In the Matter of:

JUDITH CLIFFORD, **ARB CASE NO. 2017-0064**

COMPLAINANT, **ALJ CASE NO. 2017-WPC-00002**

v. **DATE: September 6, 2019**

CONOCO PHILLIPS,

RESPONDENT.

Appearances:

For the Complainant:
Alfonso Kennard, Jr., Esq.; Davina Bloom, Esq.; *Kennard Richard, P.C.*, Houston, Texas

For the Respondent:
Shauna Johnson Clark, Esq.; *Norton Rose Fulbright US LLP*, Houston, Texas

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Thomas H. Burrell, *Administrative Appeals Judges.*

FINAL DECISION AND ORDER

THOMAS H. BURRELL, *Administrative Appeals Judge*: This case arises under the Federal Water Pollution Control Act (WPCA) and its implementing regulations. 33 U.S.C. § 1367 (1972); 29 C.F.R. Part 24 (2017). Judith Clifford filed a complaint with the United States Department of Labor alleging that her former employer, Conoco Phillips, violated the WPCA by terminating her employment. A Labor

Department Administrative Law Judge (ALJ) issued a Decision and Order (D. & O.) granting Conoco's motion for summary decision because Clifford's complaint was not filed within the WPCA's limitations period. Clifford appealed the ALJ's order to the Administrative Review Board (ARB or the Board). We affirm the ALJ's Order and deny Clifford's complaint.

BACKGROUND

Conoco hired Clifford as a regulatory supervisor in July 2014. Clifford's job duties included managing compliance with oil and gas regulations and ensuring uninterrupted drilling and production operations by overseeing the plugging and abandoning of wells. In October 2015, Clifford reported to a new manager. Clifford claims that her new manager did not have concern for her compliance efforts. In March 2016, Clifford was cited for poor performance. Clifford in turn reported the new manager's noninterest in her safety and compliance efforts to human resources. On April 7, 2016, Clifford's manager informed her that she would be terminated effective April 27, 2016. The April 7 notifying letter states the following:

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

Conoco Mot. for Summ. Dec. Ex. B.

On May 23, 2016, Clifford filed a complaint with the Occupational Safety and Health Administration (OSHA). On September 29, 2016, OSHA issued its findings, concluding that Conoco provided clear and convincing evidence that it had terminated Clifford for non-retaliatory reasons. Clifford objected and the case was assigned to an ALJ for hearing. Before the ALJ, Conoco filed a motion for summary decision on the ground that Clifford's complaint was barred by WPCA's thirty-day statute of limitations. Clifford responded, arguing that the effective date of the termination began the thirty-day clock, not the date of notice. On July 24, 2017, the ALJ granted Conoco's motion. The ALJ found that Clifford did not timely file her WPCA claim and concluded that equitable considerations did not toll the statutory

limitations period or estop Conoco from asserting timeliness as a bar to Clifford's claim.

JURISDICTION AND STANDARD OF REVIEW

The WPCA's employee-protection provision authorizes the Secretary of Labor to hear complaints of alleged discrimination because of protected activity and, upon finding a violation, to order abatement and other remedies. 33 U.S.C. § 1367. The Secretary has delegated authority to the Administrative Review Board (ARB or the Board) to review an ALJ's decision. Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's decision granting summary decision. *See* 5 U.S.C. § 557(b) (1976); *Griffo v. Book Dog Books, LLC,* ARB No. 18-029, ALJ No. 2016-SOX-041 (ARB May 2, 2019). Summary decision is permitted where "there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." 29 C.F.R. § 18.72(a) (2017). On summary decision, the ALJ, in the first instance and the Board on appeal must review the record in the light most favorable to the nonmoving party. *Micallef v. Harrah's Rincon Casino & Resort*, ARB No. 16-095, ALJ No. 2015-SOX-025, slip op. at 3 (ARB July 5, 2018).

DISCUSSION

1. *Clifford had Final, Definitive, and Unequivocal Notice of Termination on April 7*

An employee alleging a violation of the WPCA's employee-protection provision must file his complaint no later than thirty days after the alleged violation.[1] In cases arising under environmental whistleblower statutes like

[1] 33 U.S.C. § 1367(b). Under the WPCA:

> Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in

WPCA, the limitation period for filing a complaint begins to run from the date the employee receives "final, definitive, and unequivocal notice" of an adverse employment decision. *McManus v. Tetra Tech Constr. Inc.*, ARB No. 16-063, ALJ No. 2016-SOX-012 (ARB Dec. 19, 2017). The date that an employer communicates to the employee its intent to implement an adverse employment decision marks the occurrence of a violation and not the date that the employee experiences the consequences. *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, -128, ALJ No. 1997-ERA-053, slip op. at 36 (ARB Apr. 30, 2001); *see also Chardon v. Fernandez,* 454 U.S. 6, 8 (1981). In cases addressing equitable modification of statutes of limitations, we have been guided by the discussion of modification in *School Dist. of City of Allentown v. Marshall,* 657 F.2d 16 (3d Cir. 1981). In that case, which arose under a different whistleblower provision, the court articulated three principal situations in which equitable modification may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum. *Allentown*, 657 F.2d at 20 (internal quotations omitted).

Parties do not dispute that Clifford received notice of her termination on April 7 to be effective on April 27, 2016. D. & O. at 8. She filed her complaint on May 23, 2016—46 days after she had notice of her termination. On appeal, Clifford claims that Conoco's April 7 notice was neither definitive nor unequivocal because Clifford continued to be an employee after the notice. Further, Clifford argues that the termination letter and severance documents use April 27, 2016, as the date of termination. We concur with the ALJ.[2] The fact that Clifford's termination did not become effective until April 27, 2016, does not extend the notice of termination to that date. *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054 (ARB Aug. 31, 2005). We further deny Clifford's claim that her discovery of Conoco's allegedly retaliatory motive several days after her April 7 extends the start date. The Supreme Court has repeatedly stated that "discovery of the injury, not

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> violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination.

Id.; *see* 29 C.F.R. 24.103(d)(1).

[2] In response to Clifford's observation that OSHA did not find the complaint untimely, the ALJ correctly answered that proceedings before the ALJ are *de novo*.

discovery of the other elements of a claim, is what starts the clock." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Here, the injury is Clifford's termination, and she became aware of that decision on April 7.

2. Clifford is not Entitled to Equitable Estoppel, Equitable Tolling, or Waiver

The ALJ analyzed Clifford's claims under both equitable tolling and equitable estoppel theories of relief and found that Clifford had not demonstrated that she was entitled to either.[3] On appeal, Clifford argues that Conoco should be prohibited from asserting untimeliness because Conoco misled her as to the reason why she was terminated and also misled her by not using more assertive termination language such as "fired" and "terminated" over "layoff" and "let go." "Lay off," Clifford claims, connotes that the termination was not for performance reasons. Clifford additionally claims that the termination letter indicated she was let go for "business reasons" and did not say "effective immediately."

We affirm the ALJ's findings of fact and conclusions of law. In emphasizing the difference between "layoff" and "termination," Clifford cites to *Donovan v. Hahner, Foreman, and Harness, Inc.*, 736 F.2d 1421, 1427-28 (10th Cir. 1984). The employee in *Hahner, et al.* complained about scaffolding and the employer informed the employee that he was fired. The employee was later told that he was not fired but was laid off until the scaffolding was repaired. *Id.* at 1422, 1427. Upon learning that he had in fact been terminated, the employee filed a complaint under Section 11(c) of the Occupational Safety and Health Act, which has a thirty-day statute of limitations. The employer argued that the date that the employee had been told that he was laid off started the thirty-day statute of limitations and that the employee's complaint was untimely. Applying equitable considerations, the trial court found that the complaint was timely filed because the employer had misled the employee and that the employee had attempted to discover his true status as to whether he had been fired.

[3] D. & O. at 7, 10-11. Equitable estoppel refers to those cases where the employer has actively misled the complainant and thus contributed to his or her inability to timely file a complaint. Equitable tolling refers to set of circumstances equitably excusing the complainant's inability to timely file, for example, timely filed but in the wrong forum. *Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020 (ARB Mar. 31, 2010).

In *Hahner, et al.*, the use of "laid off" was part of a statement the employee had received indicating that he was not fired. Here, Clifford was on notice when she received the April 7 notice of termination. Conoco's April 7 notice was unequivocal and definitive notwithstanding the use of "layoff" language or when Clifford suspected or discovered Conoco's retaliatory motive. Statutes of limitation would not serve their purpose of promoting timely litigation if an employer, to start the limitations period, had to acknowledge that it fired an employee for unlawful reasons. *Olson v. Mobil Oil Corp.*, 904 F.2d 198, 203 (4th Cir. 1990). Clifford's April 7 notice was unequivocal and Conoco did not attempt to mislead Clifford into believing that she was not fired. Clifford's last day in the office was April 7, and she turned in her badge and keys that same day. D. & O. at 2.

Responding to Clifford's waiver argument, the ALJ found that waiver of a timeliness requirement was discretionary and that Clifford had not demonstrated grounds for such waiver. On appeal, Clifford claimed that the ALJ erred in finding that Clifford provided no legal authority in support of her claim. In support of that claim, Clifford claims that Conoco will not be prejudiced by the late filing. We affirm the ALJ's findings and conclusions. While the absence of prejudice to the nonmoving party may be considered in determining whether to toll the limitations period, it alone is not sufficient justification for doing so. *Prince v. Westinghouse Savannah River Co.*, ARB No. 10-079, ALJ No. 2006-ERA-001 (ARB Nov. 17, 2010); *see also Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984). Clifford has failed to persuade us that the ALJ abused his discretion not to waive the thirty-day filing requirement.

CONCLUSION

In conclusion, viewing the evidence in the light most favorable to Clifford, she has failed to establish a genuine issue of material fact that she timely filed her complaint or was entitled to equitable modification of the limitations period. The ALJ did not err in granting Conoco's motion for summary decision on the ground that Clifford's complaint was untimely filed. Accordingly, we **AFFIRM** the ALJ's order dismissing the complaint.

SO ORDERED.