2006 WL 3060149
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

E.E.O.C., Plaintiff,
and
Delia Casas, Myriam Cazares, Miriam Delgado, Patricia Delgado, Flor Rivera and Terri Salcido, Applicant-Intervenors,
v.
KOVACEVICH "5" FARMS, a partnership, Defendant.

No. 1:06 CV 0165 OWW TAG. | Oct. 27, 2006.

Attorneys and Law Firms

Evangelina Patricia Hernandez, Linda Susan Ordonio-Dixon, William Robert Tamayo, U.S. Equal Employment Opportunity Commission, San Francisco, CA, for Plaintiff.

Robert Tomas Olmos, Allred, Maroko & Goldberg, Los Angeles, CA, for Applicant-Intervenors.

Ronald H. Barsamian, Barsamian Saqui and Moody, Fresno, CA, for Defendant.

Opinion

ORDER DENYING DEFENDANT'S MOTION TO DISMISS SECOND CLAIM FOR RELIEF IN COMPLAINT IN INTERVENTION (DOC. 28)

OLIVER W. WANGER, District Judge.

***1** On February 13, 2006, the Equal Employment Opportunity Commission (EEOC) filed a Complaint against Kovacevich "5" Farms (K5) pursuant to Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 alleging unlawful employment practices on the basis of sex and seeking relief on behalf of six charging parties: Patricia Delgado, Myriam Cazares, Flor Rivera, Miriam Delgado, Terri Salcido, and Delia Casas (Charging Parties/Intervenors).

By Order filed on August 7, 2006, Magistrate Judge Goldner granted the charging parties' motion to intervene. On August 23, 2004, the Charging Parties/Intervenors filed a Complaint in Intervention against K5. The First Claim for Relief alleges sex discrimination in employment in violation of Title VII. The Second Claim for Relief alleges sex discrimination in employment in violation of the Fair Employment and Housing Act (FEHA), California Government Code §§ 12900*et seq*. The Complaint in Intervention alleges in pertinent part:

> 12. On or about November 13, 2003, Plaintiff-Intervenors filed charges of employment discrimination with Plaintiff [EEOC] alleging sex discrimination by Defendant. These charges of employment discrimination were dual-filed with the California Department of Fair Employment and Housing ('DFEH'). Pursuant to the work-sharing agreement between said agencies, the DFEH issued a right to sue letter to each Plaintiff-Intervenor and Plaintiff [EEOC] assumed responsibility for investigating and processing said charges. On August 18, 2004, Plaintiff [EEOC] issued a Letter of Determination, finding that Defendant violated Title VII of the Civil Rights Act of 1964 by refusing to hire Plaintiff-Intervenors, and a class of female applicants, because of their sex, female.

K5 moves to dismiss the Second Claim for Relief for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, on the ground that the statute of limitations for this claim elapsed and that Charging Parties/Intervenors are not entitled to tolling of the statute of limitations.

A. *Procedural Issue-Untimely Opposition*

K5 contends that Charging Parties/Intervenors' opposition to the motion should be disregarded in resolving the motion because it was untimely served on K5.

K5's motion to dismiss was filed on September 12, 2006 and noticed for hearing on October 16, 2006. The opposition to the motion was filed with the court and electronically served on K5 on October 2, 2006. Rule 78-230(c), Local Rules of Practice, provides in pertinent part:

> Opposition ... shall be filed with the Clerk not less than fourteen (14) days preceding the noticed ... hearing date. Opposition shall be

> personally served on opposing counsel not less than fourteen (14) days preceding the hearing date (personal service) or mailed or electronic service not less than seventeen (17) days preceding the hearing date ... No party will be entitled to be heard in opposition to a motion at oral arguments if opposition to the motion has not been timely filed by that party....

***2** Because the opposition was not served on K5 on seventeen days prior to the hearing date, K5 requests that the opposition not be considered in resolving the motion and that Charging Parties/Intervenors not be allowed to argue in opposition to the motion on October 16. K5 asserts: "The very lack of diligence that condemns Intervenors' cause of action under state law continues to this day, and is demonstrated by their failure to comply with the plain terms of the local rules of court."

K5's request that the opposing brief not be considered in resolving the motion to dismiss is not allowed by Rule 78-230(c). The only sanction for an untimely filed opposition is that the party will not be allowed to participate in oral argument. Furthermore, the opposition brief was timely filed with the court-K5's claim relates solely to service of the opposition. Finally, K5 points to no prejudice to itself because of the untimely service of the opposition-K5's reply brief was filed on Friday, October 6. There was no prejudice to the ability of the court to be prepared for the October 16 hearing.

Consequently, K5's request is DENIED.

B. ***Procedural Issue-Request to File Supplemental Authority***

On October 11, 2006, Charging Parties/Intervenors filed a request to file supplemental authority in opposition to the motion to dismiss. Specifically, they seek to cite the Memorandum Opinion and Order Re Defendant's Motion to Dismiss Complaint in Intervention filed by Judge Ishii on February 24, 2004 in *EEOC v. Harris Farms, Inc.,* No. 1:02-cv-6199 AWI LJO. Counsel for the Charging Parties/Intervenors asserts that he became aware of Judge Ishii's Order on October 11, 2006.

K5 objects that the request to file supplemental authority is untimely because the authority should have been included in Charging Parties/Intervenors' initial opposition to the motion to dismiss.

The request to file supplemental authority is GRANTED. Parties are expected to fully support their positions with appropriate legal authority in accordance with Rule 78-230, Local Rules of Practice. However, on occasion such authority is discovered after the brief has been filed. Because any decision on a motion should comply with the law, appropriate legal authority should not be disregarded merely because it was not cited in an initial brief. Any prejudice to the other party can be alleviated by the allowance of a supplemental response. Here, K5 filed a supplemental response prior to oral argument discussing the merits of Judge Ishii's Order. In any event, Judge Ishii's Order is not binding precedent. *See Starbuck v. City and County of San Francisco,* 556 F.2d 450, 457 n. 13 (9th Cir.1977).

C. ***Governing Standards***

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. *Novarro v. Black,* 250 F.3d 729, 732 (9th Cir.2001). Dismissal of a claim under Rule 12(b)(6) is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."*Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory or where the complaint presents a cognizable legal theory yet fails to plead essential facts under that theory. *Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530, 534 (9th Cir.1984). In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of all factual allegations and must construe all inferences from them in the light most favorable to the nonmoving party. *Thompson v. Davis,* 295 F.3d 890, 895 (9th Cir.2002). However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *Ileto v. Glock, Inc.,* 349 F.3d 1191, 1200 (9th Cir .2003). Immunities and other affirmative defenses may be upheld on a motion to dismiss only when they are established on the face of the complaint. *See Morley v. Walker,* 175 F.3d 756, 759 (9th Cir.1999); *Jablon v. Dean Witter & Co.,* 614 F.2d 677, 682 (9th Cir.1980). When ruling on a motion to dismiss, the court may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the court takes judicial notice. *Parrino v. FHP, Inc.,* 146 F.3d 699, 705-706 (9th Cir.1988).

D. ***Evidence in Support of Motion***

***3** In moving to dismiss, K5 submits two declarations and a number of documents. No objection and no contention are made by Charging Parties/Intervenors that the motion must be treated as one for summary judgment.

K5 submits as an exhibit a copy of the charges filed with the DFEH and the EEOC on December 12, 2003. Also

submitted are copies of the right-to-sue letters issued by the DFEH on December 15, 2003. The DFEH right-to-sue letters stated in pertinent part:

> The EEOC will be responsible for the processing of this complaint. DFEH will not be conducting an investigation into this matter. EEOC should be contacted directly for any discussion of the charge. DFEH is closing its case on the basis of 'processing waived to another agency.'
>
> ...
>
> Since DFEH will not be issuing an accusation, this letter is also your right-to-sue notice. According to Government Code section 12965, subdivision (b), you may bring a civil action under the provisions of the Fair Employment and Housing Act against the ... employer ... named in the above-referenced complaint ...Government Code section 12965, subdivision (b), provides that such a civil action must be brought within one year from the date of this notice. Pursuant to Government Code § 12965(d)(1), this one year period will be tolled during the pendency of the EEOC's investigation of your complaint. You should consult an attorney to determine with accuracy the date by which a civil action must be filed.....

Ronald Barsamian and Anthony Raimondo, attorneys for K5, aver that, at the time the EEOC charges were filed, attorney Marni Willensen of Miner, Burnhill & Galland, advised them that her firm represented the charging parties. Submitted as an exhibit is a copy of the August 18, 2004 letter from the EEOC to Mr. Raimondo, advising that the EEOC had determined reasonable cause to believe that K5 had discriminated against the Charging Parties and initiating a conciliation conference. Mr. Barsamian avers that he participated in an extended conciliation conference call with the EEOC and attorneys for the Charging Parties on March 29, 2005 and that an agreement was not reached to resolve the dispute. Submitted as exhibits are copies of letters dated April 7, 2005 from the EEOC to Mr. Raimondo advising that conciliation had been unsuccessful and that the case was being forwarded to the EEOC's Regional Attorney for litigation review. As noted, the EEOC filed its Complaint on February 13, 2006. Mr. Barsamian avers in pertinent part:

> 6. When the EEOC filed this action in February 2006, EEOC attorney Evangelina Hernandez informed my office that Intervenors were represented by Mr. Tomas Olmos of Allred, Maroko & Goldberg, and stated that Mr. Olmos' clients would be intervening in the EEOC action.
>
> 7. I acknowledged the unconditional right to intervene as established in Title VII, and urged Ms. Hernandez to instruct Mr. Olmos to intervene without delay so that all parties would be formally involved in the litigation.
>
> ***4** 8. hPrior to our Rule 26 conference with the EEOC, Ms. Hernandez asked K5 to consent to participation by Intervenors in the conference. K5 declined to give such consent, and again urged intervention without delay to formalize all parties' participation in this litigation. Intervenors declined, and did not participate in the Rule 26 conference.

A scheduling conference before Magistrate Judge Goldner was held on May 4, 2006. A Scheduling Order was filed on June 9, 2006, wherein Magistrate Judge Goldner ruled in pertinent part:

> The parties are informed and believe that the six charging parties in this case will move to intervene into the instant lawsuit in the near future. The parties would not oppose any motion for intervention.
>
> The Court orders that the ... six charging parties shall intervene in this matter within sixty (60) days of the date of this Scheduling Order.

On June 20, 2006, the Charging Parties filed a motion to intervene, noticing the motion for hearing on August 7, 2006. Submitted with the motion to intervene was a proposed Complaint in Intervention, which proposed Complaint alleged the Second Claim for Relief at issue in the instant motion. On July 19, 2006, K5 filed a notice of non-opposition to the motion to intervene, stating that K5 "reserves the right to file an appropriate response to the proposed Complaint In Intervention if the court grants the motion and permits the intervention."As noted, by Order filed on August 7, 2006, the Magistrate Judge granted the motion to intervene. Another scheduling conference was held on August 17, 2006. By Order filed on August 18, 2006, the Magistrate Judge ordered Charging Parties/Intervenors to file their Complaint in Intervention by August 18, 2006. The Complaint in Intervention was filed on August 23, 2006.[1]

[1] Although the August 18, 2006 Order required the Complaint in Intervention be filed by August 18, Mr. Barsamian avers that the Magistrate Judge ordered that the Complaint be filed by August 25, 2006. Thus, the date in the written order is a typographical error.

E. ***Merits of Motion***

As a general rule, a plaintiff must file an action under the FEHA within one year from the date of the notice of right to sue issued by the FEHA.Cal.Govt.Code § 12965(b).Section 12965(d) provides:

> (1) Notwithstanding subdivision (b), the one-year statute of limitations, commencing on the date of the right-to-sue notice by the Department of Fair Housing and Employment, to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met:
>
> (A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the Department of Fair Employment and Housing.
>
> (B) The investigation of the charge is deferred by the Department of Fair Employment and Housing to the Equal Opportunity Commission.
>
> (C) A right-to-sue notice is issued to the person claiming to be aggrieved upon deferral of the charge by the Department of Fair Employment and Housing to the Equal Employment Opportunity Commission.
>
> (2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the Department of Fair Employment and Housing, whichever is later.
>
> ***5** (3) This subdivision is intended to codify the holding in *Downs v. Department of Water and Power of City of Los Angeles* (1997) 58 Cal.App.4th 1093.

Here, the EEOC did not issue a right-to-sue letter to the charging parties because the EEOC itself brought the employment discrimination complaint against K5. There is no statute of limitations applicable to the EEOC when the EEOC brings an employment discrimination action. *See Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355 (1977). When the EEOC pursues an employment discrimination claim under Title VII, the charging party may intervene pursuant to 42 U.S.C. § 2000e-5(f) ("The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission ...."); *see also* Rule 24(a)(1) ("Upon timely application anyone shall be permitted to intervene in an action: [¶] (1) when a statute of the United States confers an unconditional right to intervene").[2]

[2] Case authority holds that an aggrieved employee has an absolute right to intervene in an employment discrimination action brought by the EEOC against the employer but that intervention still must be timely sought. *See EEOC v. Westinghouse Electric Corporation,* 675 F.2d 164 (8th Cir.1982). In granting Charging Parties/Intervenors' motion to intervene, Magistrate Judge Goldner ruled:

> Here, where the proceedings have only recently commenced, where there has been no delay in moving to intervene, and where no party opposes the motion, it is appropriate to allow intervention.

K5 concedes that the First Claim for Relief under Title VII in the Complaint in Intervention is timely. K5 argues that the Second Claim for Relief is not timely because "nothing suggests that the California Legislature intended to extend the individual right to sue *under the FEHA* without limit when it enacted Cal.Govt.Code § 12965(d)(1)."

As noted *supra,* Section 12965(d)(1) was intended to codify the holding in *Downs v. Department of Water & Power,* 58 Cal.App.4th 1092 (1997). In *Downs,* an employee filed an FEHA claim with the DFEH and a claim under Title VII with the EEOC. The DFEH issued a right-to-sue letter, but it deferred investigation to the EEOC under the work-sharing agreement between the agencies. The EEOC dismissed the employee's Title VII claim, and the employee filed his FEHA action in state court more than one year after the DFEH had issued the right-to-sue letter. The trial court dismissed the FEHA claim, finding that the action was barred by the one-year limitation period set forth in Government Code § 12965(b) because the action was not filed within one year of the issuance of a right-to-sue letter. The Court of Appeals reversed based on the doctrine of equitable tolling. The Court of Appeals noted that three factors determine whether a statute of limitations is equitably tolled: (1) timely notice to defendants in filing the first claim; (2) lack of prejudice to defendants in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by plaintiffs in filing the second claim. 58 Cal .App.4th at 1100. The Court of Appeals further noted:

> The doctrine of 'equitable tolling' is supported by several policy considerations. First, it serves the fundamental purpose of the statutes of limitations by providing timely notice of claims to defendants, without imposing the costs of forfeiture on plaintiffs ... Second, it avoids the hardship of compelling plaintiffs to pursue several duplicative actions simultaneously on the same set of facts ... Third, it lessens the costs incurred by courts and other dispute resolution tribunals, because disposition of a case filed in one forum may render proceedings in the second unnecessary or easier and less expensive to resolve....

***6** The Court of Appeals cited *Salgado v. Atlantic*

Richfield Co., 823 F.3d 1322 (9th Cir.1990), wherein the Ninth Circuit ruled that an EEOC investigation of an employee's claims tolled the one-year statute of limitations in Section 12965(b) until the EEOC issued the right-to-sue letter. In so ruling, the Ninth Circuit stated, "the procedures and remedies of Title VII and the [FEHA] are wholly integrated and related. Moreover the practical relationship between Title VII and California's FEHA, embodied in the work sharing agreement between the EEOC and the [DFEH], provides a basis for tolling § 12965(b)'s one-year statute of limitations during the pendency of the EEOC's administrative process." *Salgado,* 823 F .2d at 1325-1326. The Ninth Circuit further stated: "The state agency deferred investigation and processing of Salgado's claims to the EEOC. The administrative proceedings of the EEOC replaced those of the state agency. Salgado had to await the outcome of the EEOC's processing of his claims in order to receive the full benefit of an investigation" and that "[i]f there is an established administrative mechanism in place to give notice to employers charged with a violation and to undertake efforts at conciliation, it would be anomalous indeed to hold that a claimant, whose use of this mechanism put him outside the relevant time period, could not have that period equitably tolled."*Salgado, id.* at 1326.The Court of Appeals held:

> ... When a charge of discrimination or harassment is timely filed concurrently with the EEOC and the DFEH, the investigation of the charge is deferred by the DFEH to the EEOC under a work-sharing agreement, and the DFEH issues a right-to-sue letter upon deferral, then the one-year period to bring an FEHA action is equitably tolled during the pendency of the EEOC investigation until a right-to-sue letter from the EEOC is received.
>
> ...
>
> Tolling the one-year statute satisfies the policy considerations [underlying equitable tolling]. The DFEH apparently issues a 'right-to-sue' letter under its work-sharing agreement with the EEOC upon deferral of the investigation to the EEOC. If the one-year statute were not tolled, a plaintiff would often be compelled to pursue a state law action before the EEOC had completed its investigation. If the EEOC issued an accusation or achieved conciliation, the state law action would become redundant or moot. Tolling the one-year statute for bringing the FEHA action until the EEOC completes its determination provides a defendant with notice of the charges, but relieves a plaintiff from pursuing duplicative actions simultaneously on the same set of facts. Moreover, disposition of a case by the EEOC may render a state court action unnecessary or easier and less expensive to resolve.

58 Cal.App.4th at 1102.

K5 argues that *Downs* demonstrates that the Legislature only intended to toll the statute of limitations during the pendency of the administrative and investigation process and did not intend to create an unlimited ability to pursue state law claims "by riding on the coattails of an EEOC action in federal court."K5 argues that "once the EEOC determines that conciliation will not reach a resolution, the reason for tolling vanishes, and the statute of limitations must begin to run on the FEHA claim."K5 also refers to the Comment to AB 1146, which enacted Section 12965(d) as demonstrating that the Legislature did not intend to extend the FEHA statute of limitations when EEOC conciliation fails and the EEOC decides to file an action on behalf of the charging parties:

> ***7** This bill codifies the principles in *Downs* and the federal cases, thus allowing complainants in dual-filed cases to await the outcome of the EEOC process by tolling the one-year state right-to-sue period, under specified conditions, until EEOC completes its administrative processing of the charge. The specified conditions are: 1) that a timely charge has been filed concurrently with both DFEH and EEOC; 2) DFEH has deferred to EEOC for charge processing, or EEOC has initially deferred to the state but subsequently undertakes an independent review; and, 3) a right-to-sue notice has been issued regarding the state claim.

K5, noting that the Charging Parties/Intervenors were represented by counsel throughout the EEOC investigation and conciliation process and actively participated in the conciliation process, asserts that they never took any action to preserve their FEHA claim even when the EEOC waited ten months to file its Complaint with this court after giving notice on April 7, 2005 that the conciliation process had failed. K5 contends that the tolling period for the FEHA claim ended on April 7, 2006. K5 argues:

> Intervenors never attempted to intervene and filed their Complaint within the two months between the filing of the EEOC Complaint and the expiration of the limitations period for their FEHA claim ... Intervenors might still be sitting on their hands today had K5 not asked the court to compel them to act.

> Thus, Intervenors have not acted with the reasonable diligence required under the holding in *Downs,* and allowed their cause of action under state law to lapse. State law clearly required intervenors to act with reasonable diligence to preserve their claims under the FEHA, but they failed to do so. Despite having ample opportunity to raise their claims under state law, they chose to do nothing, and the price that they pay for their unreasonable inaction is the loss of their cause of action under the FEHA.

Charging Parties/Intervenors note that the conditions for tolling the one-year statute of limitations set forth in Section 12965(d)(1) existed in this action. The question is the applicable period of that tolling. Pointing to the language in Section 12965(d)(2) that "[t]he time for commencing an action for which the statute of limitations is tolled under paragraph (1) expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the Department of Fair Employment and Housing, *whichever is later* " (emphasis added), they argue:

> [T]he federal right-to-sue letter was never issued because the EEOC elected to pursue litigation. In this circumstance, the charging party has the 'right' to intervene in the pending litigation. The right to intervene thus supplants the purpose of the federal right-to-sue notice. As long as the charging party has the right to intervene on the federal Title VII claim, the charging party should also have the right to pursue the state FEHA claim.

***8** The Charging Parties/Intervenors argue that K5's position that the tolling provision does not apply when the EEOC elects to file litigation "is inconsistent with the plain language of the statute which ... sets forth three specific criteria to trigger tolling" and that the issuance of an EEOC right-to-sue letter is not one of those criteria. Noting that the purpose of the tolling provision in Section 12965(d)(1) is to give the parties the opportunity to engage in the administrative process and to relieve a charging party from pursuing duplicative actions simultaneously, citing *Downs, supra,* 55 Cal.App.4th at 1102, the Charging Parties/Intervenors contend that K5's position penalizes them for participating in the administrative process and allowing the EEOC to explore an administrative resolution:

> Defendant's position rests solely on the fact of the EEOC electing to file litigation. This decision is not one wherein Intervenors have any input, discretion or prior knowledge. Despite the fact that the case may be under 'legal review,' the Intervenors cannot assume that such action will be taken. The administrative processing of the EEOC is not completed until a decision is made regarding litigation. If litigation is declined, the EEOC issues a right-to-sue notice and the party is given a minimum period of ninety (90) days to file both the state and federal claims. If the EEOC elects to litigate, the time frame for the party is now controlled by the right to intervene.

The position of the Charging Parties/Intervenors is correct. The tolling period set forth in Section 12965(d)(1) ends "when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the Department of Fair Employment and Housing, whichever is later."The federal right-to-sue period to commence a civil action expires 90 days after issuance by the EEOC of a notice of right to sue. K5's position that the "federal right-to-sue period to commence a civil action" ran from the date the EEOC notified the parties that conciliation had failed and that litigation review was being conducted by the EEOC's Regional Attorney is unsupported by any statute or regulation. In *Lynn v. Western Gillette, Inc.,* 564 F.2d 1282, 1286 (9th Cir.1977), the Ninth Circuit ruled:

> The dispositive issue on this appeal is whether the statutory ninety-day period within which an aggrieved party must file his private civil action is triggered by notification from the EEOC that conciliation efforts have failed or by the formal Notice of Right to Sue letter. We conclude that the ninety-day period does not begin until the charging party receives a letter specifically informing him of his right to sue.

K5 notes that the Charging Parties/Intervenors never requested a right-to-sue letter from the EEOC in order to bring the claims alleged in the Complaint in Intervention

in federal court, despite the fact that they had the right to demand such from the EEOC at any time after May 12, 2004. In so contending, K5 refers to 29 C.F.R. § 1601.28(a)(1) which provides that the EEOC must issue a right-to-sue notice upon written request if the charge of discrimination has been pending for more than 180 days.

***9** In *Lynn, supra,* 564 F.2d at 1286-1287, the Ninth Circuit commented:

> Our determination of the type of notice necessary to begin the period in which a private action may be filed does not imply that a plaintiff's lack of diligence in filing an action must be overlooked. The Act provides that an aggrieved party may request a Right to Sue letter from the Commission any time after 180 days following the filing of the charge with the Commission. Particularly where the aggrieved party has consulted counsel and is aware of this right, it becomes inequitable at some point for the employee to delay filing suit. The complainant should not be permitted to prejudice the employer by taking advantage of the Commission's slowness in processing claims or by procrastinating while being aware that the Commission intends to take no further action. Under such circumstances, it is proper for the district court, in the exercise of its equitable discretion, to take the plaintiff's lack of diligence into account in determining the amount of back pay, if any, to be awarded the plaintiff should he prevail on the merits.

However, in *Brown v. Continental Can Co.,* 765 F.2d 810, 814-815 (9th Cir.1985), the Ninth Circuit held:

> Laches is an equitable doctrine. Its application depends upon the facts of the particular case ... To establish laches the defendant must show both an unexcused or unreasonable delay by the plaintiff and prejudice to himself ... this Circuit has recognized that laches can be used as a defense against a private plaintiff in a Title VII suit....
>
> Continental argues that *Boone v. Mechanical Specialties Co.,* [609 F.2d 956 (9th Cir.1979)] is dispositive here. In *Boone,* this circuit held that a private plaintiff's Title VII claims was barred by laches where there was a seven-year delay. The court, however, emphasized that its holding stated the exception and not the general rule. 609 F.2d at 960. The EEOC in that case had frequently informed the plaintiff that it would issue a right-to-sue letter to him and assist him in bringing an action in the courts. The plaintiff, however, repeatedly refused these offers and the EEOC kept his file open at his request. The plaintiff offered no excuse to the court for his seven-year delay and did not challenge the defendant employer's showing that it had been significantly prejudiced through no fault of its own by plaintiff's unexcusable delay.
>
> In the instant case, Brown did not deliberately delay seeking a right-to-sue letter. Furthermore, he filed within ninety days of a valid right-to-sue letter. This circuit has recognized that EEOC delays are not to be charged against private plaintiffs and that complainants are not required to terminate the administrative process by requesting a notice of right-to-sue. *See Bratton v. Bethlehem Steel Corp.,* 640 F.2d at 667 n. 8. 'Ordinarily, if the EEOC retains control over a charge, a private party will not be charged with its mistakes."*Gifford,* 685 F.2d at 1152.

***10** Although these decisions are not dispositive of the issue raised by K5, they demonstrate that Charging Parties/Intervenors were not required to demand a right-to-sue letter from the EEOC when the EEOC notified them that reconciliation had failed and that the EEOC had forwarded the matter for litigation review.

With regard to K5's assertion that the Charging Parties/Intervenors failed to act with reasonable diligence in filing the Complaint in Intervention, they respond that the Complaint in Intervention was filed within the time period ordered by the Magistrate Judge and note that K5 did not oppose their motion for intervention on this ground. They further argue:

> It is indeed incongruous to claim that the Title VII claim is timely and the FEHA claim (based on the same facts) is untimely when one of the important purposes underlying the tolling principle is the judicial economy. Defendants' position would require parties to file FEHA claims in state court pending the EEOC administrative processing in order to avoid the risk that the tolling would be retroactively denied in the event EEOC elected to pursue litigation.

They further claim it not their fault that the EEOC took ten months to decide whether to file the Complaint and

that, had the Charging Parties/Intervenors filed an FEHA claim in state court during that ten month period, K5 "would now be objecting to having to defend in two separate legal forums and the unnecessary costs of multiple litigation."Finally, they note that K5 has pointed to no prejudice to it resulting from the alleged lack of diligence.

K5 replies that Charging Parties/Intervenors will not be penalized for having engaged in the administrative process and allowing the EEOC to explore administrative resolution.

> The critical delay occurred *after* the administrative process was complete, and there was no further hope of an administrative resolution. Intervenors state that they had no input, discretion, or prior knowledge of the EEOC decision to sue K5, and assert that 'Despite the fact that the case may be under "legal review," the Intervenors cannot assume that such action will be taken.'Intervenors actually make K5's point. Intervenors did not know if the EEOC would sue, and yet they did nothing to preserve their claims under the FEHA. They could have, and should have, requested their right to sue letter, and acted to preserve their claims.

Charging Parties/Intervenors were entitled under Section 12965(b) to tolling of the limitation period until the EEOC issued a notice of right to sue. If the EEOC's litigation review resulted in the decision to issue a notice of right to sue, the tolling period would have terminated at that time and the limitation period set forth in Section 12965(b)(2) would have accrued. There is nothing in the language of Section 12965(b)(2) that supports an interpretation that the complaining party must accelerate issuance of the notice of right to sue by requesting that the EEOC issue one once the EEOC notifies the parties that conciliation has failed. A district court cannot rewrite a state statute to impose conditions not specifically required by the Legislature.

***11** K5 further replies that, had Charging Parties/Intervenors acted promptly when the EEOC filed this action, they could have preserved their FEHA claims. In so contending, K5 asserts that the statute of limitations under the FEHA did not expire until April 14, 2006, four months after the EEOC filed this action. K5 asserts that Charging Parties/Intervenors chose to do nothing to preserve their right to bring their FEHA claims:

> Intervenors had any number of options other than filing their FEHA claims in state court to preserve those claims; all that they had to do was act diligently either before the EEOC filed suit by requesting a right to sue letter or after the EEOC filed this action by promptly intervening, but they did nothing. There is simply no reason or authority to extend tolling of the limitations period for FEHA causes of action without limitation.
>
> Although the statutory condition terminating tolling of the FEHA limitation period did not occur (because the EEOC did not issue a notice of right to sue), it nonetheless remains that Charging Parties/Intervenors did not make any effort to intervene until some months after the EEOC commenced this litigation. It is apparent that Charging Parties/Intervenors believe that their right to intervene in an EEOC Title VII complaint carries with it the right to include FEHA claims. However, no authority is cited for this position. Pursuant to Rule 24(a)(1), Federal Rules of Civil Procedure, Charging Parties/Intervenors only had a right to intervene in the EEOC's Title VII claims.

Nonetheless, given that the statutory condition for termination of the tolling period did not occur, there is no legal basis for a claim that the FEHA claims are time-barred. As discussed *supra,* K5's contention that Charging Parties/Intervenors had one year from the date of the DFEH notice of right to sue to file their FEHA claims in court is contrary to the express wording of Section 12965(d)(1). K5 essentially requests that additional terms be implied in the statute to cover the situation where the EEOC determines to file litigation against the employer under Title VII. As noted *supra,* a federal district court does not have this authority. Here, because K5 raised no contention that Charging Parties/Intervenors' motion to intervene in the Title VII claims alleged by the EEOC against K5 was not timely, K5 cannot logically argue that the motion to intervene to bring the FEHA claims was untimely absent a statutory provision precluding that intervention. As noted, no statutory provision is cited.

This result is consistent with the statutory purposes of § 12965(b), avoidance of unnecessary filings in state and federal courts, economy in centering the claims in one court, and the absence of prejudice because K5 had full notice of the claims and the ability to investigate.

This conclusion is bolstered by Judge Ishii's Order in *EEOC v. Harris Farms, Inc.,* No. 1:02-cv-6199 AWI LJO. Judge Ishii addressed a motion to dismiss the FEHA claim filed by the intervenor under identical circumstances to those presented in this case. Harris Farms argued that although the statute of limitations on the FEHA claim was tolled during the pendency of the EEOC investigation, the tolling expired on the later of one year after the DFEH provided her with a notice of right to sue or when the federal right to sue period to commence a civil action expired. In rejecting this claim, Judge Ishii ruled in pertinent part:

> ***12** Although Defendant states that in [*EEOC v. Farmer Brothers,* 31 F.3d 891 (9th Cir.1994)] the court 'held that the plaintiff's FEHA cause of action as

tolled until February 20, 1988 (the date the EEOC initiated its lawsuit) and since her amendment related back to her original intervention, the FEHA amendment was timely, ..., this court is unable to locate any such language in the *Farmer Brothers* opinion. Rather the Ninth Circuit references and relies on a prior ruling in *Salgado v. Atlantic Richfield Co.,* 823 F.2d 1322, 1326 (9th Cir.1987) holding that the statute of limitations on a FEHA cause of action is tolled 'pending resolution of the EEOC investigation.'This court can locate no language in the *Farmer Brothers* opinion regarding the *expiration* of the tolling period. Thus, while the court finds that it would be reasonable for the tolling period to expire when the EEOC initiates a civil action, it is unconvinced that *Farmer Brothers* establishes a rule on this issue.

Moreover ..., the only citation that Defendant provides for the concept that she had ninety days after the expiration of the tolling period to bring her FEHA claim is a citation to 42 U.S.C. section 2000e-5(f)(1)... This statute establishes a ninety-day time period applicable in certain situations, but it makes no mention of a ninety-day time period after the EEOC has commenced a civil action. The court thus finds, that even if the tolling period expires on the date that the EEOC initiates a civil action, Defendant has not demonstrated that the federal right-to-sue period to commence a civil action expires ninety days later. Because under Government Code section 12965(d) and (e) the time for filing an action for which the statute of limitations was tolled expires when the federal right-to-sue period expires or one year from the right-to-sue notice from the DFEH, whichever is *later,* and Defendant has not established when the federal right-to-sue period expires in this case, the court concludes that Defendant has failed to demonstrate that Intervenor's second claim for relief is barred by the statute of limitations.

The court is unaware of any authority on when the tolling period would expire in a case like this in which the EEOC conducts an investigation and then files a civil action without providing the employee with a right-to-sue letter, or how long the statute of limitations would be once it started running. The court acknowledges that this apparent dearth of authority is surprising in light to the parties' need to have a statute of limitations by which to gauge the ability of an employee to intervene in an action such as this and to specify the factual basis for her claim. However, without such authority, this court is unable to provide the parties with a ruling on these issues. The court can only conclude that Defendants have not shown that they are entitled to dismissal of Intervenor's second claim for relief.

CONCLUSION

***13** Here, Defendant had specific notice of Plaintiff's intent to intervene as of right during February 2006, when the EEOC complaint under Title VII was filed. At a May 4, 2006, Scheduling Conference, Magistrate Judge Goldner was advised and memorialized in her June 9, 2006, Scheduling Order that Charging Plaintiffs intended to intervene and they were given until August 8, 2006, to do so. Plaintiffs moved to intervene June 20, 2006, Defendant did not oppose, and their motion to intervene was granted on August 18, 2006. The Complaint in Intervention was ordered filed August 23, 2006. The § 12965(b) tolling requirements were satisfied. Limitations on the federal right-to-sue period where no EEOC right-to-sue notice was issued is undefined by statute. The Defendant had full notice of the state claim, knew it would be filed and has suffered no prejudice. The Complaint in Intervention was filed within six months of the filing of the EEOC complaint.

Defendant's motion to dismiss the Second Claim for Relief under state law is DENIED.