



**Issue Date: 14 September 2011**

In the matter of  
CYNTHIA BURKE,  
Complainant

v.

PTM of Cape Code, INC,  
Respondent.

CASE NO. 2011-NTS-00001

### **RECOMMENDED ORDER OF DISMISSAL**

This proceeding arises under the National Transit Systems Security Act of 2007, 5 U.S.C. 1142, and the applicable regulations issued thereunder at 29 C.F.R. Part 1982. The Act provides protection from discrimination to employees who report violations of federal law, rules, or regulations relating to transit safety or security; who report a hazardous safety or security condition; or who refuse to authorize the use of any equipment in the belief that a hazardous safety condition exists. The pertinent provisions of the Act prohibit discharge, discipline, or any other discriminatory act against covered employees. This recommended order of dismissal is governed by those provisions, and the provisions of 29 C.F.R. Part 18.<sup>1</sup>

#### **Procedural History**

On November 6, 2010, the Complainant, Ms. Cynthia Burke, through counsel filed an NTSSA complaint with the Occupational Safety and Health Administration (OSHA) alleging that the Respondent violated the NTSSA. Complainant alleged that Respondent fired her on March 4, 2010 in retaliation for raising safety concerns about the buses operated by Respondent. On December 8, 2010, the OSHA Regional Administrator found that Complainant did not file her complaint with OSHA within 180 of the date that the alleged adverse employment action took place and, therefore, dismissed the complaint as untimely. The Secretary calculated that the

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<sup>1</sup> Part 18 of 29 C.F.R. contains the general rules of practice and procedure applicable to proceedings before the Office of Administrative Law Judges. These rules apply unless inconsistent with a rule of special application. 29 C.F.R. § 18.1. Interim Final Rules governing NTS complaints, 29 C.F.R. Part 1982, are found at 74 Fed. Reg. 53522 (Aug. 31, 2010).

complaint was filed 247 days after the alleged violation. On January 7, 2011, Complainant filed an objection to the Secretary's Findings and requested a *de novo* hearing before an Administrative Law Judge (ALJ).

On February 4, 2011, I issued a Notice of Docketing and Order to Show Cause requiring the parties to show cause why the complaint in this case should not be dismissed as untimely. On March 8, 2011, counsel for the Complainant filed a Response of Respondent Cynthia Burke to Order to Show Cause (Comp. Brief). On March 16, 2011, counsel for the Respondent filed a Motion Requesting Additional Time to Respond to an Order to Show Cause. On March 28, 2011, counsel for the Complainant filed Complainant Cynthia Burke's Opposition to Respondent's Motion Requesting Additional Time to Respond to an Order to Show Cause.

On April 6, 2011, counsel for the Respondent filed: (1) Motion of Respondent PTM of Cape Cod, Inc. to File its Response to an Order to Show Cause; and (2) Response to PTM of Cape Cod, Inc. to the Order to Show Cause (Resp. Brief). On April 18, 2011, counsel for the Complainant filed Complainant Cynthia Burke's Opposition to Motion of Respondent PTM of Cape Cod, Inc. to File its Response to an Order to Show Cause.

On May 4, 2011, counsel for the Respondent filed Respondent's Reply to Complainant Cynthia Burke's Opposition to Motion of Respondent PTM of Cape Cod, Inc. to File its Response to an Order to Show Cause. On May 10, 2011, counsel for the Complainant filed Complainant Cynthia Burke's Motion to Strike Respondent's Reply to Complainant's Opposition to the Motion of Respondent PTM Cape Cod, Inc. to File its Response to an Order to Show Case, and Further Motion for Sanctions.

On May 10, 2011, counsel for Respondent filed Respondent's Request that the Instant Application for Permission to File a Reply be Accepted *Nunc Pro Tunc* and Respondent's Opposition to Complainant's Motion to Strike and Further Motion for Sanctions.

### **Background<sup>2</sup>**

Respondent is a Massachusetts corporation located in Dennis, Massachusetts. Respondent operates pursuant to a contract with the Cape Cod Regional Transportation Authority (CCRTA), by which Respondent provides busses, dispatchers and maintenance, and manages the CCRTA's day-to-day operations. Complainant was formerly employed by Respondent as a bus driver. Respondent's bus drivers are represented by the Amalgamated Transit Union, Local 1548 (Union).

Complainant's employment was terminated on March 4, 2010, after the Respondent claims it learned that she had refused to transport one of her regular passengers in the motorized wheelchair that had been recommended by the passenger's health care provider. Respondent states that Complainant's refusal led to the passenger being placed in a different wheelchair not

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<sup>2</sup> The facts set forth in this section are agreed upon by Complainant and Respondent, unless noted otherwise.

suited to the purpose, creating a substantial risk of injury. The Complainant states that she had a spotless, accident-free driving record as of the date of her termination by Respondent.

The day of her termination, the Union filed a grievance on Complainant's behalf in connection with her termination. Complainant had previously reported to Respondent that she was concerned about the possible leakage of fumes into the cabin of a bus to which she and other drivers were assigned. Complainant states that she made multiple complaints, both verbally and in writing, as to the noxious fumes into the cabin of her bus, which lasted over a period of several weeks and resulted in elevated exposure to carbon monoxide. The Complainant states that Respondent failed to remediate the issues of noxious fumes, and continued to assign her the same bus until she reported her safety concern over the company-wide intercom.

Complainant asserts that she was subject to various acts of retaliation following her complaint about her bus, culminating in the termination of her employment on what Complainant alleges were putative grounds that were a mere pretext for Respondent's true motive in firing her, namely, to retaliate against her for having reported her safety concerns.

On March 26, 2010, the parties signed a Grievance Settlement Agreement by which the Union withdrew its grievance over Complainant's termination and Respondent agreed to pay Complainant two months severance, agreed not to contest her claim for unemployment compensation, and agreed to provide Complainant with a letter attesting that during the course of her employment with Respondent, she had no reportable accidents or other safety violations. (Employer's Exhibit 2). Complainant's safety related concerns were not raised in the course of the grievance proceedings. She alleges that she did not raise her safety concerns at that time because of inadequate representation on the part of her Union, and also because of assurances from her Union president that he would see to it that she obtained a job as a bus driver at Plymouth and Brockton Street Railway Co. (P&B), another regional bus company serving Cape Cod, if she simply settled her grievance. Complainant was subsequently denied employment with P&B.

### *Discussion*

Before I address the motions filed by the parties, I will address the primary issue of whether Complainant's NTSSA complaint was timely filed. Under the statute and applicable regulations, a complaint must be filed not later than 180 days after the date that an alleged violation of the Act occurs. 6 U.S.C. § 1142(c)(1); 29 C.F.R. § 1982.103(d). The limitations period begins to run the date an employee receives "final definitive, and unequivocal notice" of a discharge or other discriminatory act. *See Sneed v. Radio One*, ARB No. 07-072, ALJ No. 2007-SOX-018, slip op. at 6-7 (ARB Aug. 28, 2008). "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." *Corbett v. Energy East. Corp.*, ARB No. 07-044, ALJ No. 2006-SOX-65, USDOL/OALJ Reporter at 4. (ARB Dec. 31, 2008) (citations omitted).

The time for filing a complaint may be tolled for reasons warranted by applicable case law. 29 C.F.R. § 1982.103(d). The Administrative Review Board (ARB) has allowed for

equitable tolling under the following circumstances: (1) when the respondent has actively misled the complainant respecting the cause of action; (2) when the respondent's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights; (3) when the complainant has in some extraordinary way been prevented from asserting her rights; or (4) when the complainant mistakenly raised the precise statutory claim at issue in the wrong forum. *Marc Halpern v. XL Capital, Ltd.*, ARB Case No. 04-120, ALJ No. 2004-SOX-54, at 4 (Aug. 31, 2005); *Hyman v. KD Resources*, ARB Case No. 09-976, 2009 SOX-20, at 7 (Mar. 31, 2010). Although these categories are not exclusive, the ARB is "much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Halpern*, ARB Case No. 04-120, at 4, quoting *Wilson v. Secretary, Department of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995).

The parties do not dispute that Complainant was fired on March 4, 2010 and that Complainant filed a formal complaint with OSHA on November 6, 2010. (Resp. Brief at 4-5; Comp. Brief at 1). The complaint was filed 247 days after the alleged retaliation, and therefore, was untimely filed. Complainant contends that she should nevertheless be allowed to proceed under the doctrine of equitable tolling.

#### Materially Misleading Information from OSHA

On July 19, 2010, Complainant retained counsel to represent her. (Comp. Brief at 7; Resp. Brief at 4). Having foregone the opportunity to file an OSHA retaliation claim within the 30-day limitations period, Complainant nonetheless was well within the 180-day limitation period for filing a claim under the NTSSA. Complainant, through her counsel, argues that that the latter deadline should be tolled due to materially misleading information on the OSHA web pages as to the rules applicable to filing an OSHA complaint. Specifically, Complainant's counsel cites on OSHA's website instances where it states that complaints must be filed within 30 days, which is true for cases arising out of Section 11(c) of the Occupational Safety and Health Act—one of the 20 whistleblower statutes that OSHA presently administers. Complainant's counsel argues that he discovered and relied on the plain meaning of these references to "30 days" on OSHA's website in July 2010 and since the 30 days had already passed by that time, he concluded that his client had missed the filing deadline. In reality, Complainant could have timely filed a complainant under NTSSA until August 30, 2010.

The Complainant argues that equitable tolling should be applied in this case because she pursued her claim with due diligence and there was some sort of extraordinary circumstance which prevented a timely filing. The Complainant argues that "a misrepresentation on the part of the adjudicatory body with whom a complaint was filed, which misrepresentation caused the plaintiff to miss an otherwise applicable deadline, constitutes one such 'extraordinary circumstances'" (Comp. Brief at 12).

Complainant cites *Smith v. Solis*,<sup>3</sup> as an example of a federal case where equitable tolling has been applied to a discrimination claim brought under the NTSSA, where the misrepresentation was committed by OSHA. The facts in *Smith*, however, are clearly

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<sup>3</sup> *Smith v. Solis*, No. 08-4058 (6th Cir. July 26, 2010)(unpublished)

distinguishable from the instant case. In *Solis*, the court held that the filing deadline for appealing an adverse decision of the Administrative Review Board as to a NTSSA discrimination claim was tolled, where notice of dismissal was sent to the claimant, and where the notice indicated that a copy was sent to the claimant's lawyer when no such copy had, in fact, been sent. The court reasoned that "...a complainant should not be punished for missing a filing deadline when he is *affirmatively misled* in a manner that causes the delay." *Smith* at 7. (emphasis added). The court further reasoned that "when the agency sends its findings directly to the complainant with a clear indication that his counsel has contemporaneously received those same findings, but does not actually notify counsel until after expiration of the statutory period for filing objection, the refusal to permit a late objection is unjust." *Id.*

Unlike the complainant in *Smith*, Complainant in this instant case has presented no evidence that she was affirmatively misled by OSHA or its representative in a manner that caused her to delay filing. I accept the findings of the OSHA Regional Administrator that a reasonable amount of research into whistleblower complaints via the OSHA website ([www.osha.gov](http://www.osha.gov)) or "Google" ([www.google.com](http://www.google.com)) would have revealed OSHA's Whistleblower Program webpage ([www.whistleblowers.gov](http://www.whistleblowers.gov)) that contains each law and regulation administered by OSHA. Therefore, I find that any confusion with the 30-day references to Section 11(c) of the Occupational Safety and Health Act is not sufficient to constitute a "material misstatement" or a "material omission."

Equitable tolling may be appropriate where a plaintiff is "excusably ignorant" of his rights. *Mercado-Garcia v. Ponce Federal Bank*, 979 F.2d 890, 896 (C.A. 1 (Puerto Rico) 1992). The ARB has held, however, that it does not extend tolling principles to complainants who are represented by counsel. *See, e.g., Patino v. Birkin Manufacturing Co.*, ARB No. 09-054, ALJ No. 2005-AIR-023, slip. op. at 4 (Nov. 24, 2009); *McCrimmons v. CES Env'tl. Servs.*, ARB No. 09-112, ALJ. No. 2009-STA-035, slip. op. at 6 (Aug. 31, 2009). Further, equitable principles do not operate to excuse a counsel's lack of awareness of the remedies available to his client. *See Evert v. 357 Corp.*, 453 Mass. 585, 601, 612 (2002) (declaring that "when a plaintiff retains an attorney during the limitations period, he or she is charged with constructive knowledge of all procedural requirements" and finding that complainant "pressed no estoppel or equitable tolling argument that would excuse his failure to file a charge"); *Mercado-Garcia*, 979 F.2d at 895 ("tolling ends once the employee receives actual notice of his statutory rights or retains an attorney").

The additional decisions of the ARB relied upon by Complainant that assert otherwise, are unavailing. The facts of each case are distinguishable from the facts in this instant case. For example, in *Hyman v. KD Resources*, ARB No. 09-076, ALJ No. 2009-SOX-020 (March 31, 2010), the complainant was *pro se*, the evidentiary record supported equitable tolling based on misrepresentations of the respondent to the complainant that he would be reinstated and compensated for being wrongly terminated; and the ALJ cited and exclusively relied on an incomplete standard of review. In *Gutierrez v. Regents of Univ. of Cal.*, ARB No. 99-116 (November 8, 1999), it was the respondent (the University) that was represented by counsel—not the complainant.

I agree with Respondent that the remaining decisions relied upon by Complainant are equally unavailing and provide no support for the proposition that Complainant's counsel's ignorance of the remedies available to his client excuses his failure to file a complaint within the applicable limitations period. Even assuming, for sake of argument, that the OSHA webpage did not serve to fully inform the Complainant's counsel of the remedies available to his client, certainly, an attorney who undertakes to represent a client's interest has an obligation to do more than consult a webpage intended to provide information to a universal audience.

### Materially Misleading Information from Respondent

Complainant argues that equitable estoppel should be applied because it was materially misleading statements by respondent's own personnel which lulled her into a false sense of security and caused her to delay in asserting her complaint within the applicable statute of limitations. Complainant states that from March 26, 2010 through at least April 19, 2010, the statutes of limitations should be tolled because she had been "laboring under the misconception" created by "a representative of her union" and "enforced by various employees of the Respondent" that if she agreed to withdraw her grievance claim, she was assured a position as a bus driver with another regional bus company. (Comp. Brief 1-2).

Complainant, however, has failed to present evidence to support this contention. I accept Respondent's position that it had no way of knowing what Complainant was told by representatives of her Union, and likewise, could not know what, if anything, might have been suggested to her by her coworkers, none of whom have been identified by the Complainant. Nowhere in the facts, nor within Complainant's brief, does she allege that any assurances were even made by Respondent, its agents, or any member of the management team. The parties do not dispute that the subject of Complainant's safety concerns was never raised during her grievance proceedings and that the actual Grievance Settlement Agreement, signed and dated by the Complainant on March 26, 2010, contains no assurances of a job with another company. (Comp. Brief at 6; Resp. Brief at 2). At this time, Complainant was still well within the 30-day limitations period for filing an OSHA retaliation claim and had ample opportunity to preserve her rights by filing a claim within the time frame. Where Complainant's inaction cannot be attributed to conduct on the part of Respondent, the doctrine of equitable estoppel cannot be invoked. *See Mercado-Garcia v. Ponce Federal Bank*, 979 F.2d at 896 ("it is something less than reasonable" for a party contemplating litigation to allow itself to miss filing deadlines in reliance upon an employer's offer to consider settlement or request that he refrain from filing a lawsuit); *School District of City of Allentown v. Marshall*, 657 F.2d 16, 20, 21, (3rd Cir. 1981) (noting, "ignorance of the law is not enough to invoke equitable tolling," and finding that equitable estoppel was inapplicable where School District was in no way responsible for employee's failure to file a complaint within the applicable limitations period).

### CONCLUSION

I find that the alleged adverse action occurred when Complainant was terminated on March 4, 2010. Consequently, Complainant had 180 days from March 4, 2010 to file her complaint under the Act; and the last day she could file a complaint was August 31, 2010.

However, her complaint was not filed until November 6, 2010. Since I have found that there is no basis for tolling the limitations period, her complaint was untimely and must be dismissed.

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JOHN M. VITTONI  
Administrative Law Judge