U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 June 2009

OALJ CASE NO.: 2009-SOX-00011

In the Matter of:

MATTHEW GLOSS,
Complainant,

v.

MARVELL SEMICONDUCTOR, INC. and
MARVELL TECHNOLOGY GROUP, LTD.,
Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This matter arises under the employee protection provisions of the Corporate and Criminal Fraud and Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("Sarbanes-Oxley," "SOX," or "the Act").

PROCEDURAL BACKGROUND

On September 26, 2007, Matthew Gloss ("Complainant") filed a formal claim against Respondent ("Respondent" or "Marvell") under the Act with the Department of Labor, Occupational Safety and Health Administration ("OSHA"). The complaint alleged that, in retaliation for whistleblowing activities, Respondent wrongfully demoted Complainant, subsequently discharged him, and ultimately divested him of approximately one million dollars worth of stock options. On October 16, 2007, following an investigation, OSHA dismissed the portion of the complaint pertaining to the wrongful demotion and discharge claims, finding it was untimely because Complainant filed his claim more than 90 days after the alleged stripping of responsibilities and retaliatory termination.[1] On November 14, 2008, Complainant filed a timely appeal of OSHA's determination with the Office of Administrative Law Judges (the "Office").

This case is currently set for trial beginning September 21, 2009, in San Francisco, California.

On March 23, 2009, Respondents filed a Motion to Dismiss, or in the Alternative, Motion for Summary Decision (the "Motion") with respect to Complainant's retaliatory discharge claim. Respondent argues that all claims pertaining to any retaliatory acts that occurred on or before

[1] In contrast, OSHA did not find the stock option claim untimely. That claim is not at issue in this order.

March 26, 2007, the date of Complainant's termination, were not timely filed. They also contend that Complainant did not timely file his complaint in the wrong forum, nor did any extraordinary circumstances prevent him from timely filing. Thus, Respondents maintain that there is no equitable reason to permit tolling.

On May 26, 2009, Complainant filed a response to the Motion (the "Response"). Complainant contends that Respondent's initial refusal to waive attorney-client privilege prevented him from timely filing his claims. In light of this assertion, Complainant maintains that Respondent should be equitably estopped from having his retaliatory discharge claim dismissed and the statute of limitations should be tolled. Additionally, Complainant argues that equitable tolling is appropriate because he timely raised his complaints in the wrong forum. Finally, Complainant suggests Marvell's motion should be denied as premature because factual findings are necessary to determine if equitable tolling or equitable estoppel are appropriate.

On June 2, 2009, Respondent filed a reply to the Response (the "Reply").

For the reasons that follow, Respondent's Motion for Summary Decision is granted with respect to Complainant's alleged wrongful termination and all prior adverse actions.

FACTUAL BACKGROUND

Complainant is the former General Counsel of Marvell. He joined the company in April 2000 and was subsequently promoted to Chief Legal Officer ("CLO") and Vice-President of Business Affairs in 2001. Declaration of Matthew Gloss in Opposition to Motion to Dismiss or, in the Alternative, for Summary Decision ("Gloss Decl.") ¶ 2. As General Counsel, Complainant was responsible for overseeing the filing of documents with the Securities and Exchange Commission ("SEC"), managing the company's legal department, and preparing documentation for stock options granted by Marvell's Stock Option Committee ("SOC") and Executive Compensation Committee ("ECC"). Motion at 3.

On May 23, 2006, Marvell Chief Executive Officer Dr. Sehat Sutardja ("CEO Sutardja") initiated a review of the company's stock option granting practices after a third party, Merrill Lynch, indicated that Marvell executives might have backdated option grants. Motion Ex. C at 5-7; Motion Ex. E at 80. Two days later, the Company appointed a Special Committee to internally investigate Marvell's stock option granting and accounting practices. Motion Ex. E at 80-83. The Special Committee's sole member, Arturo Krueger, employed outside counsel to assist in the investigation. Motion Ex. D at 34.

In June 2006, the Special Committee first interviewed Complainant. Motion at Ex. D at 35-36. A second interview with the Special Committee's outside counsel, Matthew Jacobs, took place on August 8, 2006. Motion Ex. D at 36.

On September 28, 2006, the Special Committee reported to Marvell's Board that the company's financial statements needed to be revised. Motion Ex. E at 81. In response, the Board instituted a "black out period" during which Marvell could not issue stock or allow options to be exercised. Response at 8.

Complainant alleges on the evening of October 25, 2006, the day before he was scheduled to have his third interview with the Special Committee, CEO Sutardja called him at his home in an apparent effort to influence his testimony. Gloss Decl. ¶ 3. CEO Sutardja also indicated that he could not attest to the accuracy of certain records from Stock Options Committee meetings with Chief Operating Officer Weili Dai ("COO Dai"). *Id*.

Complainant avers that, on October 26, 2006, he mentioned the phone call with CEO Sutardja during his interview with Special Committee's counsel Matthew Jacobs. *Id*. Complainant alleges that following the interview, Krueger reprimanded him for disclosing the phone call with CEO Sutardja to Jacobs. Gloss Decl. ¶ 4. Complainant further alleges that Krueger suggested that he should have lied about the nature of the phone call with CEO Sutardja. *Id*.

Complainant maintains that he reported both the Sutardja phone call and the Krueger conversation to Marvell's Chief Financial Officer George Hervey ("CFO Hervey") and Vice President of World Wide Human Resources Michelle Oakes in early November 2006. Gloss Decl., ¶ 5. He also avers he discussed the matter with Doug King, Chair of the company's Audit Committee in mid-January, 2007. Gloss Decl., ¶ 7.

On February 7, 2007, Complainant met with King a second time, providing him with a letter questioning Krueger's independence on the Special Committee. Motion Ex. F at 91-92. Complainant expressed similar concerns in a document he submitted to the SEC the following day.[2] Gloss Decl., ¶ 8; Motion Ex. F at 93.

Complainant avers that he reiterated his concerns about the independence of the Special Committee during his final interview with Jacobs on February 13, 2007. Gloss Decl., ¶ 9. In contrast, Respondent contends that this was the first time that Complainant told Jacobs about the alleged conversation with Krueger. Motion at 5; Motion Ex. D at 47.

In response to Complainant's allegations, Marvell asked King to conduct an investigation. *See* Motion Ex. E at 81. King hired retired Federal Judge Abraham Sofaer to assist with the investigation. Motion Ex. D at 32. Judge Sofaer, in turn, hired outside counsel to aid him in his task. *Id*.

As a result of Complainant's allegations, Marvell delayed the Special Committee's investigation. Motion at 5. This prevented Marvell from completing its internal investigation, preparing financial statements and making necessary filings with the SEC. *Id*. Furthermore, the delay allegedly threatened to delist the Company's NASDAQ listing due to the failure to submit timely financial statements to the SEC. *Id.*

Complainant alleges that his responsibilities as General Counsel were curtailed in November 2006 and transferred to a junior attorney. Gloss Decl. ¶ 6. He further avers that, on

[2] Specifically, Complainant annotated a document certifying Marvell's adherence to its own code of ethics to reflect the alleged conversations with CEO Sutardja and Krueger. Motion Ex. F at 93.

March 26, 2007, he was terminated without explanation and barred from his office. Gloss Decl. ¶ 6.

At the time of his termination, Complainant held more than one million dollars worth of unexercised stock options. Gloss Decl., ¶ 13. Because of the "black out period" imposed by Marvell's Board after the allegations of backdating surfaced, these stock options could not be exercised at the time of Complainant's termination. On March 29, 2007, the ECC voted to extend the exercise period for stock option holders until June 30, 2007. *See* Exhibit I. On July 6, 2007, the Company declined to extend Complainant's options. Motion at 10; *see* Motion Ex. O at 125.[3] The Board also declined to extend the options of another former employee, CFO Hervey. *See* Motion Ex. N at 119 & 125. Because the "black out period" was still in effect at the time that Complainant's options expired, he was unable to exercise the options prior to their expiration. Gloss Decl., ¶ 13.

On March 28, 2007, two days after the termination, Complainant received a letter from Respondent instructing him to maintain the company's secrets pursuant to his obligations as former counsel. Motion Ex. S, 137-39.

Complainant alleges that within the first 30 days of his termination, his attorney, Miles Ehrlich, informed the U.S. Attorneys Office that Complainant's termination might have been in violation of Section 1107 of the Sarbanes-Oxley Act, a provision that authorizes criminal prosecution for retaliation against whistleblowers. Ehrlich Decl. ¶ 3.

Complainant avers that, during his four interviews with the SEC in April through June 2007, Respondent insisted on attending and asserting attorney-client privilege whenever the issue of the alleged conversations with Krueger and CEO Sutardja arose. Gloss Decl., ¶ 13.

Complainant alleges that on June 26, 2007, 91 days after his termination, Respondent "began to reconsider" its assertion of privilege. Response at 16; Response Ex. 17. Complainant avers that he was unable to confirm Respondent's purported waiver of privilege until August 30, 2007, when his attorney was able to obtain copy of an agreement between Marvell and the SEC. Response at 16; Response Ex. 10. In contrast, Respondent maintains that it did not waive privilege and the agreement had no bearing on Complainant's ability to plead his claims, as the period covered by the agreement only minimally overlapped with the period relevant to Complainant's ultimate claim. Reply at 4-5; Motion Ex. T at 140.

ISSUES FOR DETERMINATION

1. Should the 90-day SOX filing period be equitably tolled?
2. Should Respondent be equitably estopped from asserting that Complainant's claims were untimely?
3. Should Respondent's motion be dismissed as premature?

[3] In contrast, Complainant asserts that the Company's decision to allow his stock options to expire was made on July 18, 2007. Gloss Decl., ¶ 13. Both parties agree that the effect of the decision was to preclude Complainant from exercising his options before they expired.

THE STANDARD FOR GRANTING SUMMARY DECISION

The standard for granting summary decision is set forth at 20 C.F.R. 18.40(d), which is based on Federal Rule of Civil Procedure (FRCP) 56.[4] Summary decision is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issues as to any material fact and that a party is entitled to summary decision." 20 C.F.R. 18.40(d). If the moving party meets the initial burden of showing no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence showing the existence of a genuine issue for trial. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The moving party need not provide evidence negating elements on which it does not bear the burden at hearing. It only needs to identify those portions of the record which "demonstrate the absence of a genuine issue of material fact." *Celotex Corp., v. Catrett*, 477 U.S. 317, 323 (1986). If the non-movant fails to establish the existence of an element that is essential to his case and on which they bear the burden of proof at hearing, there is no genuine issue of material fact and the movant is entitled to summary judgment. *Id.* Credibility, doubts, and reasonable inferences are resolved in favor of the non-moving party, but "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," summary judgment is appropriate. *Matsushita*, 475 U.S. at 586.

DISCUSSION

A complaint alleging retaliation in violation of the Sarbanes-Oxley Act must "be commenced not later than 90 days after the date on which the violation occurs." 18 U.S.C. § 1514A(b)(2)(D). Accordingly, complaints filed after the statue of limitations period are generally dismissed. *See e.g. Flood v. Cendant Corp.*, 2004-SOX-16 (ALJ Feb. 23, 2004) (dismissing SOX complaint filed 95 days after alleged violation as untimely); *see also Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) ("Even if the interests of justice might be served [by overlooking a violation of the statute of limitations]… strict adherence to the procedural requirements specified by the legislature is the best guarantee of even-handed administration of the law"). Thus, equitable tolling relief applies only sparingly, in "rare and exceptional circumstances." *Id.*; *see also Irwin v. Dep't. of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Hasken v. City of Louisville*, 234 F.Supp. 2d 688, 692 (W.D. Ky. 2002)("[E]quitable tolling should be granted only sparingly."). Here, Complainant filed his complaint on September 26, 2007. Thus, his complaint would generally be considered timely only for violations that occurred on or after June 28, 2007. *See* 18 U.S.C. § 1514A(b)(2)(D). Because the alleged adverse actions occurred on or before March 26, 2007, the portion of the complaint alleging Complainant's March 26, 2007 termination as an adverse act would normally be dismissed as untimely.

The *Irwin* Court noted that it "[has] generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Irwin,*

[4] Respondent notes that its motion to dismiss is predicated on Rule 12(b)(6) of the Federal Rules of Civil Procedure. However, because the Court has already considered matters outside the pleadings, Respondent's motion will be treated as one for summary decision. *See* Motion Ex. A-BB; Response Ex. 1-17; Fed. R. Civ. P. 12(d).

498 U.S. at 96. The law is clear that equitable tolling is not warranted in cases where a filing delay results from attorney error, *see, e.g., Hinton v. CPC Int'l., Inc*., 520 F.2d 1312, 1316 (8th Cir. 1975) (no equitable tolling where plaintiff mistakenly relied on extensions of what his attorney considered to be a statute of limitations), from bad advice of counsel, *see, e.g., Woods v. Denver Dept. of Revenue, Treasury Div.*, 818 F.Supp. 316 (D. Colo. 1993), or from simple attorney neglect. *See, e.g., Trader v. Fial Distributors, Inc*., 476 F.Supp. 1194 (D. Del. 1979)(no equitable tolling where plaintiffs, individually, or through their attorney, simply neglected the limitations period in filing their civil actions for employment discrimination).

I. Equitable Tolling

Complainant argues that the filing period for his claims should be equitably tolled because Respondent refused to waive attorney-client privilege until after the statute of limitations period expired. Response at 38. Complainant also suggests that tolling is proper because he timely filed in the wrong forum. *Id*. at 39.

Generally, there are three situations where equitable tolling is appropriate: (1) when the respondent actively misled the complainant concerning the filing of his complaint, (2) where the complainant was in some extraordinarily way prevented from filing his claim, or (3) where complainant timely raised the precise claim in the wrong forum. *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 20 (3rd Cir. 1981); *Ubinger v. CAE Int'l*, 2007-SOX-36 at 3 (ALJ May 22, 2007). However, restrictions on equitable tolling "must be scrupulously observed" and equitable principles are generally unavailable to a complainant who has failed to exercise due diligence in preserving his legal rights. *Marshall*, 657 F.2d at 19; *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984); *Scholar v. Pacific Bell*, 963 F.2d 264, 267–68 (9th Cir. 1992). Equitable tolling is not a device to disregard a limitations period merely because it would bar what may otherwise be a meritorious claim. *Doyle v. Alabama Power Co.*, 1987-ERA-43 (Sec'y Sept. 29, 1989). The party seeking the benefit of equitable tolling has the burden of establishing that tolling is warranted. *Bost v. Federal Express Corp*., 372 F.3d 1233, 1242 (11th Cir. 2004).

Here, Complainant has not alleged, nor do the facts establish, that Respondent actively misled him in any way regarding his cause of action under the Act.

a. Extraordinary Circumstances

Complainant maintains that he was prevented from filing in a timely manner because Respondent "claimed privilege as to all of the communications that formed the basis of his SOX claims." Response at 37-39. Complainant argues that as long as Respondent asserted privilege, he could not file without violating his professional and ethical obligations. *Id*. Thus, in Complainant's view, Respondent's assertion of attorney-client privilege constituted extraordinary circumstances. This argument fails for several reasons.

First, there is no exception to the 90-day statute of limitations for Complainant here or other attorney employees with claims under SOX where they claim exception to SOX' statutory requirements because compliance would require them to breach their fiduciary duty to their

employer and require them to divulge information subject to attorney-client privilege in violation of state ethics rules.

> To the contrary, it is clear from the existence of Section 307 of Sarbanes-Oxley, 15 U.S.C. § 7245, that Congress recognized circumstances in which attorney employees would be whistleblowers regarding violations of securities laws [footnote omitted]. Despite this acknowledgment, no exceptions were created. The fact that Congress included a provision addressing attorneys as claimants and did not create an exception for them indicates an intention not to create such an exception. (*See United States v. Northrop Corp*., 59 F.3d 953, 959 (9th Cir. 1995)(recognizing that courts are compelled to conclude that, in the absence of contrary congressional intent, Congress provided precisely the remedies it considered appropriate and that Congress stated in the statute). Neither the plain language nor the legislative history of the Act or any judicial interpretation supports creating such an exception.

Curtis v. Century Surety Co., No. CV 05-1538 at 5-6 (D.Az. Aug.24,2006), *affirmed, Curtis v. Century Surety Co*., No. 08-16236 (9th Cir. March 23, 2009) (unpublished) (Ninth Circuit affirmed the District Court's ruling granting summary judgment in favor of the employer on the Complainant's SOX whistleblower claim because he did not fulfill the exhaustion requirements of 18 U.S.C. § 1514A(b)).

Second, while Complainant's contention that professional obligations can prevent attorney-whistleblowers from bringing claims against their employer-clients may be correct, it is not evident that such barriers are extraordinary. Indeed, Complainant cites no authority for the proposition that the limitations of the attorney-client relationship may serve as a basis for equitable tolling. Moreover, should courts adopt Complainant's reasoning, they would be granting a de facto license for all in-house counsel to flout the statue of limitations so long as their employer-clients declined to waive privilege and rights to confidential attorney-client communication.

Third, even if the doctrine of equitable tolling is available to an attorney unable to timely file due to the restrictions of the attorney-client relationship, Complainant has not shown that such restrictions prevented him from timely filing here. Complainant suggests that, in light of his obligations to Respondent, the statutory requirements for filing were too stringent for him to meet. *See* 29 C.F.R. §1980.104; Response at 31. Contrary to these assertions, however, the requirements for filing a complaint with OSHA are quite flexible. *See Bassett v. Niagara Mohawk Power Co.*, 86-ERA-2, slip op., at 5 (Sec'y July 9, 1986) (Observing a whistleblower complaint need not set forth "every element of a legal cause of action."); *accord Swierkiewicz v. Sorema*, 534 U.S. 506 (2002) (holding an employment discrimination complaint only requires "a short and plain statement of the claim showing that the pleader is entitled to relief.") (*citing* Fed. Rule Civ. Proc. 8(a)(2)). A whistleblower complaint can be "informal." *See Richter et al. v. Baldwin Associates*, 84-ERA-9-12, slip op., at 9-10 (Sec'y March 12, 1986). The primary function of the complaint is to give the respondent "fair notice of what the [complainant's] claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

Without violating any obligations to his client, Complainant could have filed a complaint that would have given Respondent "fair notice."[5] *Id*. Such a complaint could have referenced Complainant's nearly seven years of positive performance reviews and high bonuses while working for Marvell, mentioned his February 2007 annotation which formed the basis of his exception to the SEC certificate of compliance, described the circumstances of his termination the following month, and highlighted the close temporal proximity between the protected activity and the adverse action. As to Complainant's other claims, he could have provided the dates of the relevant violations, names of the participants, protected activities, and adverse actions, and declared his willingness to plead his claims more specifically as soon as the Department of Labor provided mechanisms to protect Respondent's attorney-client privilege and confidentiality. Such a complaint would have almost certainly survived preliminary attacks. *See Gen. Dynamics Corp. v. Superior Court*, 7 Cal 4th 1164, 1170 (1994) (observing that dismissal of a claim due to obstacles presented by attorney-client privilege is rarely if ever appropriate at the pleading stage). Moreover, even a limited filing would have enabled an ALJ to determine if some combination of protective orders and in camera review would have allowed the case to go forward. *See id*. Once the issues pertaining to confidentiality and privilege were resolved, the complaint could have been amended as necessary. *See* 29 C.F.R. § 18.5(e); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (holding that leave to amend complaints should be "freely granted").

Fourth, even assuming that this Court found that no combination of protective measures would have allowed the case to move forward without compromising attorney-client privilege, it would still not be clear that Complainant would have been precluded from seeking relief. While many courts apply an exception to the attorney-client privilege only where the client brings suit against the attorney or where an attorney must reveal privileged communication to collect a fee, some courts have held that attorneys can compromise privilege to bring employment discrimination claims. *See Willy v. Admin. Review Bd.*, 423 F.3d 483, 495 (5th Cir. 2005); *see also Van Asdale v. Int'l Game Tech.*, 498 F. Supp 2d 1321, 1329 (D. Nev. 2007) (noting in dicta that disclosure of confidential information for a SOX whistleblower claim is appropriate in an ALJ hearing). While the Ninth Circuit has yet to consider this issue, in light of the findings of other courts, it is not certain that Complainant would have been precluded from bringing his claim even if Respondent had categorically refused to waive privilege.

For these reasons, I find that restrictions attributable to Complainant's attorney-client relationship with Respondent are not sufficient to justify equitable tolling of the 90-day SOX filing period.

b. Filing in the Wrong Forum

Complainant contends that the statue of limitations should be tolled because he "raise[d] the precise statutory claim in issue before the DOJ, which has jurisdiction under SOX and was

[5] Presumably, Complainant's counsel recognized that privilege was not an obstacle to bringing the claim when he wrote to Respondent's counsel that "I don't anticipate that we will need to disclose attorney client communications to prosecute our claim and I don't expect that you will need to disclose any privileged communications with [Complainant] in order to defend it...I recognize that you may disagree about specific waiver issues but we will be able to get a judicial determination of those matters to resolve any disagreements." Reply Ex. Y at 158.

conducting its own criminal investigation." Response at 39. In support of this assertion, Complainant refers to his former counsel's suggestion to the U.S. Attorney's Office that they "might wish to examine" whether Respondent had violated a criminal statute in retaliating against Complainant. *See Id.*; Ehrlich Decl., ¶ 3. While the Sarbanes-Oxley act authorizes the Department of Justice to prosecute criminal violations of the Act, the Department of Labor has exclusive jurisdiction over whistleblower complaints. *See* 18 U.S.C § 1513(e); *see also* 18 U.S.C. § 1514A(b). It strains credulity for Complainant, an experienced attorney represented by several other expert attorneys, to suggest that his former counsel's comments regarding a possible criminal violation might in anyway be tantamount to "raising the precise statutory claim." Moreover, Complainant does not even allege that he attempted to file a complaint with the DOJ or any other non-DOL forum. Accordingly, I find that equitable tolling due to filing in the wrong forum is inappropriate in the present matter.

II. Equitable Estoppel

Equitable estoppel, sometimes referred to as "fraudulent concealment," prohibits a respondent from asserting the statute of limitations as a defense if the respondent took active steps to prevent the complainant from timely filing. *Santa Maria,* 202 F.3d at 1176. In determining if the doctrine applies, courts consider a non-exhaustive list of factors, including: (1) the complainant's actual and reasonable reliance on the respondent's representations, (2) evidence of improper purpose on the part of the respondent, or of the respondent's knowledge of the deceptive nature of its conduct, and (3) the extent to which the purposes of the limitations period have been satisfied. *Id.; Reynolds v. Dave & Busters,* 2007-SOX-00028 (ALJ May 12, 2008).

Here, there is no indication that Respondent made any misrepresentations that prevented Complainant from timely filing. On the contrary, Complainant, an experienced attorney, indicates that he was aware of the limitations period under the Act and consciously chose to delay filing. Response at 38-39.

Similarly, Complainant has failed to demonstrate that Respondent's assertion of privilege was in any way inappropriate. While Complainant suggests that "Marvell may have asserted attorney-client privilege for the purpose of preventing [Complainant] from filing his claim," he does not venture beyond mere conjecture in making the case that Marvell's assertion of privilege was improper. Response at 38. Rather, Complainant contends the obligations arising from his relationship with Respondent created an "unenviable Catch-22" which both obliged him to file his claim under Sarbanes-Oxley and threatened to expose him to California sanction for doing so. Response at 40. However, as noted *infra*, Complainant's characterization of his dilemma is overly simplistic and ignores the possibility of employing protective measures to allow the claim to move forward. More importantly, even if Complainant's theory of his predicament were accurate, absent some showing that there was improper purpose on the part of Respondent, equitable estoppel is inapplicable. It is not the place of this Court to rewrite the statute of limitations, regardless of the underlying merits of Complainant's case. *See Mohasco Corp. v. Silver*, 447 U.S. 807.

III. Premature Dismissal

Complainant argues that Respondent's motion is premature because "[s]ummary disposition is inappropriate where issues of equitable tolling and equitable estoppel are involved." Response at 41. This statement, however, mischaracterizes the law. Asserting tolling or estoppel does not guarantee that a complaint will survive a motion for summary decision. On the contrary, summary decision is appropriate in the absence of any genuine issues of material fact. *See Celotex Corp*, 477 U.S. at 323.

Here, the facts that relate to equitable tolling and estoppel are not in dispute. For the reasons discussed above, these facts cannot be reasonably construed as permitting either form of equitable relief. Accordingly, summary decision is appropriate.

In summary, I find that neither equitable tolling nor equitable estoppel are applicable in the present case. I also find that Respondent's motion for summary decision is not premature. Thus, because the portions Complainant's claim based on adverse actions that occurred before June 28, 2007, including his termination with Respondent, were not timely filed, Respondent's Motion for Summary Decision is hereby granted.

ORDER

For the reasons stated above:

IT IS ORDERED that:

1. Respondents' Motion for Summary Decision is **GRANTED** as to Complainant's claims based upon adverse actions that occurred prior to June 28, 2007, including his termination.

A

GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California