U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 19 December 2007

CASE NO.: 2008-ERA-00001

In the Matter of

LOREN LEWIS,
Complainant,

v.

COMPUTER SCIENCES CORP.
d/b/a ADVANCEMED and U.S.
DEPARTMENT OF ENERGY
Respondents.

DECISION AND ORDER DISMISSING UNTIMELY COMPLAINT

This is a "whistle-blower" case under the Energy Reorganization Act of 1978 (ERA), and in particular the Act's employee protection provisions. *See* 42 U.S.C. § 5851. Respondents have moved for summary judgment. The Complainant opposes. All parties have fully briefed the motion and submitted declarations, affidavits, and exhibits. I have considered all of the submissions and documents of record and will grant the motion and dismiss.

Introduction and Procedural History

The Complainant is a former employee of Respondent Computer Sciences Corp. d/b/a AdvanceMed ("the Company"). He alleges that the Company discharged him from employment in violation of the whistle-blower provision described above. At all relevant times, the Company was a contractor of the U.S. Department of Energy (DOE). The Complainant also names the DOE as a respondent, alleging that it too was his employer and participated in the decision to terminate his employment with the Company.

The Company terminated the Complainant from employment on October 27, 2006. The Complainant filed a complaint with the Occupational Health & Safety Administration some nine months later, on July 30, 2007. The Regional Administrator found the complaint untimely in that it was filed more than 180 days after the adverse action. Finding no basis for tolling, OSHA closed the case on September 25, 2007. On October 22, 2007, the Complainant timely demanded a hearing before an Administrative Law Judge.

At the hearing level, the U.S. Department of Energy (DOE) filed a dispositive motion by letter brief dated August 22, 2007. I took the motion as one for summary judgment. DOE raised three grounds, namely: (1) the Complainant was not at any relevant time an employee of the DOE as required by the ERA; (2) the Complainant has not engaged in a protected activity; and (3) the complaint was not timely filed. I rejected the second argument without prejudice as premature and set a briefing schedule as to the remaining issues. The Company joined as to the timeliness argument.

Legal Requirements for Summary Judgment.

On a motion for summary judgment, I must determine if there is no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56. I consider the facts in the light most favorable to the non-moving party with all justifiable inferences drawn in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on its pleadings, but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The question is whether a fair-minded factfinder could decide for the non-moving party on the evidence presented. *Anderson* at 252.

Facts

I find the following facts to be undisputed.[1] The Company is a contractor of the Department of Energy, providing services at DOE's Hanford site near Richmond, Washington. Zizzi, ¶ 2.[2] It hired the Complainant in January 2004 to work at the Hanford site as the Site Occupational Medical Director. *Id.*, ¶ 3; Lewis, ¶ 5. In June 2004, DOE assigned the Company certain occupational medical services (*see* below), taking over from a previous contractor. Lewis, ¶ 12. Initially, the Company continued the practices and procedures that its predecessor had in place when the Company took over. *Id.* Much of the present dispute arises out of later proposed changes to these practices and procedures.

On August 8, 2005, the Complainant attended whistleblower training provided by the Department of Labor, through OSHA's investigative staff. Zizzi, ¶ 4. He signed the attendance roster. *Id.* and Exh. A. The training included a PowerPoint presentation and a discussion of the requirement that a whistleblower complaint be filed with the Department of Labor within 180 days of the adverse action at issue. *Id.*, ¶ 5, Exh. B. Trainers gave each participant, including the Complainant, handouts including a copy of the poster, *Your Rights under the ERA*. *Id.*, ¶ 6. The poster states that complaints must be filed with DOL within 180 days. *Id.* and Exhs. C-G. I discuss this training in greater detail below.

[1] These findings of fact are for purposes of this motion only. No party has objected to any of the evidence offered by any other party. Considerable portions of the Complainant's affidavit are irrelevant to the present motion, conclusory, or argumentative. I have taken the argumentative averments as though submitted as part of the Complainant's brief. I have taken the irrelevant and conclusory averments for background.

[2] "Zizzi" refers to the Declaration of Martin E. Zizzi, submitted by the Company. "Lewis" refers to the Affidavit of Loren Lewis, submitted by the Complainant.

The central facts in this matter surround DOE's efforts to protect workers (both workers of DOE and of DOE's contractors) against the potential negative health effects from exposure to the chemical beryllium. The DOE's regulations establish a "chronic beryllium disease prevention program." *See* 10 C.F.R. §§ 850 *et seq.* The parties apparently refer to the applicable regulatory mandates as the "beryllium rule," and I will do the same. *See, e.g.*, Lewis, ¶ 8.

Among other things, employers subject to the beryllium rule must offer workers a voluntary medical surveillance program, administered by a Site Occupational Medical Director. 10 C.F.R. § 850.34. Workers must be evaluated for the effects of exposure both routinely and under some particular circumstances. Evaluations must be done by or under the direction of medical doctors. When workers are dissatisfied with their evaluation, they must be allowed to involve an additional medical doctor. If the two involved doctors disagree, a third doctor must be made available for another evaluation. *Id.* The regulations specify how to decide whose evaluation is adopted. Once the evaluation report is complete, the Site Occupational Medical Director must adopt it in a report to the employer. *Id.* The report must contain, *inter alia*, "Any recommendation for removal of the worker from DOE beryllium activities, or limitation on the worker's activities or duties or use of personal protective equipment, such as a respirator . . . ." 10 C.F.R. § 850.34 (e)(1)(ii).

In 2006, one of the contractors working at Hanford stated that if any of its employees was so affected by beryllium exposure that they would have to be removed or their work restricted, this contractor wanted to receive only recommendations that such employees be removed; they did not want to receive recommendations for work restrictions or protective equipment. Lewis, ¶¶ 20-21. A DOE representative supported the request but admitted that this was confusing to him and that he was unfamiliar with certain relevant portions of the beryllium rule. *Id.*, ¶ 21.

The Complainant opposed compliance with the contractor's request. He argued that the other options (restricted work or protective gear) were established by regulation, and that the regulation fixed the responsibility on him for the recommendation; moreover, his recommendation had to be based on the opinion of examining medical doctors, not the preference of a contractor. He argued to the Company that acquiescing in the contractor's demand would violate the beryllium rule and amount to relying on the contractor for a medical opinion. He said that it might also violate the Americans with Disabilities Act. *Id.*

After this discussion, the DOE representative told the Complainant to comply with the contractor's request and recommend only removals when employees could no longer tolerate the exposure levels of beryllium. *Id.* He said that if any liability resulted, DOE would accept responsibility. *Id.* The Complainant asked for written confirmation, and the DOE representative said that he would supply it. *Id.* The Complainant apparently continued to make "efforts to provide input" that his recommendation was not to adopt this practice.[3] Lewis, ¶ 25.

[3] The Complainant's affidavit does not verify any opposition that Dr. Lewis expressed to this practice between the meeting with the DOE representative in "early 2006" and the Company's directive on this subject, issued in the latter part of July 2006. The Complainant's statement that he made "efforts to provide input" falls short of stating that he did provide "input" opposing the practice as unlawful, hazardous, or the like. Nonetheless, given that I construe the factual averments in the light most favorable to the non-moving party (the Complainant), I will take this as sufficient for purposes of this motion to show that Dr. Lewis voiced as least some opposition.

In July 2006, after some discussion, the Company distributed a directive. It appears that the directive accepted the Complainant's opposition to the contractor's request: The Complainant states of the directive that it "reiterates the language of the beryllium rule." Lewis, ¶ 25. The Complainant argues, however, that from the "tone" and especially when set into the context of the earlier discussions, the directive still effectively forecloses restricted work or protective gear. He offers no explanation for how this could be, given the express language of the directive. When the substance of the directive was integrated into the Medical Support Plan, the Complainant objected that this could require him "to violate, appear to violate, or . . . could be accused of violating the Americans with Disabilities Act." Lewis, ¶ 27. The Complainant refused to sign off on the Plan. *Id.*

There were additional meetings with DOE representatives present. Lewis, ¶ 31. Finally, in September 2007, in a meeting with the same DOE representatives, it was decided to return to the earlier program that had been in place when the Company first assumed this work in June 2004. That program allowed the Site Occupational Medical Director (*i.e.*, Complainant) to recommend work restrictions, not just removals from the worksite altogether. *Id.*

During the following month, October 2007, the Company was drafting language aimed at implementing this decision. Managers met with DOE officials. The DOE officials suggested some language. From the manner of the "suggestions," the Company concluded that a failure to include the suggestion would be a "show-stopper" and viewed as "resistance" to direction. Lewis, ¶ 35. The Complainant took this to mean that the Company had no effective choice but to accept the "suggestions" from DOE. From this, the Complainant argues that DOE was directing his work and thus was his employer. The Complainant again believed that the suggestions violated the beryllium rule and constituted the unlicensed practice of medicine. *Id*, ¶¶ 36-37.

On October 5, 2006, DOE officials met with the Complainant, another medical doctor who worked with the Complainant, and the AdvanceMed manager. The DOE officials stated that they wanted the work restriction provision in the program to read the same as the language that the beryllium rule uses." Lewis, ¶ 44. Again it appeared that the Company (and DOE) were acquiescing in the Complainant's view. Yet this was unsatisfactory to the Complainant. He now stated another concern. He said that this meant accepting OSHA's standard limit for beryllium exposure, which was 2 micrograms per milliliter. The Complainant's opinion was that the safe limit was 1 microgram per milliliter. *Id.*, ¶ 45.

That same day, the Complainant looked for support to a DOE whistleblower program. Lewis, ¶ 38. Specifically, the DOE maintains an "Employee Concerns Program." *See* 10 C.F.R. § 708, *et seq*. The program establishes procedures for handling "complaints by *employees of DOE contractors* alleging retaliation by their employers for disclosure of information concerning danger to public or worker health or safety, substantial violations of law, or gross mismanagement . . . . [emphasis added]." 10 C.F.R. §§ 708.1, 708.3 (program "applies to a complaint of retaliation filed *by an employee of a contractor*" [emphasis added]; *see* § 708.2

(defining "contractor"). The procedures set out in the regulations are extensive and comprehensive.[4]

This DOE program is unavailable if the employee also pursues other relief under the same facts. Examples would include claims under the "Department of Labor regulations at 29 CFR part 24, 'Procedures for the Handling of Discrimination Complaints under Federal Employee Protection Statutes,'" any other provision of state or other applicable law, or binding arbitration. *Id.* § 708.4; *cf.* § 708.15 (reciting certain exceptions not applicable here). This restriction against filing other claims on the same facts while pursuing relief from the DOE program applies regardless of whether the other claim is made before, concurrent with, or after the complaint is filed in the Employee Concerns Program. *Id.* § 708.15.

The Complainant had raised two previous Employee Concerns. He now raised his third, aimed at the Company's decisions that he believed to be inconsistent with the DOE regulations and amount to the unauthorized practice of medicine. Lewis, ¶ 38.

Meanwhile, the Company gave the Complainant a written warning on October 8, 2006, citing the DOE officials' "obvious and palpable frustration," most specifically with the Complainant's (and another doctor's) attempted explanations for why they "could not/would not specify an exposure limit to beryllium" and even more so because he and his medical colleague gave apparently inconsistent statements about how work restrictions were determined. Lewis, ¶ 52, Exh. 24. The Company stated that, while the Complainant disputed the acceptable beryllium exposure levels, he had failed to help DOE resolve the issue. *Id.* The Company wrote that DOE representatives acknowledged that they were not medical doctors, and that was exactly why they had hired the Company: to get medical leadership at the worksite. *Id.* The Company described the Complainant's approach as "inflexible": rather that working on contentious issues, the Complainant had "taken a position alleging interference in medical judgment/clinical practice as a reason for your stance." *Id.* Thus, the Company stated, he failed to articulate the foundation for his views, offer alternatives, or find a compromise. *Id.* The Company stated that DOE's loss of confidence in the Complainant's performance was something they had been asking him to address since springtime, and that the Complainant's failure to address it was reducing his personal effectiveness and the Company's ability to meet its contractual responsibilities.[5]

After another meeting which apparently was not productive, the Company terminated the Complainant's employment on October 27, 2006. *See* Lewis, Exh. 27. The Company stated as reasons for the discharge that the Complainant had been unwilling to work effectively with Company staff, *"and our customer,"* to resolve site issues.[6]

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[4] The procedures establish filing deadlines, requirements for DOE's initial responses, summary disposition, settlement efforts, DOE investigation (through Office of Hearings and Appeals), contested hearings before a Hearing Officer, mediation, procedural rules for hearings, explicit regulatory statements regarding burden of proof, an appeal to the Director of the Office of Hearings and Appeals, subsequent petitions to the Secretary of Energy, and a panoply of equitable remedies including the recovery of attorney's fees and expert witness costs (to prevailing employees),

[5] The Complainant disputes all of this. I take the written warning as proof that the Company wrote and delivered this warning on or about the date indicated and stated what is stated therein, not for the truth of its contents.

[6] Again, the Complainant disputes this. I have considered the letter as I described in footnote 5, *supra*.

In the next few days, the Complainant consulted with an attorney about his termination from employment. In an hour-long discussion, the Complainant talked about his case and asked about a potential whistleblower claim.[7] The attorney said that he did not believe the Complainant had a whistleblower claim. Nonetheless, on November 7, 2006, the Complainant wrote to the Company, stating that he had met with an attorney and was exploring litigation. He demanded that the Company preserve all relevant documents so that they would be available in the event of litigation.

The Complainant returned to the same lawyer five months later, in April 2007. At that point, the lawyer gave excuses for rejecting the case and referred the Complainant to another attorney. The Complainant was dissatisfied with the referral and eventually retained his current counsel.

In his affidavit, the Complainant offers considerable detail, commentary, and criticism of his meetings with the initial attorney. Entirely absent from all this detail, however, is any affirmative statement that the attorney either neglected to mention the 180-day filing requirement or to mention that the filing had to be with the Department of Labor.[8]

Discussion

Prima facie case and status as an employee of DOL. To make out a *prima facie* case, an employee must show, among other elements, that the employer is subject to the ERA. *See, e.g., DeFord v. Secretary of Labor,* 700 F.2d 281, 286 (6th Cir. 1983). While the statute defines the term "employer," it does not define "employee." *See Demski v. U.S. Department of Labor,* 419 F.3d 488, 490-91 (6th Cir. 2005). Nor do the regulations. *Id.* Thus, in *Demski*, the ALJ and ARB relied on the Supreme Court's teaching that in such circumstances the common law definition of "employee" should be used. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).

Darden is an ERISA benefits case. ERISA defines "employee" as "any individual employed by an employer." 29 U.S.C. § 1002(6). The Court construes the language as follows:

> Where Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.... In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.

Id. at 322-23. The Court explains:

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[7] While represented by counsel, the Complainant chose to reveal in considerable detail the substance of the discussion he had with his former attorney or attorneys. This is a knowing and voluntarily waiver of attorney-client privilege as to the two discussions. Having found the privilege waived, I consider the Complainant's statements about the meetings as evidence.

[8] The Complainant also tried to get information from other sources. He served the DOL with a demand under the Freedom of Information Act. He asked the DOE for advice on what more he could do to pursue his allegations. He was dissatisfied with all of these sources.

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 323-24. The Court cites examples of previous cases that defined "employee" more broadly in an effort to achieve what a court viewed as the statutory purpose. It rejects these as relying on "feeble" reasons to vary from the accepted common law meaning and notes that Congress modified the statutes involved and made clear that "employee" was to take its common law meaning. *Id.* at 324-25.[9]

The Complainant misplaces his reliance on *Connecticut Light & Power Co. v. Sec'y of U.S. Department of Labor,* 85 F.3d 89 (2nd Cir. 1996) for the proposition that remedial statutes such as the one here must be given a broad construction to achieve Congress' purpose. In *Darden,* the Supreme Court reversed the Fourth Circuit's holding which turned on the same theory. 503 U.S. 318, 324-25. The Court also criticized other cases that had adopted this theory.

Moreover, *Connecticut Light* is inapposite. The issue there was whether a *former* employee qualified as an "employee" under the ERA. The Court concluded that, when an employer harasses and makes unlawful demands of an employee and then continues to do so after the employment is terminated, the now former employee remains protected within the definition of "employee." This is because the employer's violation of the statutory protection arose out of the employment and continued after the employment ended ("continuing violation"). Similarly, the Supreme Court has read the statutory definition of "employee" in Title VII to include former employees at least in certain sections of the Act. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341-48 (1997). The Complainant, however, presents nothing like this. He is not a former employee of the DOE, and he does not allege a continuing violation by DOE since his termination.

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[9] There is a similar rule under the Fair Labor Standards Act, applicable to cases that require a distinction between employees and independent contractors. The distinction there depends on an "economic dependency analysis." The factors to be considered are (1) the degree of control exercised by the alleged employer, (2) the relative investments of the alleged employer and employee, (3) the degree to which the employee's opportunity for profit and loss is determined by the employer, (4) the skill and initiative required in performing the job, (5) the permanency of the relationship, and (6) the degree to which the alleged employee's tasks are integral to the employer's business. *See Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir.1979). Because independent contractors are in business (as opposed to employees), the factors do not transfer directly, but they emphasize the same factors as in *Darden,* such as control.

Under the *Darden* definition, DOE was not the Complainant's employer. DOE had no control over the Complainant's day-to-day work duties or performance. It did not hire him, pay him, provide him benefits, set his hours, provide his tools, set personnel policies or procedures, evaluate his performance, determine his compensation, allow him to hire DOE employees, direct him on the specifics of how he was to perform his work, provide him payroll documentation such as IRS W-2 forms, or involve itself in any actual decisions to promote, demote, suspend or otherwise discipline the Complainant. The Complainant's work was necessary to the Company to meet its contractual obligations to DOE.[10]

The Complainant contends, however, that DOE effectively terminated his employment. If so, that would be a strong indicator that DOE was the Complainant's employer. But the Complainant fails to offer more than conjecture to support this. Specifically, from the Company's statements, the Complainant can establish that when the Company decided to terminate the employment, it considered what it perceived as DOE's loss of confidence in and frustration with the Complainant.

This falls well-short of enough to create a disputed fact. DOE was a client or customer of the Company. If the Company believed that the Complainant was jeopardizing its relationship with a client, it might choose to safeguard the relationship by reassigning the Complainant to work at which he would have no contact with the customer. If that were unavailable, the Company might terminate the employment. The Company's concern with satisfying client demands, however, in no sense transforms the client into the Complainant's employer. [11]

Accordingly, I find that the Complainant was not an employee of the U.S. Department of Labor.

Timeliness of filing complaint with Secretary of Labor. Any employee who believes he has been discharged or otherwise discriminated against in violation of the ERA may, "within 180 days after such violation occurs file . . . a complaint with the Secretary of Labor . . . alleging such discharge or discrimination." 42 U.S.C. § 5851(b)(1); 29 C.F.R. § 24.103(d)(2). The 180 days begin to run when the complainant learns of employer's final decision, *Connecticut Light & Power Co. v. Secretary of U.S. Department. of Labor*, 85 F.3d 89 (2nd Cir. 1996), or when the discharge or other adverse action occurs, *Hill v. U.S. Department of Labor*, 65 F.3d 1331 (6th Cir. 1995). It is undisputed that the Complainant first learned of the Company's decision to terminate his employment on the day that the termination occurred, October 27, 2006 (Lewis ¶ 55). That date is when the limitations period began to run under either *Connecticut Light* or *Hill.* The 180 days therefore ran on April 25, 2007,[12]

The Complainant did not file a complaint with the Secretary of Labor until July 30, 2007, as the date stamp on the face of the complaint shows. Indeed, he did not sign his complaint until July 25, 2007. *See* Complaint, page 1. The filing thus was untimely.

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[10] When the Complainant asked for help from the DOE Employee Concerns Program, he was turning to a program expressly established for employees of contractors, not employees of DOE.

[11] The Complainant contends that DOE was an *indirect* employer, even if not a direct one. He then relies on the beryllium rule, which includes in its definition of "employer" entities which manage the employee only indirectly. What the Complainant neglects is that neither the ERA nor DOL regulations applicable to the ERA include such language. The common law rule therefore applies in ERA cases, not the beryllium rule.

[12] I take official notice of the calendar. *See* 29 C.F.R. § 18.45.

Equitable considerations. The Complainant does not dispute any of these facts. Rather, he argues: (1) that the limitations period was tolled until he discovered the violation; (2) Respondents cannot interpose the limitations period by reason of equitable estoppel; and (3) the limitations period was equitably tolled. Although the time requirement is subject to equitable considerations, the Complainant's arguments are without merit.

The first two arguments must be conflated; they are essential the same. Both assert that Respondents are equitably estopped from asserting the statute of limitations because of their respective fraudulent conduct. *See Hill*, fn.2; *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) ("where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered'").

Equitable estoppel or fraudulent concealment requires: "' (1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts.'" *Hill, supra, citing Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975). This form of estoppel is applied narrowly because "'statues of limitation are vital to the welfare of society and are favored in the law.'" *Hill, supra.* Here, the Complainant cannot establish either of the first two requirements.

First, the Complainant knew of the operative facts by the date of his termination from employment (October 27, 2006). The Company effectuated the termination by telling him that his job had ended; he obviously knew about that central fact. The Complainant knew that the termination closely coincided in time with his disputes over the legality of the surveillance plan. Both the warning letter and the termination letter pointed to the DOE's apparent dissatisfaction with the Complainant's work. The Complainant is a medical doctor and thus intelligent and well-educated. There can be little doubt that he did infer or should have inferred from the timing that his disputes with DOE could have been the impetus for the Company's decision to terminate the employment. The Complainant repeatedly voiced that he was basing his views on what the law and ethics required. He was well-aware that whistleblowers have protection under the ERA. All this was sufficient to put the Complainant on notice that he should take the necessary steps to determine his legal rights. More to the point, that is what he did.

Specifically, the Complainant met with an attorney in the first week of November 2006, that is, within two weeks of the termination. Lewis, ¶ 61; Decl. Zizzi, Exh. H. He discussed his case for an hour, including "whistle blower status." *Id.* He states now of the attorney's comments: "It was my impression after our discussion that my options were limited but they did not include Whistleblower status." *Id.* He states that he left with the "understanding" that his claim essentially was premature until he had gone back to work and his damages could be ascertained. *Id.*

This evidence is vague: the Complainant states his "impression" and his "understanding" but does not tell us what the attorney said.[13] It is possible that the attorney failed to tell the Complainant about the obligation to file with the Department of Labor in particular and that the filing must be within 180 days of his termination from employment. Yet the Complainant never says as much. Nor does he state that the second attorney also failed to give him the information. The Complainant's affidavit contains nearly 13 single-spaced pages of averments, grouped into 73 numbered paragraphs, and he is represented by counsel. The affidavit is very detailed. If the attorneys never told him this information, the Complainant almost certainly would have said as much. Moreover, even if his attorney(s) had failed to tell the Complainant, their failures are not wrongful concealment *on the part of either Respondent*; they are the failures of the attorneys with whom the Complainant chose to consult. Equitable tolling requires wrongful concealment *by the opposition*, not by a party's counsel.

I thus find no support for the proposition that the Company wrongfully concealed its actions. Nor do I find support for the contention that the Complainant did not have available sufficient operative facts to file a complaint under the ERA's whistle-blowing provision. The standard for equitable estoppel set out in *Hill, supra*, 523 F.2d at 394, requires the presence of both of these. Thus, even if the Complainant can meet the third requirement, due diligence,[14] he has not met his burden for entitlement to equitable estoppel.

Equitable tolling. Equitable tolling is applied "*sparingly.*" *See Alexander v. Atlantic Automotive Components,* 2007 WL 708629 (W.D. Mich. 2007), *citing Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 95 (1990). The factors to be considered for equitable tolling are:

> (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 statue were tolled; and (5) the reasonableness of the plaintiff remaining ignorant of his rights.

[13] I do not exclude the Complainant's affidavit testimony on this point. We accept hearsay when there are sufficient indications of the testimony's trustworthiness. But I place less weight on the Complainant's interpretation of undisclosed hearsay than I would on the Complainant's recitation of what he recalls the attorney saying (*i.e.,* simple hearsay).

[14] The Complainant describes in his affidavit other steps he took at this time, including, for example, a request for documentation from the Department of Energy under the Freedom of Information Act, and numerous emails asking for information. While this might show due diligence, it does not establish wrongful concealment or the Complainant's inability to get access to the operative facts.

Nor did it prevent the Complainant's knowledge of the operative facts. The Complainant misconstrues the scope of the "operative facts." These are the central facts necessary needed to determine whether he there is a good faith, colorable claim to be asserted. Essentially the Complainant wanted to conduct extensive pre-filing discovery, including document productions, access to his personnel file, access to Company documents that he was required to leave in his office at termination, and answers to certain questions. He offers no explanation for needing all this discovery prior to filing a complaint and I find none.

Steiner v. Henderson, 354 F.3d 432, 435 (6th Cir. 2003); *Hill*; *Alexander*. "Typically, equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Steiner* at 438.

Here, the Complainant cannot show that he was ignorant of his rights or subjected to circumstances beyond his control. Specifically, the Company arranged for OSHA investigators to give the Complainant and others extensive training about the whistle-blower provisions of the ERA on August 8, 2005. Decl. Zizzi, ¶ 4. A PowerPoint presentation included a slide entitled, "Filing Whistleblower Complaints." Decl. Zizzi, Exh. B. It states that the complaint must be filed "with the OSHA office where the employee resides or works." *Id.* Because certain other complaints are to be reported to DOE, the PowerPoint included a chart about which actions to report to "U.S. DOL/OSHA" and which to "U.S. DOE. *Id.*, Exh. D. The chart shows that complaints related to the ERA should be made to DOL/OSHA. It also states that a complaint under the ERA "must be filed within 180 days" after the alleged discrimination occurs. *Id.* The date of the alleged discrimination is defined as the date "'when the discriminatory decision has been both made and communicated to the Complainant (employee)." *Id.* Exh. B. By way of exemplar, OSHA showed a video on the case of Karen Silkwood. *Id.*, Exh. C.

The course also included several handouts that the Complainant could have consulted if his memory from the training had faded. The OSHA investigators distributed an "OSHA Fact Sheet," which summarizes the whistle-blower protection. *Id.*, Exh. E. The fact sheet states: "If you believe your employer discriminated against you because you exercised your legal rights as an employee, contact your local OSHA office *as soon as possible* because you must file your complaint within the legal time limits." *Id.* OSHA also distributed a copy of the final regulatory revision of procedures for these claims, 29 C.F.R. Part 24. The first page of text states: "***Time Period for Filing Complaints***. The time period for filing ERA whistleblower complaints was expanded from 30 days to 180 days from the date the violation occurs." *Id.* Finally, the OSHA investigators distributed copies of the poster giving notice of "*Your Rights under the Energy Reorganization Act.*" *Id.*, Exh. G. The poster states: "Filing a complaint: You may file a complaint ***within 180 days*** of the retaliatory action. A complaint must be in writing and may be in person or by mail at the nearest local office of [OSHA]." *Id.* This same poster was posted at the Complainant's workplace. Decl. Zizzi, ¶ 7 [emphases in original].

This put the Complainant on *actual* notice of what he needed to do to initiate a complaint.

By seeing at least one attorney twice and perhaps a second attorney, the Complainant was also on *constructive* notice. He discussed the relevant facts and in particular discussed whistleblower protection. Regardless of the advice he got, the Complainant either received or should have received the minimum information necessary to know how to pursue an ERA whistle-blower claim. The Complainant offers nothing to avoid such an inference.

Having found that the Complainant was on actual notice – and most likely on constructive notice as well – the other factors are of limited relevance: the Complainant knew his rights and how to pursue them, and nothing delayed him that was beyond his control.[15]

[15] As to the other factors, it cannot be said that the Complainant's ignorance of the legal requirements was reasonable because I find that he was not ignorant or should not have been. I find further that the Complainant did

The Complainant misplaces his reliance on a Third Circuit decision made some 26 years ago. *School District v. Marshall*, 657 F.2d 16, 19-20 (3rd Cir. 1981) (setting aside Secretary's decision to apply equitable tolling). There, the requirements for equitable tolling were stated as: (1) the respondent actively misled the complainant about his rights to seek relief under the Act; or (2) the complainant had been prevented in some extraordinary way from asserting his rights, or (3) the complainant mistakenly presented the precise statutory claim in a timely manner in the wrong forum. *Marshall* warned, however, that

> The tolling exception is not an open-ended invitation to the courts to disregard limitations periods simply because they bar what may be an otherwise meritorious cause. We may not ignore the legislative intent to grant the defendant a period of repose after the limitations period has expired.

Id. at 20. Limitation periods by nature are arbitrary, but they are determined legislatively, and neither administrative agencies nor courts may disregard them. *Id.* "Prejudice to defendant, or lack of it, is simply irrelevant when Congress has drawn a line . . . ." *Id.*

In the present case, neither respondent actively misled the Complainant as to his right to file an ERA complaint with the DOL. The Complainant offers nothing by way of an extraordinary reason that he could not file timely; on the contrary, he had received legal advice, which did or should have put him in a better position to file than others who had not seen attorneys. The Complainant does contend, however, that he filed a timely complaint "in an acceptable format to an appropriate DOE official . . . ." Lewis, ¶ 71.

At the outset, filing a complaint "in an acceptable format" does not meet the requirement that the complainant presented the precise statutory claim in the wrong forum. Indeed, there is no evidence that the Complainant's complaints to the DOE Concern program ever mentioned the ERA.

As *Marshall* explains, this is not a hypertechnical requirement. This basis for equitable tolling follows from an earlier case. There, a plaintiff had mistakenly filed in a state court lacking proper venue. *Id.* The result, as *Marshall* notes, is that "the defendant had been placed on notice within the appropriate limitations period" of the precise claim being raised against him. *Id.* No analogous facts are present here, nor are the facts even close to those in *Marshall*.

Specifically, the Complainant seems to point to a letter that he wrote to the DOE Employee Concerns Program on October 4, 2006. Lewis, Exh.17. In the letter, the Complainant states that he wishes to open "a new Employee Concern," this being his third. He twice expressly requests "whistleblower status." He asserts that he is being compelled, placed under duress, and threatened so that he will adopt certain language in the beryllium surveillance program plan

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not pursue this claim diligently. If he was dissatisfied with his first two lawyers, that was all the more reason to look for a third rather than rely on lawyers whose opinions he did not value. Moreover, he had the information about how to file a claim but instead focused on how his second and third "Concerns" were being handled at DOE. Thus, even were Respondents not prejudiced by equitable tolling, the other factors show that the Complainant is not entitled to this relief.

concerning the option of work restrictions, rather than removal from the worksite. He asserts that the proposed language in unlawful because it was not written by a medical doctor and would falsely describe some working conditions as safe when they were not. The Complainant acknowledges that he is not yet entirely ready to initial his complaint formally: "Even though I do not have all of the issues defined, I wanted to get this into the works today and start the process."

On October 9, 2006, the DOE official to whom the Complainant had written sent an email response. Lewis, Exh. 17. He told the Complainant what steps he needed to take to be a protected whistleblower: In particular, he must provide the basis for the complaint, *citing* 10 C.F.R. § 708, and being that he is an employee of a contractor, must put the complaint in writing and file it in duplicate with the Head of the Field Element with jurisdiction over the contract, *citing* 10 C.F.R. § 708.10 (b).

On October 18, 2006, the DOE official wrote to the Complainant again. He referred to the Complainant's request for whistleblower status. He confirmed that on the preceding day, October 17, 2006, the Complainant had withdrawn this request. The DOE official stated that DOE accepted the withdrawal and would not process the "Concern" as a complaint by the Complainant. The official reserved DOE's right to investigate the allegations on its own. Lewis, Exh. 19.

A week later, the Company terminated the Complainant's employment. The Complainant emailed another official about the termination. That official confirmed the understanding that the Complainant had "dropped" his complaint. Lewis, ¶ 28.

Finally, on June 20, 2007, an official at DOE headquarters office of Civil Rights & Diversity emailed the Complainant. Exh. 32. He suggested that the Complainant contact the Department of Labor in Seattle, pursuant to the Energy Reorganization Act. He gave the Complainant the name and phone number for a contact at the DOL office. *Id.*

Despite whatever advice he had from the two lawyers with whom he spoke shortly after the termination, as well as the specific direction to go to a particular person at DOL, the Complainant still did not file with DOL for over an additional month, on July 30, 2007.

Thus, the facts do not support the Complainant's argument that he filed the precise same complaint under the same statute in the wrong forum. His complaint to the DOE was vague – too vague to amount to whistleblowing in the DOE official's view. The DOE official explained that, for treatment as a whistleblower, the Complainant must give specific details in writing and file with a particular office. The Complainant did neither. Instead, he voluntarily withdrew the complaint. DOE confirmed this twice, and the Complainant did not dispute that a withdrawal was his wish.

Moreover, there is no reason to conclude that this briefly existing complaint was merely filed in the wrong forum. OSHA had given the Complainant considerable training and reference material about how to raise a whistleblower claim under the ERA. Even viewed in the light most favorable to the Complainant, it remains likely that the Complainant simply chose to pursue the

DOE "Concern" procedure that he had used twice before, and not to pursue the DOL procedure.[16]

Finally, unlike in *Marshall*, the Complainant's filing with the DOE "Concern" program did not have the effect of putting the Company on notice that the Complainant was pursuing a whistleblower claim. It is not the same as filing and serving the correct complaint in a court where venue was lacking.

Accordingly, I find that the Complainant has not met the requirements for equitable tolling.

I conclude that the U.S. Department of Energy has met its burden to show that it is entitled to summary decision on both of the arguments considered above. Computer Sciences Corp. joined only as to the timeliness of the complaint and is entitled to summary decision on that basis. Accordingly,

IT IS ORDERED that the joint motion by the respective Respondents for summary decision be GRANTED.

IT IS ALSO ORDERED that as to each Respondent respectively this matter be, and it hereby is, DISMISSED.

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STEVEN B. BERLIN
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 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. The date of the postmark, facsimile transmittal, or e-mail communication 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 Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, N.W., Washington, DC 20210.

[16] The Complainant might have been aware that he had to elect between a remedy in the DOE's Concern program or in the DOL's whistleblowing enforcement, but not both. That is, were the Complainant to elect to file with DOL, DOE would close his "Concern" file. *See* 29 C.F.R. § 708.4, *supra.* Were he aware of this, it would be even more likely that the Complainant's decision to pursue the claim with DOE and not with DOL was a considered election. As I view the evidence in the light most favorable to the Complainant, however, I will draw no inference based on these facts.

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, N.W., 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 the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. 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, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).