U.S. Department of Labor

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Issue Date: 08 September 2008

CASE No.: 2008-SOX-00051

In the Matter of:

CHRISTINE AVLON,
Complainant,

v.

AMERICAN EXPRESS COMPANY,
Respondent.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DISMISSING COMPLAINT

This case arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("the Act" or "SOX") enacted on July 30, 2002. The Act prohibits discriminatory actions by publicly traded companies against employees who provide information to their employer, a federal agency, or Congress, which the employee reasonably believes constitute violations of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission or any provisions of federal law relating to fraud against shareholders.

I. PROCEDURAL HISTORY

Christine Avlon ("Complainant"), acting *pro se*, filed a complaint with the Occupational Safety and Health Administration of the United States Department of Labor ("OSHA") on March 2, 2008. Complainant submitted additional statements to OSHA on May 5, 2008 and May 16, 2008. The allegations contained therein were consolidated with her originally filed complaint of March 2, 2008. The gravamen of Complainant's complaints is that American Express Company ("the Employer" or "Respondent" or "AXP") retaliated against her in violation of the Act by terminating her employment after Complainant voiced various concerns to management regarding alleged misconduct by Respondent's employees. She also alleged that she was discriminated against when she was not informed of transfer opportunities or the anticipated departure of her former supervisor.

OSHA conducted an investigation and in Findings issued on June 3, 2008, determined that Complainant had failed to file her complaint within 90 days of the alleged retaliatory action. OSHA dismissed Complainant's complaint as untimely filed. Complainant disagreed with OSHA's findings, and filed an objection with the Office of Administrative Law Judges

("OALJ") on July 2, 2008. The case was assigned to me and by Notice of Hearing and Pre-hearing Order issued July 11, 2008, I directed the parties to submit a statement of jurisdiction regarding the timeliness of the complaints and the nature of protected activity and adverse actions relating thereto. On July 21, 2008, Complainant filed her written statement of jurisdiction ("Complainant's Statement of Jurisdiction"). Respondent filed its statement of jurisdiction on July 23, 2008. On August 8, 2008, Respondent filed a motion to dismiss the complaint as untimely filed or in the alternative grant summary decision. Complainant filed a response to that motion on August 18, 2008. Respondent filed a reply brief on August 22, 2008.[1] Complainant filed a response to the reply brief on September 2, 2008.

II. ISSUES

1. Whether Complainant's complaint involving her discharge was timely filed with OSHA;
2. Whether Complainant's allegations of hostile environment constitute a complaint that was timely filed; and
3. Whether Complainant's allegations regarding Respondent's alleged withholding of information constitute separate adverse actions about which complaints were timely filed.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Statute of Limitations

The Act establishes the statute of limitations for a whistleblower's complaint under SOX:

> An action under paragraph (1) [i.e., filing a complaint alleging discrimination] shall be commenced not later than 90 days after the date on which the violation occurs.

18 U.S.C. § 1514A(b)(2)(D). The applicable regulations add:

> (d) Time for filing. Within 90 days after an alleged violation of the Act occurs (i.e. when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file…a complaint alleging discrimination…

29 C.F.R. 1980.103 (d). The Department of Labor's commentary on the regulations states:

> [T]he alleged violation is considered to be when the discriminatory decision has been both made and communicated to the complaint. (Citing Delaware State College v. Ricks, 449 U.S. 250, 258 (1980).) In other words, the limitations period [i.e., the 90 days] commences once the employee is aware or reasonably

[1] The parties' pleadings included documents and declarations, which constitute evidence, and which I have marked and identified for the record. Complainant's exhibits shall be referred to as "Compl EX #-." The Respondent's exhibits shall be referred to as "Resp EX. #-."

should be aware of the employer's decision. Equal Employment Opportunity Commission v. United Parcel Service, 249 F.3d 557, 561-62 (6th Cir. 2001)…

69 Fed. Reg. No. 163, p. 52106 (August 24, 2004). See also Lawrence v. AT&T Labs, 2004-SOX-00065 (ALJ Sept. 9, 2004).

B. Standard of Review

The standard for granting summary decision is essentially the same as the one used in FED. R. CIV. P. 56, the rule governing summary judgment in the federal courts. Reddy v. Medquist, Inc., ARB No. 04-123 (ARB Sept. 30, 2005). Thus, pursuant to 29 C.F.R. § 18.40(d), the Administrative Law Judge ("ALJ") may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." A "material fact" is one whose existence affects the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). And a "genuine issue" exists when the nonmoving party produces sufficient evidence of a material fact so that a fact finder is required to resolve the parties' differing versions at trial. Reddy, ARB No. 04-123. Sufficient evidence is any significant probative evidence. Id.

C. Factual Background

I have primarily relied upon Complainant's complaint and submissions to OSHA, her pleadings before me, her response to my Order to provide a statement of jurisdiction, and her response to Respondent's motion to dismiss the complaint or in the alternative grant summary decision for her factual averments. In addition, I have considered Respondent's evidence in support of its motion to dismiss or in the alternative for summary judgment, consisting of correspondence between Complainant and employees of Respondent, authenticated by Declaration of Attorney Renee B. Phillips. I have confined my consideration of the facts to those that pertain to the issues stated herein.[2]

In January, 2006, Complainant began her employment with Respondent in an internal audit position, with the title of Director, Special Investigations Unit, Enterprise Risk and Assurance Services (ERAS). Complaint at 1. In March 2006, Complainant raised her first allegation of misconduct to her supervisors. Complaint at 2; May 5, 2008 submission to OSHA. She raised other concerns over the course of her employment, and she has contended that management did not seriously consider her allegations. Id.

Complainant's supervisor, Jacqueline Wagner, placed Complainant on a 60 day period of performance counseling commencing August 30, 2006. Complaint at 3. Complainant complained that she was placed on performance counseling in retaliation for making complaints about management's misconduct. See, Letter to Ken Chenault dated October 27, 2006[3], attached

[2] I note that many of Complainant's arguments address OSHA's findings, which are not binding upon me. Pursuant to 29 C.F.R. § 1980.107(b), hearings before OALJ shall be conducted *de novo*.

[3] Although Complainant conceded that she did not timely file with OSHA any complaint regarding her placement on performance counseling, she argued in the alternative that this act was one demonstrating hostile work environment.

to Complaint. Complainant asked to apply for other positions with Respondent in September or October, 2006. Attachment to Complaint at 1-2. Respondent advised Complainant that she was not eligible for a transfer because under company policy, employees could not transfer to another position while in performance counseling. In addition, it was against company policy to allow transfers to employees with less than two years' experience with the company. Complaint; Submission of May 16, 2008; Objection to motion; Statement of Jurisdiction.

Respondent hired the law firm of Sullivan & Cromwell to conduct an investigation into Complainant's complaints, including her complaint of retaliation by Ms. Wagner. Complaint at 4; Submission of May 16, 2008; Objection to motion; Statement of Jurisdiction. Respondent offered to place Complainant on paid administrative leave pending the conduct of an investigation, commencing in November, 2006. Complaint; Attachment A to Phillips Declaration, RX 1. In response to Complainant's request for clarification of the terms of the paid leave, Respondent's Director of Employee Relations, Marcel Menedez, advised her by e-mail that "when the investigation is completed, you would return to ERAS in your same role and on the same terms as when you left." Attachment A to Phillips Declaration, RX 1. Complainant elected to take paid administrative leave. Complaint at 4.

At the conclusion of the investigation, Director of Human Relations Indera Rampal-Harrod contacted Complainant on August 13, 2007 and advised her that she was expected to return to her former work unit. Attachment B to Phillips Declaration, RX 1. In response to Complainant's request for written clarification of the terms of her return to work, Ms. Rampal-Harrod wrote in an e-mail on September 4, 2007:

> At your request I have tracked down who you would be reporting to upon your return from administrative leave now that the Endeavor investigation has been completed. You will still be in ERAS as a Director and you will report to Curtis Strohl, who in turn reports to Ms. Wagner. You have expressed concern about being part of Jacquie's organization but you were hired by that group in January 2006 to be a forensic investigator, that is the role you had when you went on administrative leave in November 2006 ant that is the role to which you must return if you want to continue to work at American Express.

Attachment B to Phillips Declaration, RX 1.

In response to Complainant's objection to working with Ms. Wagner, Ms. Rampal-Harrod sent an e-mail to Complainant on September 6, 2007 that stated, in pertinent part:

> …I want to be clear about how you must proceed if you want to continue your employment at American Express.
> 1. By 5 pm this Friday (September 7th) you must schedule a meeting with Dave Enders and me for some time next week during normal business hours. You also must attend the meeting at whatever time we agree on…
> 2. [omitted]
> 3. If you do return to work it will be part of the audit group and you will be reporting to Curtis Strohl who reports to Jacquie Wagner. If upon your return

you feel any adverse action is taken against you because you raised allegations against Ms. Wagner in the Endeavor investigation, you can apprise Human Resources or the Ombuds [sic] Office and it will be looked into.

If you're not willing to abide by all of the requirements I've set forth in this note, your employment will be terminated.

Attachment B to Phillips Declaration, RX 1.

In addition, other e-mail correspondence between Complainant and Ms. Rampal-Harrod reflects that Complainant was advised that she needed to meet with Ms. Rampal-Harrod and another AXP official before returning to work. On September 4, 2008, Ms. Rampal Harrod wrote the Complainant as follows: "…At this point, if you don't schedule the meeting this week and meet with Dave and me on the scheduled date next week, we will treat this as a job abandonment and/or resignation for your employment. I hope you will abide by this requirement." Attachment B to Phillips Declaration, RX 1.

When Complainant did not return to work, Respondent's counsel John Parauda engaged in an attempt to negotiate a separation package for Complainant through her lawyer, and then directly with her. May 16, 2008 Submission; Objection to motion. Complainant's request to transfer to other positions in the company was denied. See, each of Complainant's pleadings and submissions. Complainant advised Mr. Parauda that she would not accept a severance agreement from Respondent until she communicated with Richard Levin of the company's Audit Committee. Attachment C to Phillips Declaration, RX 1. May 16, 2008 submission to OSHA; Complainant's Statement of Jurisdiction; Complainant's Objection to Respondent's motion. Mr. Paruada sent Complainant an e-mail on December 7, 2007, that stated, in salient part:

Beginning in September, Lori Sundberg of Employee Relations and I spoke to you on several occasions and ruing those discussions proposed the following two options.

1. Return to work in the Audit Group in your position as a Director. You have made it quite clear that you are not willing to do this because you do not want to be part of Jacquie Wagner's organization for various reasons. You expressed concern you might be retaliated against for raising issues about her during the investigation. It has been conveyed to you that if you returned and felt any adverse actions were taken against you because you previously raised allegations against Ms. Wagner, you could apprise Human Resources or the Ombuds [sic] Office and a prompt and appropriate investigation would be undertaken.
2. Agree to an amicable parting of the ways and enter into a separation agreement on terms acceptable to you and the Company. You said you were unwilling to explore this option without first corresponding with Rick Levin of the Company's Board of Directors. I understand you've done that and have been sent a response from Mr. Levin.

   Christine, the Company feels it has been more than reasonable in its efforts to treat you fairly. You have been paid your full salary and bonus over the past year, received full medical and other benefits and performed no work. We

> have attempted to negotiate with your attorneys and when they told us to talk directly to you, we attempted to work out a fair arrangement.
> We are still willing to bring this situation to a resolution that is fair to you and the Company but we are not willing to continue in the current status any longer. Since you have rejected our offer that you return to the Audit Group we can only give you one more week to propose reasonable terms for a separation agreement…

Attachment C to Phillips Declaration, RX 1.

When Complainant did not propose terms, her thirteen month long paid leave was ended by Respondent upon the deposit of her final paycheck on December 23, 2007. May 16, 2008 Submission; Complainant's Statement of Jurisdiction; Complainant's Objection to Respondent's motion.

D. Positions of the Parties

1. Complainant

Complainant filed her complaint with OSHA on March 2, 2008, and augmented the complaint with submissions dated May 5, 2008 and May 16, 2008. She submitted a brief in support of her objection to Respondent's motion to dismiss her complaint as untimely or in the alternative issue summary decision. In her brief, Complainant discusses many of the substantive underpinnings of her complaint. As I have noted, I have confined my consideration to those facts and arguments that pertain to the timeliness of her complaint and to whether certain allegations constitute adverse actions.

Complainant argues that there is a genuine issue of fact about whether the September 6, 2006 e-mail from Respondent's Human Relations Director constituted final and unequivocal communication regarding Respondent's intent to terminate her employment. She also contends that notice was not final and not unequivocal because it lacked a date certain. Complainant argues that she did not receive unequivocal notice of the termination of her employment until the e-mail sent by Respondent's counsel on December 7, 2007.

In the alternative, Complainant argues that grounds exist for equitable tolling of the statute of limitations if deemed to commence earlier. Complainant specifically charges Respondent with "administrative misconduct which improperly deterred [her] from exercising her right to return to employment with a potential reassignment in the short term of several months." Complainant alleged that Respondent withheld from her the knowledge that her supervisor Jacqueline Wagner would occupy a different position, thereby eliminating Complainant's concern about returning to her job.

In addition, Complainant points to an agreement between Respondent and the U.S. Department of Justice that describes other audit positions that Respondent failed to discuss with her. Complainant suggests that Respondent's counsel knew of the existence

of other positions for which she was qualified, and "replied falsely to Complainant's direct question about transfer opportunities, which caused her to decline to return to previous position". Complainant's Objection to Respondent's motion at page 5. Complainant further argues that this misinformation constitutes a denial of her right to return to her position, and constitutes a discrete adverse action under the Act. Complainant acknowledges that "the denial of this right through affirmative misconduct did not result in the Complainant delaying a filing under OSHA, it resulted in Complainant declining to return to a position of employment which she a right to under Section 806". Id. May 16, 2008 Submission.

Complainant further avers that Respondent engaged in misconduct by lying to her about the terms of her employment in September, 2007. Complainant contends that she learned about this misconduct during the week before filing her complaint of March 2, 2008 to OSHA. In her Objection to Respondent's motion at fn. 9, Complainant states that she "learned that she had been harmed due to Respondent's failure to reply truthfully to her questions and then informed the Secretary in filings dated May 5, 2008 and May 16, 2008". Complainant further asserts that this constituted a new violation of the Act. Id.

Complainant also asserted the existence of a hostile work environment and identified Respondent's failure to transfer her as an additional adverse action.

2. Respondent

Respondent asserts that Complainant's complaint of March 2, 2008 is untimely, as it was filed more than 90 days after the alleged violation of the Act occurred. Respondent argues that it clearly and unequivocally communicated its decision to terminate her employment on September 6, 2007, in e-mails sent by the company's Director of Human Relations.

Respondent contends that Complainant's arguments regarding equitable estoppel are invalid, and that her other claims do not bear on the issue of timeliness of her complaint. Respondent did not fully address the issue of whether her complaint on May 16, 2008, charging Respondent with misconduct in withholding information, constitutes a timely filed complaint of discrimination under the Act. Respondent did not address the issues involving hostile environment.

E. Timeliness of Complaint Regarding Discharge from Employment

1. Whether the September 6, 2007 e-mail communication was clear and unequivocal

As I have noted, supra., the Department of Labor's commentary on the regulation at issue cites to Delaware State College v. Ricks, *infra.*, for the proposition that the alleged violation of the Act is considered to be when the discriminatory decision has been both made and communicated to the complainant. 449 U.S. at 258. The Supreme Court of the United States held in Ricks that the filing limitations period commenced at the time it was decided and communicated to the complainant that he would not be granted tenure; not his actual termination

date. Id. Indeed, the Court noted that termination of employment at the college was a delayed, but inevitable, consequence of the denial of tenure. Id. at 257-58. The Court cited its approval of the earlier Ninth Circuit holding that "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." Id. at 258 (citing Abramson v. University of Hawaii, 594 F.2d 202, 209 (9th Cir. 1979) (emphasis included in original).

Complainant's argument that the e-mails from Respondent's Director of Human Relations dated September 4, 2007 and September 6, 2007 do not constitute Respondent's clear and unequivocal intention to terminate her employment is without merit. I disagree with Complainant's contention that there is a material issue of fact regarding the meaning of these e-mails. Complainant alleges in her objection that "there are documents in the Respondent's e-mail records which would cast light on and provide a factual basis to evaluate how final and unequivocal the communication was when issued by Respondent". I find no need to look beyond the unambiguous language that clearly conveyed to Complainant Respondent's intention to terminate her employment if she failed to return to her previous position with the company or to meet with the company's officials. Ergo, in order to be timely, her complaint with OSHA would have had to have been filed within 90 days of the e-mail dated September 6, 2007, when Complainant was told unequivocally: "If you're not willing to abide by all of the requirements I've set forth in this note, your employment will be terminated." I find that Complainant reasonably should have been aware as of that date that Respondent intended to terminate her employment if she did not accept the conditions it placed upon her return to work. Her complaint of March 2, 2008 is more than 90 days after that communication, and therefore her complaint is untimely. Complainant's argument that the adverse action occurred when she received her final paycheck is not supported by the law.

I reject Complainant's argument that she did not reasonably believe that Respondent's Director of Human Relations had appropriate authority to communicate Respondent's decision to terminate her employment. Moreover, even if Complainant reasonably believed that the decision regarding her return to work could have been overturned by the Audit Committee or senior management, that belief does not affect the time at which the statute of limitations commenced. The period commences on the date that an employer communicates its intention to implement an adverse employment decision. The date of the communication constitutes the occurrence of a violation, rather than the date when consequences of the decision are felt. Richardson v. JP Morgan Chase & Co., 2006-SOX-00082 (ALJ July 7, 2006); Ricks, supra. In Russo v. Trifari, 837 F.2d 40 (2d Cir. 1988), a case brought under the Age Discrimination in Employment Act ("ADEA"), the Second Circuit held that the complainant's action accrued on the date on which he was informed that he had the option of relocating or being terminated and not on the actual date of termination.[4] Russo, 837 F.2d at 42-43 (citing Delaware State College v. Ricks, *infra.*).

I also find little support for Complainant's contention that the September 6, 2007 e-mail was equivocal because it did not provide a date certain for the termination. I agree that Respondent's subsequent communications with the Complainant demonstrate that the actual date of her discharge from employment was uncertain. However, I find that the evidence establishes

[4] The complainant was informed of his option on November 1, 1983. If he declined to relocate, termination was effective January 1, 1984. The Court held that the action accrued on November 1, 1983. Russo, 837 F.2d at 42.

that she was provided a definite notice of Respondent's intention to discharge her if she chose not to return to work. See, Russo, supra. In addition, the subsequent communications between the parties addressed the terms of her separation, and not its fact. Negotiations between the parties after the decision to terminate do not render the decision unequivocal. Bulls v. Chevron/Texaco, Inc, 2006 SOX-17 (ALJ. Oct. 13, 2006).

Complainant concedes that a date certain for the execution of discharge is not required for a communication to be sufficient to commence the statutory period for filing a complaint. See, Chardon v. Fernandez, 454 U.S. 6, 8 (1981); Sneed v. Radio One, 2007 SOX 18 (ALJ Apr. 16, 2007). However, Complainant argued that the lack of a date certain for her termination "contributed to her reasonable belief that the possibility existed to appeal any discharge at levels higher than Ms. Rampal-Herrod". Complainant's Objection at page 4, paragraph 3. The fact that Complainant might have avoided termination if she successfully appealed Respondent's decision does not prevent the statute of limitations from running. The statute of limitations begins to run when the employee is made aware of the employer's decision to terminate him or her even when there is a possibility that the termination could be avoided. See, Lawrence v. AT&T Labs, 2004-SOX-00065 (ALJ Sept. 09, 2004) (citing English v. Whitfield, 858 F.2d 957 (4th Cir. 1988)[5]; Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976); Ricks, *infra.* at 261). The record does not reflect that Complainant sought reconsideration of the directive to return to work. In her September 24, 2007 letter to the Respondent's Board member Richard Levin, Complainant urged improvement in the company's whistleblower program[6]. Attachment to Complainant's Objection to Respondent's motion. Complainant did not refer to being directed to return to work, but rather stated that she "is on administrative leave". Moreover, the standard of reasonableness that applies to the instant adjudication is objective, and not subjective. If a reasonable person in the position of Complainant would or should have been aware of Respondent's decision, the limitations period commences. EEOC v. UPS Inc., 249 F. 3d 557, 562 (6th Cir. 2001).

I find that it is reasonable to conclude that the e-mail of September 6, 2007 clearly and unequivocally on its face communicated Respondent's intention to discharge Complainant if she failed to return to work or meet with other AXP personnel. Accordingly, her complaint to OSHA of March 2, 2008 was untimely filed.

2. Whether circumstances allow for equitable tolling of the statute of limitations

Generally, the statute of limitations may be tolled: (1) when the defendant has actively misled the plaintiff respecting the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from asserting her rights; or (3) where the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. School District of the City of Allentown, 657 F.2d 16, 20 (3rd Cir. 1981)(citing Smith v. American President Lines, Ltd., 571 F.2d 102, 109 (2nd Cir. 1978)). See also Harvey v. Home Depot U.S.A., Inc., ARB Nos. 04-114 and 115, ALJ Nos. 2004-SOX-20 and 36 (ARB June 2, 2006).

[5] Also cited by Complainant. CB at 8.

[6] Although Mr. Parauda alludes to a response to Complainant from Mr. Levin (see Attachment C to Phillips Declaration), that response is not of record. The response would have no probative value on my determination of the timeliness of the complaint.

Courts have held that the restrictions on equitable tolling must be scrupulously observed, and it is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious claim. Doyle v. Alabama Power Co., 1987 ERA 53 (Sec y, Sept. 29, 1989). Complainant bears the burden of establishing grounds for applying equitable modification of the statutory time limitation. See Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984).

Complainant alleges that she was intentionally misled about the existence of jobs for which she might be qualified upon the fulfillment of Respondent's requirement that an employee have two years of tenure with the company to qualify for transfer. Complainant contends that she relied upon the information provided her by Respondent's counsel regarding her ability to transfer to other positions. Complainant contends that she would have exercised her right to return to her position had she known that other jobs existed to which she may have transferred, and also, had she known that her supervisor would have left her position. None of Complainant's arguments demonstrate misleading conduct on the part of the Respondent that impeded Complainant's ability to file her complaint within the statutory period. In fact, Complainant admits as much when she writes: "The denial of this right [to return to work] through affirmative misconduct did not result in the Complainant delaying a filing under OSHA, it resulted in Complainant declining to return to a position of employment which she had a right to under Section 806." Complainant's objection at page 6, paragraph 6. Complainant repeated this argument in her response to Respondent's reply brief. I decline to address whether the Act invests Claimant with a right to return to work, other than through successful prosecution of the complaint. I otherwise accept Complainant's acknowledgement that she was not prevented from timely filing her complaint because of any misconduct by Respondent. There is no evidence that Respondent engaged in any conduct that prevented her from filing her complaint timely. Thus, Complainant can not establish the first possible basis for tolling the statute.

Complainant has failed to point to any extraordinary circumstances that may have prevented her from timely asserting her rights under the Act. Claimant has not asserted that she filed her complaint in the wrong forum. Therefore, she has failed to establish grounds for equitable tolling of the statute of limitations. Regarding alternative arguments for equitable relief, it has been established that failure to secure counsel in order to pursue a claim under the Act is an insufficient reason, in and of itself, to justify equitable tolling of the limitations period for filing a complaint. Barker v. Perma-Fix of Dayton, Inc., 2006-SOX-1 (ALJ Jan. 11, 2006). Accordingly, Complainant's lack of counsel is not dispositive on the issue of timeliness.

In addition, ignorance of the law is not an adequate excuse for accepting an otherwise untimely complaint, unless the complainant can demonstrate that his or her ignorance of the limitations period was caused by circumstances beyond the party's control. Guy v. SBC Global Services, 2005-SOX-113 (ALJ Dec. 14, 2005)(citing Stoll v.Runyon, 165 F.3d 1238, 1242 (9th Cir. 1999)(plaintiff's mental incapacity warranted equitable tolling); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998)(*pro se* inmate's lack of knowledge "until it was too late" of one-year limitation period for filing *habeas corpus* petition insufficient to warrant equitable tolling); Fisher v. Johnson, 174 F.3d 710, 714 (5th Cir. 1999), cert. denied, 531 U.S. 1164 (2001)("ignorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse prompt filing.")). Complainant has not established that circumstances existed beyond her

control which prevented her from filing her complaint within the statute of limitations set forth in the Act.

F. Timeliness of Complaint Regarding Respondent's Refusal of Transfer

In her original complaint with OSHA, Complainant alluded to Respondent's refusal to allow her transfer. I find that this refusal constitutes an adverse action, as it affects a condition of employment. However, for all of the reasons cited herein, supra., I find that the complaint about the refusal of transfer is untimely. Complainant was advised early in her discussions with Respondent that she was not eligible for a transfer. I have discussed the facts involving the transfer more fully, infra., below.

G. Hostile Work Environment

Complainant contends that a genuine issue of material fact exists with respect to whether a hostile environment existed in her work place. It has been determined that "each retaliatory adverse employment decision constitutes a separate act and that the plaintiff can only file a complaint to cover discrete acts that occurred within the applicable time period. The only exception to this rule is an action based on a hostile work environment." Dolan v. EMC Corp., 2004-SOX-1 (ALJ Mar. 24, 2004)(citing National Railroad Passenger Corporation v. Morgan, 536 U.S. 101 (2002)).

I find that the record establishes that Complainant did not allege a hostile work environment as the basis for her March 2, 2008 complaint of discrimination with OSHA. In that complaint, Complainant specifically identified her discharge as an adverse employment action. Complaint at page 3. She also considered her placement on performance probation on August 30, 2006, as an adverse action, but conceded that it was time barred. Complainant also appears to consider Respondent's failure to reassign her to an alternative position to be an adverse action. Complaint at pages 4-5.

I agree in principle with Complainant that the issue of whether a hostile environment existed would require further factual inquiry. However, I need not consider that issue, as I find that Complainant did not timely raise the issue of hostile work environment in her complaints to OSHA. Complainant's complaint and submissions to OSHA refer to her concerns about returning to work for her former supervisor, and Complainant specifically stated that she "has not claimed that this hostile work environment was the specific adverse action which triggered her March 2, 2008 filing with OSHA..." Complainant's objection at page 15, paragraph (a). Complainant contends that she did not abandon her job, but was in fact constructively discharged because she refused to return to work for her supervisor, whom, she alleges, created a hostile work environment. Complainant stated in support of that argument that she:

> has written clearly, in each of the filings related to this matter, not that she asserted that the hostile work environment itself was the precipitating adverse action causing her to file with OSHA [but that] the hostile work environment claim is related directly to Complainant's refusal to return to work, and is related directly to Respondent's charge that Complainant abandoned her job.

Complainant's objection at page 15, paragraphs (b) and (c).

In her submission to OSHA dated May 16, 2008, Complainant alleged that Respondent lied to her about the availability of positions to which she may have been reassigned, and argued that this alleged dishonesty supported tolling the statute of limitations for complaints filed under the Act. As additional support for equitable tolling, Complainant charged Respondent with withholding information about her prior supervisor's intention to leave the company in February, 2008. Complainant further wrote that:

> she would not return to work for Ms. Wagner because of a hostile work environment, but that she would return to AXP absent Ms. Wagner's direct or indirect supervision…Had Complainant known on December 7, 2007 or during the subsequent weeks what she believes the Company knew by then, she would have returned to her position.

Submission dated May 16, 2008 at page 3.

Complainant's pleadings do not consistently reflect that she intended to file a complaint of hostile work environment. Complainant has asserted that she made no overt complaint about a hostile environment, but in her submission to OSHA dated May 16, 2008, and in her complaint and attachment thereto, she refers to actions by her former supervisor that she asserts created a hostile work environment. I construe the pleadings in the light most favorable to Complainant and find that she filed a complaint alleging a hostile work environment. However, I find that none of her references to a hostile environment took place within the 90 day statutory period.

After Complainant was place on paid administrative leave in November, 2006, she was effectively removed from work, and not subjected to further actions by her supervisor. On September 6, 2007, she was directed by the Director of Human Relations to return to work in her previous job, under her former supervisor, which Complainant suggests demonstrates a continuation of the hostile work environment that Respondent allegedly created. However, even accepting that contention as true, that action occurred on September 6, 2007, well beyond 90 days before March 2, 2008. Since Complainant did not return to work, she was not exposed to any other circumstances that could be construed as a hostile work environment.

Accordingly, I find that Complainant did not timely file a complaint alleging hostile work environment, and therefore it is unnecessary to consider whether additional evidence should be developed on this issue. Cf. with Grove v. EMC Corp., 2006-SOX-99 (ALJ July 2, 20007).

H. Respondent's Alleged Misconduct

In her submission of May 16, 2008, Complainant alleged that she was harmed by Respondent's failure to inform her about other positions to which she may have transferred once

she completed two years employment with the company, consistent with its policy. She also alleged that she was harmed by the company's failure to inform her that her supervisor, Ms. Wagner, left the company in February, 2008. Complainant characterized these allegations as factors supporting equitable tolling of the statute of limitations. She also characterized these allegations as discrete complaints of adverse action under SOX.

Complainant has alleged that Respondent, through its legal counsel, had represented to her that there were no jobs involving an anti-money laundering program, despite an Agreement with the Department of Justice in which the company committed to expanding that program. Submission of May 16, 2008; Objection to OSHA's findings filed on July 7, 2008; Objection to motion; Statement of Jurisdiction. Complainant also alleged that she was misled by Respondent's failure to inform her that her former Supervisor had left the company, as announced to employees on February 20, 2008. Complainant alleged that had she known of the existence of the potential jobs referred to in the Agreement, or of her former supervisor's imminent departure, she would have returned to her position. Id. Complainant characterizes both of these alleged omissions as "affirmative misconduct" and has argued that each represents a discrete adverse action.

Complainant has stated that during the week before she filed her complaint with OSHA on March 2, 2008, she learned of Respondent's agreement with the Department of Justice to create additional positions. Complainant further asserted that she learned that her former supervisor would be leaving the company on February 20, 2008. Submission of May 16, 2008 at page 13, paragraph 51. That announcement was made on February 20, 2008 and Ms. Wagner left Respondent's employment on February 28, 2008. Submission of May 16, 2008 at page 11, paragraph 38.

I find that the Complainant's complaint of May 16, 2008 regarding these two assertions was timely filed. I further find it appropriate to consider whether the allegations raised by Complainant constitute adverse actions.

The Administrative Review Board (ARB) has adopted a standard developed by the Supreme Court of the United States in determining whether an action constitutes an adverse employment action. *See* Burlington Northern & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (June 22, 2006). The Supreme Court found that plaintiff must show that a reasonable employee or job applicant would find the employer's action "materially adverse". Burlington at 2409. The ARB further concluded that a theoretical argument based on facts that may never occur does not constitute a cognizable adverse employment action. Friday v. Northwest Airlines, Inc., ARB No. 03-132, ALJ Nos. 2003-AIR-19 and 20 (ARB July 29, 2005).

The record reflects that Complainant was advised that a transfer was not available to her because she did not have two years of tenure with Respondent. Complainant tacitly acknowledged that she was ineligible for a transfer when she was directed to return to work in September, 2007. In her submission to OSHA on May 16, 2008, Complainant wrote:

> If Complainant had known in September, in October, in November or in December, 2007 that AXP was expanding its staff in the anti-money laundering

> program, which was outside the General Auditor's (GA) team, she would have returned to her position under the General Auditor and waited until January 2008 to patiently seek reassignment. Within ten days of her last pay date, December 21, 2007, she would have been eligible to apply to other positions for which she was qualified, under the first of two procedural conditions which she was told prevented her reassignment.

Submission of May 16, 2008 at page 9, paragraph 29. Complainant explained the "procedural condition" as follows:

> This first procedural condition was that an employee at her level of Director could apply for reassignment if he or she had competed two years of employment with AXP. Having commenced employment in January 2006, she would have been eligible under this rule to apply for a reassignment within 30 days of the final, definite and unequivocal notice given to me on December 7, 2007, or as of January 1, 2008.

Submission of May 16, 2008 at page 9, paragraph 30.

Complainant also alleges that Respondent, and specifically counsel Parauda, knew about Ms. Wagner's intention to leave Respondent's employ during the period when he was engaged in negotiating the terms of Complainant's separation from the company. Submission of May 16, 2008 at page 11, paragraph 40. Complainant speculates that common business practices suggest that the Respondent knew months in advance that Ms. Wagner would depart. Submission of May 16, 2008 at pages 11-14, paragraphs 40 through 53. She postulates the Respondent had a duty to inform her that the obstacle to her return to her previous position, i.e., the presence of Ms. Wagner, would shortly be removed. Id.

Complainant's charges are grounded in speculation and are theoretical. I find that they do not constitute adverse action. Complainant is unable to establish that she would have been transferred to a different job, even if she qualified for a transfer at some future date. Therefore, she cannot establish that Respondent's failure to disclose its agreement with the Department of Justice affected the terms or conditions of her employment. As of September 6, 2007, she did not qualify for a transfer and was directed to return to her former position. Counsel's communications with her following her refusal to return to work were to negotiate the terms of her departure from the company. The evidence does not establish that she could have returned to any other job but her previous position during the period when she was instructed to return to work or be prepared to be discharged. I decline to find that Respondent's failure to inform Complainant of potential future job opportunities for which she might theoretically qualify constitutes an adverse action under the Act.

Similarly, Complainant's contention that Respondent was obliged to advise her that Ms. Wagner would be leaving the company does not constitute an adverse action. Complainant was directed to return to work on September 6, 2007. Ms. Wagner continued to be in a supervisory position, and Complainant was expected to work under her supervision. When Complainant

refused to return to her job, Respondent negotiated with her counsel, and then with her, to develop the terms of her separation from the company. Complainant's contentions that Respondent knew during those negotiations that Ms. Wagner would leave the company shortly are speculative. Complainant's contentions regarding what she would have done are theoretical and do not constitute an adverse action. See, Friday, supra.

I find that Complainant's complaints regarding Respondent's withholding of information do not constitute adverse actions under the Act. Accordingly, they must be dismissed.

IV. CONCLUSION

Based on the foregoing, I find that the complaint involving Complainant's discharge and refusal of request for transfer, filed on March 2, 2008, is barred by the 90-day statute of limitations in 18 U.S.C. § 1514A(b)(2)(D). The statute of limitations began to run on September 7, 2007, when Complainant was told that she could return to work to her previous position or face termination of her employment. She was also directed to arrange to meet with two company officials or face discharge.

In addition, I find that Complainant's allegations of hostile work environment were not filed within 90 days of the last action by the Respondent that could be construed as an act demonstrating hostile workplace.

I further find that the subsequent complaints filed in May, 2008 do not constitute adverse actions under the Act.

ORDER

I find it appropriate to GRANT Respondent's motion to dismiss the complaint or in the alternative to grant summary decision in this matter. It is hereby ORDERED that Complainant's Complaint be DISMISSED. The hearing scheduled in this matter is CANCELED[7].

A

Janice K. Bullard
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-

[7] Because the complaint is dismissed, I need not address Respondent's motion for continuance of the hearing, filed July 31, 2008.

delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).