IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KEITH B. BULLS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. H-06-3810
	§	
CHEVRON CORPORATION, et al.,	§	
	§	
Defendants.	§	
	§	
	§	
	§	

ORDER

Pending before the Court are Defendants Chevron Corporation, et al.'s Motion for Summary Judgment (Document No. 16), Defendants' Motion to Strike Affidavit in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment (Document No. 27), Defendants' Motion for Writ of Mandamus Relief and Renewed Motion to Stay (Document No. 30), and Plaintiff Keith Bulls's Motion for Temporary Stay, Motion for Leave to File Motion to Compel Arbitration and for Implementation of Briefing Schedule (Document No. 33). Having considered the motions, submissions, and applicable law, the Court determines that Defendants' motion for summary judgment should be granted and the remaining motions should be denied.

BACKGROUND

Plaintiff Keith Bulls ("Bulls"), a Texas resident, began working for Defendant Chevron Pipe Line Company ("Chevron") in October 2002 as a Regulatory Specialist. After Bulls received a low performance rating in October 2003 and February 2004, Chevron met with him informally to discuss ways to improve his performance. On April 15, 2004, Chevron placed him on a Performance Improvement Plan ("PIP"). The PIP stipulated that if an employee fails to achieve the expectations established in the program, the employee would be subject to disciplinary action, including termination. On August 27, 2004, Chevron terminated Bulls's employment because it avers he failed to meet the performance expectations established in the PIP.

After he was terminated, Bulls hired an attorney to represent him and alleged Chevron discriminated against him. On September 24, 2004, Bulls's attorney suggested the parties engage in pre-litigation mediation of his federal and state law anti-discrimination claims. In response, on October 6, 2004, Chevron informed Bulls that Chevron has an internal dispute resolution process, Steps to Employee Problem Solution ("STEPS"), that included mediation of a former employee's claims.[1] On October 8, 2004, Bulls, through his attorney, completed the requisite STEPS forms

[1]One of the benefits to the STEPS program is that Chevron pays the cost of the mediator and reasonable attorney fees.

and requested mediation.[2] However, mediation was unsuccessful, and on June 27, 2005, ten months after his termination, Bulls filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"). In his EEOC charge, Bulls broadened his claims against Chevron and alleged not only gender discrimination and retaliation, but also discrimination based upon his age and religion. On August 19, 2005, the EEOC dismissed his claims as untimely and informed him that he had a right to file a lawsuit within 90 days of receiving the EEOC's letter.

On August 8, 2005, while his EEOC claim was pending, Bulls continued to utilize Chevron's STEPS process and requested arbitration of his claims. In his request for arbitration, Bulls again added new claims against Chevron, including defamation, breach of contract, breach of good faith and fair dealing. He also alleged that Chevron terminated him in retaliation for his knowledge of improper and illegal activities at Chevron. However, the arbitration did not take place, and Bulls alleges Chevron terminated the STEPS agreement in January 2006.

In February 2006, Bulls filed a whistle blower complaint under 18 U.S.C.

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[2]In response, Chevron requested that Bulls's attorney submit a more detailed description of the nature of his claims. On October 19, 2004, his attorney responded that Bulls asserts claims of "discrimination and harassment on account of his gender under Title VII of the Civil Rights Act of 1964, as amended, and comparable provisions of the Texas Commission on Human Rights Act."

§ 1514A, the Sarbanes-Oxley Act ("SOA" or "Act") *reprinted in* 69 Fed. Reg. 52104 (Aug. 24, 2004) with the Occupational Safety and Health Administration ("OSHA") and filed suit in Texas state court.[3] In his OSHA complaint, Bulls alleged Chevron retaliated against him because he reported to his supervisors that Chevron was engaging in fraudulent activities. Moreover, he averred he timely filed the complaint because Chevron's STEPS process prevented him from filing it until he satisfied STEPS' requirements. However, OSHA dismissed Bulls's complaint as untimely.[4]

In July 2006, Bulls timely appealed OSHA's dismissal by filing an objection.[5] After discovery and a hearing on the merits before an Administrative Law Judge ("ALJ"), on October 13, 2006, the ALJ issued a summary decision dismissing his OSHA complaint because it was not timely filed.[6] On October 19, 2006, Bulls

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[3]Although the Act mandates that an employee file a complaint with the Secretary of the United States Department of Labor ("DOL" or "Secretary"), the Secretary delegated this responsibility to OSHA. *See Willis v. Vie Fin. Group, Inc.*, Civ.A. No. 04-435, 2004 WL 1774575, at *3 n.4 (E.D. Pa. Aug. 6, 2004) (citing 29 C.F.R. § 1980.103(e)) ("§ 1980").

[4]OSHA found "there is no reasonable cause to believe that Respondents [Chevron] violated SOA . . . . The Act requires that a Complaint must be filed within 90 days of an alleged violation of the Act. The appeals process/internal grievance procedure does not toll the time to file the complaint. Consequently, this complaint is dismissed as untimely."

[5]Although Bulls was represented by counsel when he filed his OSHA complaint, his attorney subsequently withdrew. Thus, Bulls filed his objection to OSHA's preliminary dismissal and all subsequent filings *pro se*.

[6]Specifically, the ALJ found that, *inter alia*, 1) Bulls's ninety day filing period began when he was terminated on August 27, 2004; 2) his February 2006 OSHA complaint was untimely; and 3) because Chevron had no duty to correct his mistaken belief that the STEPS

notified the ALJ that he intended to file suit in federal district court.[7] On December 1, 2006, Bulls filed the instant lawsuit.[8] On February 14, 2007, Chevron moved for summary judgment relative to his claims.[9] On April 9, 2007, Chevron moved for mandamus relief and a stay pending a final decision by the Board. On April 12, 2007, Bulls moved to compel arbitration.[10]

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process precluded his filing his lawsuit, Bulls was not entitled to equitable tolling of the statute of limitations.

[7]Under federal regulations, the ALJ's decision becomes "the final order of the Secretary unless the [Administrative Review] Board ("Board"), within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review." § 1980.110(b). Because the Board did not issue an order accepting Bulls's petition, the ALJ decision became the final agency decision. *See id.* On January 17, 2007, the Board issued a "final decision and order dismissing [his] appeal."

[8]Although Bulls filed his complaint *pro se*, on April 4, 2007, new counsel for Bulls filed a notice of appearance in the case at bar.

[9]Chevron also moves to strike portions of Bulls's affidavit in his response to its motion for summary judgment, alleging that some of his allegations were not based on his personal knowledge, are conclusory, constitute improper legal opinion, and/or lack factual support. However, the Court finds its analysis and conclusions do not rely on those portions of Bulls's affidavit and thus, Chevron's motion to strike is denied as moot. *See Amoco Chem. Co. v. Tex Tin Corp.*, 925 F. Supp. 1192, 1212 (S.D. Tex. 1996) (denying as moot plaintiff's motion to strike defendant's affidavits because the court did not consider them in addressing the pending motions).

[10]Although Bulls desires to arbitrate his dispute under the STEPS process, the Court finds no language in the STEPS documentation that indicates that STEPS is a binding contract between Chevron and Bulls that requires Chevron to arbitrate Bulls's claims. Thus, the Court denies his request to compel Chevron to arbitrate his claims.

STANDARD OF REVIEW

Summary judgment is proper when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The court must view the evidence in a light most favorable to the non-movant. *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). Initially, the movant bears the burden of presenting the basis for the motion and the elements of the causes of action upon which the non-movant will be unable to establish a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-movant to come "forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (quoting FED. R. CIV. P. 56(e)). "A dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993) (citation omitted). The non-movant's bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Conclusory allegations unsupported by specific facts will not prevent an award of summary judgment; the plaintiff cannot rest on his allegations to get to a jury

without any significant probative evidence tending to support the complaint. *Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 713 (5th Cir. 1994). Thus, the non-movant's burden cannot be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence. *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 215 (5th Cir. 1998). It is not the function of the court to search the record on the non-movant's behalf for evidence which may raise a fact issue. *Topalian v. Ehrman*, 954 F.2d 1125, 1137 n.30 (5th Cir. 1992). Thus, the Court must determine whether a genuine issue of material fact exists with respect to Bulls's whistle blower claim.

LAW AND ANALYSIS

Bulls asserts Chevron terminated him in retaliation for reporting a variety of activities taking place at Chevron that violated the Act. Because he disagrees with the prior administrative findings that his complaint was untimely, he appeals to this Court for de novo review.[11] In opposition, Chevron argues Bulls's claims cannot

[11]The Court notes the gravamen of Bulls's complaints, written *pro se*, are that Chevron discriminated against him in violation of Title VII and retaliated against him as a whistle blower in violation of the SOA. Relative to his discrimination charges, employees must exhaust their administrative remedies with the EEOC before bringing suit. *See Price v. Choctaw Glove & Safety Co., Inc.*, 459 F.3d 595, 598 (5th Cir. 2006). Under Title VII, Bulls had 90 days after the EEOC issued a right to sue letter to file suit. *See id.* Because the EEOC dismissed his complaint and issued a right to sue letter on August 19, 2005, and Bulls filed the instant suit more than a year later, his discrimination charges are dismissed as untimely. *See id.* Thus, the Court only considers his whistle blower claims that were the subject of his OSHA complaint.

survive summary judgment because, *inter alia*, 1) Bulls allegations of SOA violations are untimely because they were filed with OSHA seventeen months after he was terminated; and 2) his claims have been adjudicated by the Board and are thus, merely duplicative litigation. Alternatively, Chevron argues this Court should exercise its discretion to issue mandamus relief and order the Board to render a final decision on Bulls's whistle blower claims. Thus, the Court must determine, according to the administrative process, whether Bulls's claims are subject to de novo review and if so, whether his claims are properly dismissed as untimely.

A. Administrative Process

The Act prohibits companies that are subject to the Securities Exchange Act of 1934 from discriminating or retaliating against an employee for providing information that an employee reasonably believes constitutes a violation of rules and regulations of the Securities and Exchange Commission or federal law relating to fraud against shareholders. *See* 18 U.S.C. § 1514A(a)(1); *Willis*, 2004 WL 1774575, at *2. However, an employee who desires to bring a SOA claim against his employer must first exhaust his administrative remedies in order to afford OSHA an opportunity to resolve the allegations administratively. *McClendon v. Hewlett-Packard Co.*, Civ.A. No. CV-O5-087-S-BLW, 2005 WL 2847224, at *3 (D. Idaho Oct. 27, 2005).

The SOA provides for a three-step administrative process to review an employee's alleged SOA violation. *See Hanna v. WCI Cmtys.*, 348 F. Supp. 2d 1322, 1328 (S.D. Fla. 2004). First, an individual who seeks relief from a SOA violation must first file a complaint with OSHA within 90 days of the alleged violation. 18 U.S.C.A. § 1514A(b)(2)(D); *Willis*, 2004 WL 1774575, at *3. After a complaint is filed, OSHA investigates and issues a preliminary finding of whether there is reasonable cause to believe that the defendant discriminated against the employee in violation of the Act. *See Hanna,* 348 F. Supp. 2d at 1326. If a party does not file objections and/or request a hearing before the ALJ, OSHA's preliminary order becomes the final decision of the Secretary of Labor and is not subject to judicial review. *See id.* (citing § 1980.106(b)(2)).

The second step requires that a party file objections to OSHA's preliminary finding and request a hearing before an ALJ. *See* § 1980.106(a)*; see also Willis,* 2004 WL 1774575, at *3. The ALJ permits discovery, conducts a hearing, and issues a decision on the merits of the claim. *See* § 1980.107, 109; *see also Willis*, 2004 WL 1774575, at *3. If the parties do not file objections to the ALJ's decision, it becomes the final decision of the board. *See* § 1980.110(a). A party's third step is to file a petition for review of the ALJ's decision with the Board. *See Willis*, 2004 WL 1774575, at *3; § 1980.110(a). The Board's review is limited to a review of the

ALJ's factual determinations under the substantial evidence standard. *See Willis*, 2004 WL 1774575, at *3.

During this administrative process, if an employee follows the Act's procedural requirements and has not acted in bad faith, and the Board has not issued a final administrative decision within 180 days of the employee's initial OSHA filing, the employee can proceed with an action in federal court for de novo review based on the violation he alleged in his OSHA complaint."[12] *See* § 1980.114(a); *see also Willis*, 2004 WL 1774575, at *3 (citing 18 U.S.C. § 1514A(b)(1)(B)).

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[12]In the instant lawsuit, Bulls asserts claims against additional parties, asserts additional claims, and makes unsubstantiated allegations that were not raised in the administrative proceeding. Regarding additional claims, Bulls avers the STEPS program is a binding contract by which Chevron is bound to arbitrate this dispute. However, a court of appeals can review only those claims that have been administratively exhausted. *See McClendon*, 2005 WL 2847224, at *4 (citing *Willis*, 2004 WL 1774575, at *5-6). If an ALJ issued a decision that did not include a particular allegation, a plaintiff may not raise that issue on appeal. *Id.* Thus, because Bulls did not raise his claim that STEPS was a binding contract in the administrative process, this claim is barred for failure to exhaust his administrative remedies. *See id.* Regarding new and unsubstantiated allegations, Bulls avers Chevron's outside counsel conspired with Chevron to engage in illegal activities and participated in violating the Act. First, the Court finds that such bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *See Anderson*, 477 U.S. at 248. Moreover, as previously explained, Bulls may only proceed in federal court on the claims that were the subject of his OSHA complaint. *See Willis*, 2004 WL 1774575, at *6 (explaining that the district court can only conduct a de novo review of those claims that have been administratively exhausted). Accordingly, the Court finds Bulls's additional claims and allegations and his claims against additional parties are dismissed for failure to exhaust his administrative remedies. *See id.*

B. District Court Jurisdiction

Bulls alleges this Court should determine the merits of his claim because he complied with the administrative procedure and the SOA statute authorizes him to seek judicial review of the administrative process in district court.[13] In opposition, Chevron makes two arguments. First, it avers Bulls abandoned the administrative procedure and filed suit in district court before the Board issued a final decision. Therefore, Chevron moves the Court to remand Bulls's complaint via mandamus to the Board to issue a final decision. Alternatively, it argues Bulls fully litigated his claim in the administrative process and, because his claims were fully adjudicated, the Court should apply res judicata and preclude Bulls from relitigating them. Thus, the Court must determine whether Bulls's complaint is properly before the Court.

1. Remand via mandamus

The SOA is unique from other whistle blower statutes because it allows a complainant to bring an action for de novo review in district court if there is no final decision within 180 days of filing the complaint. *See* 69 Fed. Reg. at 52111; *see also* Irvin B. Nathan & Yue-Han Chow, *Interpretations and Implementation of the Whistleblower Provisions of the Sarbanes-Oxley Law*, SL027 ALI-ABA 527, 530

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[13]Bulls relies on § 1980.114 that provides for de novo review in district court if the Department of Labor has not issued a final decision within 180 days of his complaint.

(2005). The Secretary recognizes that the statutory structure of the SOA creates the possibility that a complainant will proceed through the administrative process, receive a decision from an ALJ, and then file a complaint in federal court while the case is pending before the Board. *See* 69 Fed. Reg. at 52111; *see also Hanna*, 348 F. Supp. 2d at 1328.

In this case, Bulls's complaint falls within this conundrum; that is, he followed the administrative process, had a hearing before an ALJ on the merits of his claim, received an adverse finding by the ALJ, and then filed in district court. Specifically, in February 2006, Bulls began the administrative process and filed his OSHA claim. Subsequently, he filed an objection with the ALJ and had a hearing on the merits of his claim. The ALJ issued his decision on October 13, 2006. On October 19, 2006, presumably because more than 180 days had passed from his February OSHA filing, Bulls notified both the ALJ and the Board that he intended to file suit in federal district court. Under § 1980.114(a), Bulls had the right to ignore the ALJ's decisions made during the administrative process and file his complaint in district court because the Board had not issued a final decision regarding his complaint within 180 days. *See* Nathan, SL027 ALI-ABA at 530. Moreover, Bulls's decision to seek de novo relief after requesting an ALJ hearing does not constitute a presumption of bad faith

delay.[14] *See* 69 Fed. Reg. at 52112. Even though Bulls received an adverse finding by the ALJ, the Court finds his complaint is properly before the Court because he filed the case at bar more than 180 days after he filed his OSHA complaint, and the Board had not issued a final decision. *See* § 1980.114(a). Thus, the Court denies Chevron's request to remand Bulls's SOA claim to the administrative process.

2. Res judicata

If the Court finds Bulls's complaint is properly before it, Chevron requests that the Court apply principles of res judicata to his claims because they have been "fully adjudicated and a final judgment was entered."

Prior to 1966, most courts held that the principles of res judicata did not apply to administrative decisions even if that agency acted in a judicial capacity. *Int'l Union of Operating Eng'rs, Local No. 714 v. Sullivan Transfer, Inc.*, 650 F.2d 669, 672-73 (5th Cir. 1981). However, in 1966, the United States Supreme Court stated that when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate

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[14]Moreover, the Court declines to remand Bulls's claims because the ALJ's decision became the Secretary's final decision after Bulls filed this suit. *See* § 1980.110(b) (explaining that if the Board does not accept the petition for review within 30 days of its being filed, the ALJ's decision becomes the final order of the Secretary). Thus, the Secretary's decision was final on November 25, 2006, thirty days after Bulls filed his petition for review on October 25, 2006.

opportunity to litigate, res judicata should apply. *See id.* (citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). However, if a statute authorizes a court to review the administrative proceedings de novo, res judicata should not apply. *See Am. Heritage Life Ins. Co. v. Heritage life Ins. Co.*, 494 F.2d 3, 9 (5th Cir. 1974) (explaining that a statutory construction that authorizes a court's de novo review of an underlying administrative process indicates a congressional intent not to invoke the immunizing doctrines of res judicata or collateral estoppel in connection with the administrative proceedings); *see also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108-09 (1991) (explaining that although the common-law doctrine of res judicata is favored and may be applied to administrative decisions, courts do not have a free hand to impose rules of preclusion when interpreting a statute but must determine whether Congress intended to legislate against such common-law adjudicatory principles).

In this case, the Act's statutory scheme specifically provides for de novo judicial review of the administrative process. *See* § 1980.114. Moreover, the provision that allows a complainant to file for de novo review does not distinguish between those complainants who file in district court before or after an ALJ hearing and decision. *See* § 1980.114(a). Although the Secretary commented that a defendant should be protected from the expense and vexation of multiple lawsuits and

that the public interest is served by preserving judicial resources and prohibiting suits that have been fully litigated before the ALJ, the Secretary also stated that the SOA regulations do not contain a statutory basis for preclusion. *See* 69 Fed. Reg. at 52111-12. Because the statute provides for de novo review of the administrative decision under the circumstances at bar, the Court finds that claim preclusion should not apply. *See Am. Heritage Life Ins. Co.,* 494 F.2d at 9. As a result, the Court denies Chevron's request that the Court apply res judicata to Bulls's claims in the instant action and reviews the administrative determination that his OSHA complaint is untimely.

C. Timeliness of Bulls's OSHA complaint

In his OSHA complaint, Bulls avers it is timely filed, or alternatively, that tolling applies to extend the limitations period. In response, Chevron avers his SOA complaint is time-barred and equitable tolling does not apply.

1. Limitations Period

Neither party disputes that under the Act's procedural requirements, an individual who seeks relief from a SOA violation must first file a complaint with OSHA within 90 days of the alleged violation. 18 U.S.C.A. § 1514A(b)(2)(D); *Willis*, 2004 WL 1774575, at *3. Moreover, the parties do not dispute that Bulls filed his OSHA complaint more than seventeen months after he was terminated from his

position at Chevron. Although Chevron avers his limitations period commenced when he was terminated on August 27, 2004, Bulls alleges it began in January 2006 when Chevron allegedly would not arbitrate his claims after mediation was unsuccessful.[15] Thus, the Court must determine when his limitations period began.

Employment discrimination limitations periods protect employers from the burden of defending claims arising from employment decisions that are long past. *Del. State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980); *see also Turgeau v. Admin. Review Bd.*, 446 F.3d 1052, 1058 (10th Cir. 2006) (explaining that limitations periods promote justice because parties are precluded from raising claims after evidence is lost, memories are faded, and witnesses have disappeared).

Limitation periods normally commence when an employer's decision is made. *Coke v. Gen. Adjustment Bureau, Inc.*, 640 F.2d 584, 588 (5th Cir. 1981). In determining when a limitation period begins, "[t]he proper focus is on the time of the *discriminatory acts*, not the point at which the *consequences* of the act become painful." *Ricks*, 449 U.S. at 258. Thus, the limitations period begins when an employer makes its allegedly discriminatory decision and communicates that decision

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[15]Bulls asserts his OSHA filing was within the limitations period because he did not suffer a "final" adverse employment action until the STEPS process concluded. Accordingly, he contends the parties terminated the STEPS process in January 2006, and he timely filed his OSHA complaint in February 2006.

to the employee. *Id.* at 259.

Moreover, a pending grievance or arbitration procedure does not toll the running of the limitations period because employees may seek both forms of relief; that is, employees may invoke an employer's internal grievance procedure and their statutory rights. *Id.* at 261; *see also Coke*, 640 F.2d at 588; *Int'l Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976) (explaining that a plaintiff's contractual rights with his or her employer and the statutory rights provided by Congress have legally independent origins, and both are equally available to an aggrieved employee).

Bulls alleges he was terminated because he notified his supervisors that he believed Chevron's activities violated the SOA. Although he contends his termination did not become final until the STEPS process concluded, his contention is misplaced for two reasons. One, the focus of the limitations period is not when Bulls discovered STEPS would not be successful, but at the time he became aware that Chevron terminated his employment as a discriminatory act. *See Ricks*, 449 U.S. at 258. Second, because Bulls did not allege a SOA violation in his initial STEPS request, but only asserted discrimination claims, the STEPS process was not the

reason for his delay in making SOA allegations against Chevron.[16] Therefore, the Court finds that the SOA limitations period began on the date Chevron terminated Bulls's employment, which was August 27, 2004. *See Ricks*, 449 U.S. at 258. Because Bulls filed his OSHA complaint in February 2006, seventeen months after Chevron terminated him, the Court finds his OSHA complaint is untimely.

2. Equitable Tolling

Even if he filed his OSHA complaint untimely, Bulls urges the Court to apply equitable tolling to the statutory limitations period. He alleges Chevron actively misled him to believe he was precluded from filing his OSHA complaint until the STEPS process was completed. Alternatively, he argues he filed in the wrong forum by entering the STEPS program rather than filing an OSHA complaint. In opposition, Chevron argues Bulls cannot meet the test for equitable tolling.

The parties do not dispute that the Act's statutory limitations period is not jurisdictional and therefore, is subject to equitable tolling. *See Turgeau,* 446 F.3d at 1058. It is within a court's discretion to exercise equitable tolling. *See Teemac v. Henderson,* 298 F.3d 452, 456 (5th Cir. 2002). However, equitable tolling applies only in rare and exceptional circumstances. *Id.* Moreover, a court must scrupulously

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[16]The Court notes Bulls gives no explanation for his delay in claiming that Chevron terminated him based upon his knowledge of Chevron's alleged violations of the Act.

observe the restrictions on equitable tolling. *Sch. Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 19 (3d Cir. 1981); *see also Podobnik v. United States Postal Srvs.*, 409 F.3d 584, 591 (3d Cir. 2005) (explaining that equitable tolling should be applied sparingly). A complainant bears the burden of justifying equitable tolling. *See Teemac,* 298 F.3d at 457.

In the administrative proceedings, the ALJ applied a three-step test for equitable tolling. Under that test, equitable tolling may be appropriate only under three conditions: 1) when a defendant has actively misled the plaintiff regarding his or her cause of action, 2) when the plaintiff has in some extraordinary way been prevented from asserting his or her rights, or (3) when the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.[17] *Allentown*, 657 F.2d at 19-20. Thus, the Court must determine whether Bulls justifies his request for equitable tolling for more than one year because he satisfies this test. *See Allentown*, 657 F.2d at 19-20; *Teemac,* 298 F.3d at 457.

A. Active Misleading

Equitable tolling may be appropriate when a plaintiff is actively misled by a defendant about a cause of action or is prevented in some extraordinary way from

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[17]Although Bulls avers Chevron misled him regarding the STEPS process or that he filed in the wrong forum, Bulls does not contend that he has been prevented from asserting his rights in any other extraordinary way.

asserting his rights. *Lovett v. Barbour Int'l, Inc.*, Civ.A. No. 06-60074, 2006 WL 3716406, at *2 (5th Cir. 2006) (citing *Teemac*, 298 F.3d at 457); *see also Allentown*, 657 F.2d at 20 (noting that a defendant's conduct that misleads the claimant may warrant equitable tolling).

Bulls alleges Chevron actively misled him because its documentation led him to believe that he was bound to follow the STEPS process, and his attorney believed Bulls could not take legal action until he completed that process. However, the Court does not agree that any aspect of STEPS precluded Bulls from filing a SOA claim.

On November 25, 2004, ninety days after Bulls was terminated and the date on which his SOA limitations period passed, Bulls had not asserted a SOA claim. When Bulls engaged in the STEPS program in October 2004, shortly after he was terminated, he asserted only claims for gender discrimination and harassment. Bulls makes no allegation that his attorney did not properly communicate to Chevron the legal bases of his complaints. Thus, STEPS did not preclude Bulls from filing a SOA claim against Chevron because Bulls did not assert a SOA claim in the STEPS process by the time the SOA limitations passed.

Moreover, on June 27, 2005, Bulls filed an EEOC charge of discrimination alleging various discriminatory Title VII causes of action while he was participating

in STEPS.[18] Because Bulls did not complete the STEPS process before he filed an administrative complaint with the EEOC, Bulls cannot now allege that either he or his attorney were misled into believing that STEPS precluded his filing an administrative claim. Thus, the Court finds Chevron did not actively mislead Bulls to participate in STEPS in order to delay his filing a SOA claim because Chevron was not aware of this claim. *See Allentown*, 657 F.2d at 19-20.

B. Wrong Forum

The same reasoning applies to Bulls's contention that he filed in the wrong forum by agreeing to participate in STEPS. *See Allentown*, 657 F.2d at 19-20. To assert a claim that he filed in the wrong forum, Bulls must have *timely* filed in the wrong forum. *See Podobnik*, 409 F.3d at 591 (explaining that equitable tolling applies where the plaintiff has *timely* asserted his or her rights mistakenly in the wrong forum) (emphasis added). Bulls did not timely assert a SOA claim in the STEPS process because he did not allege this cause of action until August 2005, long after the SOA limitations period had passed. Thus, Bulls did not timely file his SOA claim in the wrong forum. *See Podobnik*, 409 F.3d at 591

Because the Court finds that Chevron did not actively mislead Bulls to engage in STEPS rather than file his SOA claim with OSHA, and Bulls did not timely file his

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[18]Bulls subsequently requested arbitration pursuant to STEPS procedures.

SOA claim in the wrong forum, Bulls has not met his burden to justify equitable tolling. *See Allentown*, 657 F.2d at 19-20. The Court declines to exercise its discretion to equitably toll the limitations period, and Bulls's complaint is properly dismissed as untimely. *See Teemac*, 298 F.3d at 456. Because Bulls is procedurally barred from bringing his SOA claim, the Court grants Chevron's motion for summary judgment and dismisses his claims. Given the foregoing, the Court hereby

ORDERS that Defendants' Motion to Strike Affidavit in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment (Document No. 27) is DENIED as MOOT. The Court further

ORDERS that Defendants' Motion for Writ of Mandamus Relief and Renewed Motion to Stay (Document No. 30) is DENIED. The Court further

ORDERS that Plaintiff Keith Bulls's Motion for Temporary Stay, Motion for Leave to File Motion to Compel Arbitration and for Implementation of Briefing Schedule (Document No. 33) is DENIED. The Court further

ORDERS that Defendants Chevron Corporation, et al.'s Motion for Summary Judgment (Document No. 16) is GRANTED.

SIGNED at Houston, Texas, on this 9 day of May, 2007.

DAVID HITTNER
United States District Judge