which requires, among other things, permits for dredged or fill material into navigable waterways and wetlands. *See, e.g.*, 33 U.S.C. § 1344.

The employee protection provision of the Act states as follows:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

33 U.S.C. § 1367(a).

This same statutory provision explicitly states that an employee who “believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, **within thirty days after such alleged violation occurs**, apply to the Secretary of Labor for a review of such firing or alleged discrimination.” 33 U.S.C. § 1367(b) (emphasis added).

In whistleblower cases, statutes of limitation, such as § 1367(b), run from the date an employee receives “final, definitive, and unequivocal notice” of a discharge or other discriminatory act. *See Corbett v. Energy East Corp.*, ARB No. 07-044, ALJ No. 2006-SOX-65 (ARB Dec. 31, 2008); *Sneed v. Radio One*, ARB No. 07-072, ALJ No. 2007-SOX-018, slip op. at 6-7 (ARB Aug. 28, 2008); *Jenkins v. U.S. Emtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 14 (ARB Feb. 28, 2003). The date that an employer communicates to the employee its intent to implement the discharge or other discriminatory act marks the occurrence of a violation, rather than the date the employee experiences the consequences. *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 3-4 (ARB Aug. 31, 2005); *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-053, slip op. at 36 (ARB Apr. 30, 2001). *See also Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become apparent); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (limitations period begins to run when the decision to deny tenure is made and communicated rather than on the date employment termination is effective).

Complaints that are not timely filed may be dismissed for failure to adhere to the statutory requirements. *Jenkins v. EPA*, Case No. 98-146 (ARB: Feb. 28, 2003), slip op. at 12-13. The Administrative Review Board has held that the requirement that a complaint must be filed within 30 days is a limitations period, which may be waived (or “tolled”), based on equitable considerations. *Prybys v. Seminole Tribe of Florida*, Case No. 96-064 (ARB: Nov. 27, 1996), slip op. at 3-5; *see also Whitaker v. CTI-Alaska, Inc.*, Case No. 98-036 (ARB: May 28, 1999), slip op. at 8. It is the burden of the party seeking tolling to establish the basis for such action. *Higgins v. Glen Raven Mills, Inc.*, Case No. 05-143 (ARB: Sep. 29, 2006), slip op. at 8; *Scharfermeyer v. Blue Grass Army Depot*, Case No. 07-082 (ARB: Sept. 30, 2008), slip op. at 10.

Courts have held that the time limitation provisions under the Act are not jurisdictional, in the sense that a failure to file a complaint within the prescribed period is not an absolute bar to administrative action, but rather it is analogous to statutes of limitation and thus may be tolled by equitable consideration. *Donovan v. Hanker, Forman & Harness, Inc.*, 736 F.2d 1421 (10th Cir. 1984); *School District of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981). The *Allentown* court warns, however, that the restrictions of equitable consideration must be scrupulously observed; the tolling exception is not an open invitation to the court to disregard limitation periods simply because they bar what may otherwise be a meritorious case. See *Rose v. Dole*, 945 F.2d 1331, 1336 (6th Cir. 1991). The burden is on the party seeking the benefit of equitable tolling to establish such tolling is warranted. *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1242 (11th Cir. 2004).

There are two tolling doctrines that will, for equity purposes, stop the statute of limitations from running. The first tolling doctrine, equitable estoppel, focuses on whether the employer misled the complainant, thereby causing a delay in filing the complaint. The cases that have applied equitable estoppel have been cases in which the employer was found to have misled the employee into believing he or she has no cause of action. For example, in *McConnell v. General Telephone Co.*, 814 F.2d 1311 (9th Cir. 1987), *cert. denied sub nom. General Telephone Co. v. Addy*, 484 U.S. 1059, 108 S. Ct. 1013 (1988), the employer misled the employee into believing he had been temporarily laid off rather than terminated. Similarly, in *Charles A. Kent*, 1984-WPC-2, 1 O.A.A. 2, at 442 (Remand Decision and Order of Secretary of Labor, April 6, 1987), and *Reeb v. Economic Opportunity Atlanta Inc.*, 516 F.2d 924 (5th Cir. 1975), the employees were misled by the employers into believing they had not been terminated. In these cases, since the employees were misled into believing that no adverse action had been taken against them, they could not have been aware that a cause of action existed.

The second doctrine, equitable tolling, focuses on whether a complainant was excusably ignorant of his or her rights due to an extraordinary circumstance or, alternatively, when a complainant files a timely complaint raising issues sufficient to state a cause of action under environmental whistleblowing laws, but files the complaint in the wrong forum. *Prybys v. Seminole Tribe of Florida*, ARB No. 96-064, 95-CAA-15 (ARB Nov. 27, 1996); *Biddel v. Department of the Army*, 93-WPC-9 (ALJ July 20, 1993). The equitable tolling doctrine, however, does not permit disregard of the limitation periods simply because they bar what may be an otherwise meritorious cause. *School District of City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981).

The doctrine of equitable tolling allows a complainant to avoid the bar of the statute of limitations if, despite all due diligence, he is unable to obtain vital information bearing on the issue of his claim. *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946). Courts have considered five separate factors in determining whether equitable tolling is appropriate in a given case: (1) whether the plaintiff lacked actual notice of the filing requirements; (2) whether the plaintiff lacked constructive notice, i.e., his attorney should have known; (3) the diligence with which the plaintiff pursued his rights; (4) whether there would be prejudice to the defendant if the statute were tolled; and (5) the reasonableness of the plaintiff remaining ignorant of his rights. Ignorance of the law alone is not sufficient to warrant equitable tolling. *Rose v. Dole*, 945 F.2d 1331 (6th Cir. 1991) (*per curiam*). The complainant must make a particularly strong showing

that some extraordinary fact prevented him from timely filing. Extraordinary circumstances have included mental illness, attorney abandonment, and death of the complainant. *Ricketts v. Northeast Utilities Corp.*, 1998-ERA-30 (ALJ Oct. 29, 1998); *Hall v. EG&G Defense Materials, Inc.*, 1997-SDW-9 (ARB Sept. 30, 1998). Consultation with counsel precludes application of equitable tolling considerations. *Kent v. Barton Protective Service*, 1984-WPC-1 (Sec'y Sept 28, 1990), *aff'd*, 946 F.2d 904 (11th Cir. 1991); *Hay v. Wells Cargo, Inc.*, 596 F.Supp. 635, 640 (D.Nev. 1984), *aff'd*, 796 F.2d 478 (9th Cir. 1986). *See also: Kale v. Combined Insurance Co. of America*, 861 F.2d 746, 753 (1st Cir. 1988).

## **DISCUSSION**

### **A. Timeliness of Complainant's OSHA Complaint**

#### **1. The Positions of the Parties**

In its Motion, Respondent argues dismissal is proper since Complainant filed her complaint with OSHA more than thirty days after she received a final, definitive, and unequivocal notice of her termination by Respondent. Specifically, Respondent contends Complainant filed her complaint on May 23, 2016, forty-six days after being notified of her termination on April 7, 2016. (Resp. Mtn. for Summary Decision, pp. 4-5).

In support of its position, Respondent points to Complainant's deposition testimony in which she states her last day in the office was April 7, 2016 and that she began her search for a new job on April 12, 2016. (*Id.* at 2-3; EX-A).

In response, Complainant argues her complaint is timely filed as it was filed less than thirty days from the end of her employment with Respondent. Specifically, Complainant contends she continued to be an employee of Respondent until April 27, 2016 and had until May 27, 2016 to file her whistleblower complaint with OSHA. As such, Complainant argues her complaint was timely filed, since it was filed on May 23, 2016. (Comp. Resp., pp. 6-7).

#### **2. Discussion and Analysis**

After reviewing the record, I agree with Respondent that there is no question that Complainant's act in filing a complaint with OSHA missed the thirty day statutory deadline. Under the line of cases cited and discussed above, Complaint received a final, definitive, and unequivocal notice of discharge on April 7, 2016, and not April 27, 2016, which was the date the discharge took effect. Consequently, the thirty day limitations period began to run on April 7, 2016. Because Complainant did not file her complaint with OSHA until more than thirty days later on May 23, 2016, her complaint is untimely.

It is undisputed that Complainant received a definitive and unequivocal notice of her discharge on April 7, 2016. The letter of termination clearly states that Complainant is notified of her layoff from the company and that her employment will end on April 27, 2016. (Resp. Mtn. for Summary Decision, EX-B). As discussed above, Respondent is correction in its assertion that the date Respondent informed Complainant of its intent to implement her discharge marked the



occurrence of the alleged violation, which in this matter was April 7, 2016. *See Halpern, supra; Overall, supra*. Each discrete adverse employment act triggers the time limitation. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). As Complainant has presented no evidence of any adverse act by Respondent following her notice of termination letter dated April 7, 2016, there is no basis for excusal of the 30 day time limit for filing her complaint from the date of her termination notice.

Moreover, the rulings in *Chardon* and *Ricks* dictate that the proper inquiry in determining whether a complaint is timely is when the employee received notification of the alleged discriminatory act and when the decision was made and communicated rather than when the date of termination was effective. *See Chardon, supra; Ricks, supra*. In applying these cases to the instant matter, it is clear and undisputed that Respondent communicated its decision to terminate Complainant's employment to her on April 7, 2016. As such, Complainant had thirty days from April 7, 2016, or until May 7, 2016, to file her complaint with OSHA. Unfortunately for Complainant, she missed the statutory deadline.

Therefore, based upon the documentation submitted by the parties, and the record before me, as summarized above, I find that Complainant's complaint to OSHA was untimely.

## **B. Equitable Considerations**

Before a ruling on Respondent's Motion for Summary Decision can be made, the issue of whether the limitations period should be tolled remains and requires additional discussion.

### **1. The Positions of the Parties**

In her response, Complainant argues she is entitled to equitable tolling of her complaint since the April 7, 2016 notification stated her employment will end by layoff on April 27, 2016. Complainant argues this ambiguous notification misled her about her termination, including the date of her termination and whether she was terminated or laid off.<sup>2</sup> Moreover, Complainant contends even though Respondent believed Complainant's termination was April 7, 2016, nowhere in the April 7, 2016 letter states that Complainant's termination was effective immediately. (Comp. Resp., pp. 7-10, EX-1).

Further, Complainant argues Brazier alleged he had been documenting his concerns regarding her job performance and that she was terminated as part of a lay-off shortly thereafter. As a result, Complainant contends she was uncertain whether she was terminated due to her complaints or based on a true layoff, which she believed was supposed to occur in September 2016. Moreover, Complainant argues her lay-off notice was different from other employees, as her notice indicated she was being let go for "business reasons" while others were simply notified they were being let go. Based on the above, Complainant asserts there are inconsistencies regarding Respondent's intentions and whether she was intentionally misled about her termination of employment. (Comp. Resp., pp. 11-13).

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<sup>2</sup> Complainant also relies on the testimony of Richard Brazier wherein he stated he was not sure if Complainant was laid off or terminated. (Comp. Resp., p. 10, EX-1).

Finally, Complainant argues the procedural requirements be waived in the interests of justice since Respondent will not be prejudiced due to an untimely filing. In addition, Respondent has been aware of Complainant's claim for over one year and has not attempted to argue Complainant's complaint was untimely filed until this Motion. Further, OSHA found, after an investigation, that the complaint was timely filed. As a result, Complainant requests the undersigned waive any procedural requirements. (Comp. Resp., pp. 14-15).

On the other hand, Respondent contends Complainant failed to present any evidence to establish any grounds for equitable tolling. Specifically, Respondent points to Complainant's deposition testimony wherein she does not dispute that she received notice of her termination on April 7, 2016. Thus, regardless of whether Complainant's termination was effective on April 7, 2016 or April 27, 2016, Respondent argues it is undisputed that Complainant received notice on April 7, 2016, which triggered the thirty day filing period. In addition, Respondent contends equitable estoppel only applies when an employer conceals its actions as opposed to its motives. Since Respondent was very clear about its decision to terminate Complainant, Respondent argues any assertion that it concealed its motive is without merit. Further, even if Respondent had misled Complainant about why she had been terminated, she allegedly learned of Respondent's retaliatory motive on April 15, 2016 when she talked to her former supervisor. Thus, Respondent contends Complainant would have had until May 15, 2016 to file her complaint but failed to do so by that deadline. (Resp. Reply, pp. 4-7).

Regarding Complainant's argument to waive the requirement of filing a timely complaint, Respondent argues Complainant offered no evidentiary support or authority to allow for a waiver of the thirty-day limitations period. Respondent also asserts that OSHA's findings are now subject to *de novo* review by the undersigned and are not final. Since Complainant failed to articulate any reason for her untimely complaint, Respondent contends summary decision is proper. (Resp. Reply, pp. 7-9).

## **2. Discussion and Analysis**

After reviewing the evidence submitted by the parties, I agree with Respondent that equitable estoppel should not be applied in this matter. While Respondent may have characterized Complainant's termination of employment under many labels, it is undisputed that it meant to terminate Complainant's employment and it did not conceal any of its actions. Complainant was notified in very clear terms that she was terminated. Respondent did nothing to mislead Complaint regarding her end of employment. Even if Respondent may have possibly concealed its motive for terminating Complainant, that fact has no bearing that Complainant clearly understood that she was unequivocally terminated. As discussed above, equitable estoppel focuses on the actions, rather than the motives of Respondent. Therefore, I find that equitable estoppel cannot be applied in this case.

In like manner, I find there is no basis for a claim of equitable tolling as Complainant was not prevented in any way from asserting her rights, did not pursue her action in a wrong forum, and was represented by counsel (at least for some period of time prior to filing her complaint).

Specifically, Complainant presented no evidence of her filing a timely complaint which raised issues sufficient to state a cause of action but in the wrong forum. More important, there is no evidence that any of the *Allentown* factors are present in this matter. Specifically, there is no evidence, or any allegation, that Respondent misled Complainant or suggested to her that the WPC did not apply to her complaint or had a longer limitation period. Finally, Complaint presented no evidence that she was prevented in any way from asserting her rights, either by Respondent or other external factors, i.e. mental illness, attorney abandonment, or any other extraordinary circumstances.

Complainant bears the burden of establishing tolling is warranted. *See Bost v. Federal Express Corp.*, 372 F.3d 1233, 1242 (11th Cir. 2004). Unfortunately for her, Complainant has failed to raise a fact issue as to any equitable consideration. As stated above, the restrictions of equitable consideration must be scrupulously observed, and the tolling exception is not an open invitation for the undersigned to disregard limitation periods simply because they bar what may otherwise be a meritorious case. *See Rose v. Dole*, 945 F.2d 1331, 1336 (6th Cir. 1991).

Regarding Complainant's argument that her claim be subject to a discretionary waiver, I find Complainant has provided no legal authority in support of a waiver of the thirty day filing period. As correctly noted by Respondent, OSHA's findings are subject to *de novo* review by the undersigned due to the filing of Complainant's objections to those findings. As such, Complainant's reliance on OSHA's findings in support of her argument that her complaint is timely is without merit.

In sum, no genuine dispute as to any material fact exists as to whether Complainant timely filed her complaint under the WPC. The documentation submitted by Respondent in its Motion for Summary Decision supports its position that there is no genuine issue of material fact because Complainant failed to establish she timely filed her complaint and failed to establish any grounds for the application of equitable estoppel, equitable tolling, or a discretionary waiver by the undersigned. This shifts the burden to Complainant to set forth specific facts under 29 C.F.R. § 18.72. However, Complainant has failed to provide specific facts showing that there is a genuine issue of material fact to be resolved at a hearing. Rather, Complainant presented insufficient evidence to meet her burden under 29 C.F.R. § 18.72. Accordingly, summary decision is proper in this matter. Consequently, the issue of whether Respondent took adverse employment action against Complainant due to her alleged protected activity is moot and will not be considered.

## CONCLUSION

Respondent has shown no dispute of material fact regarding whether Complainant timely filed her complaint with OSHA under the WPC. Accordingly, I conclude as a matter of law, viewing the evidence in a light most favorable to Complainant, that Complainant failed to set forth specific facts showing a dispute regarding whether she timely filed a complaint with OSHA. Therefore, Respondent is entitled to summary decision pursuant to 29 C.F.R. § 18.72(a).

## **ORDER**

For the reasons stated above, **IT IS HEREBY ORDERED** that Respondent's Motion for Summary Decision is **GRANTED**.

**YOU ARE HEREBY NOTIFIED** that a formal hearing on the merits of the above proceeding which was scheduled to commence at **9:00 a.m.** on **October 11-13, 2017**, in **Houston, Texas**, is **CANCELLED**.

**SO ORDERED** this 24<sup>th</sup> day of July, 2017, at Covington, Louisiana.

**CLEMENT J. KENNINGTON**  
**ADMINISTRATIVE LAW JUDGE**

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

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

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

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

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

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

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.