NO. 89660-7

SUPREME COURT OF THE STATE OF WASHINGTON

POTELCO, INC.,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Department of Labor and Industries opposes further review of this appeal. This is a routine case in which Potelco's lack of diligence caused it to miss an appeal deadline. It does not involve an issue of substantial public interest.

Under RCW 49.17.140(1), Potelco had 15 working days to appeal a citation issued under the Washington Industrial Safety and Health Act (WISHA). It appealed three days late because its safety director, Bryan Sabari, did not find the citation in his inbox until nearly a month after it had been placed there. Mr. Sabari was out of the office for part of the 15-day appeal period, yet nobody reviewed his mail. And, upon his return, he did not review his mail for time-sensitive documents. Rather, he took "several days to go through" his mail and to find the citation at "the bottom of all the piles of mail."

As the Court of Appeals correctly recognized, there is no basis to apply equitable tolling here. Indeed, Potelco admits that no evidence of bad faith or deception exists and that it was not diligent. Pet. at 1. But Potelco argues that this Court should take review because it would be "educ[ational]" to consider the merits of a WISHA appeal. Pet. at 5. This is not a reason to apply equity under any articulation of this Court's

precedent. Because this is a garden variety case of excusable neglect, this Court should deny Potelco's petition.

II. COUNTERSTATEMENT OF THE ISSUE

Discretionary review is not warranted in this case. But if this Court were to grant review, the following issue would be presented:

> Does the doctrine of equitable tolling excuse Potelco's late appeal where the Department did not deceive or confuse the company into missing the appeal deadline, and where the Potelco employee responsible for addressing WISHA citations did not discover the citation in his inbox for nearly a month after it had been placed there?

III. COUNTERSTATEMENT OF THE CASE

In August 2010, the Department inspected a Potelco worksite. *See* CP 131, 144. A closing conference was held on December 2, 2010. CP 144. Bryan Sabari, Potelco's Director of Safety, was aware of the August 2010 inspection. CP 122, 131. He believed that he was present at the closing conference. CP 131.

On December 20, 2010, the Department issued a citation to Potelco for multiple WISHA violations.[1] CP 144-46; *see also* WAC 296-155. The citation included a statement of appeal rights that, under RCW 49.17.140(1), Potelco had 15 working days from the date of receipt to appeal the citation. CP 146. The Department mailed the citation to

[1] A calendar showing events relevant to this appeal appears at CP 152-53.

Potelco's local headquarters in Sumner by certified mail. CP 112, 117-18, 122, 147-48.

On December 21, 2010, Potelco received the citation. CP 117, 147-48. According to office protocol, the receptionist placed the citation in Mr. Sabari's inbox. CP 117-18, 125-26. Under RCW 49.17.140(1), Potelco had until January 13, 2011, to appeal the citation. *See* CP 152-53.

It was Mr. Sabari's sole responsibility to "handle[]" any citation that the Department issued to Potelco. CP 126, 131-32, 136-37. During Mr. Sabari's seven years as safety director, Potelco appealed every citation that the Department had issued to it, about 20 in total. CP 131. Mr. Sabari knew about the 15-day time frame for appeals. CP 131, 136; *see also* CP 146.

In this case, Mr. Sabari did not discover the citation in his inbox until approximately January 19, 2011, nearly one month after the receptionist deposited it there. CP 118, 133-34, 147, 149-51. In his testimony, Mr. Sabari explained the reason for his late discovery. Before Christmas, he "had time off." CP 127. It is not clear from this statement whether Mr. Sabari was in the office on the weekdays of December 21, 22,

or 23.[2] *See* CP 127, 152. Friday, December 24 was a holiday. CP 152. From "sometime after Christmas Day" to January 3, 2011, he was skiing in Aspen. CP 127. On January 3, he flew from Aspen to Milwaukee on Potelco business. CP 127. He returned to Washington state on Thursday, January 6 or Friday, January 7. CP 127-28. He could not recall what day he returned to the Sumner office but it was sometime during the week of January 10. CP 136; *see also* CP 128, 133.

During this extended absence, Mr. Sabari did not arrange for anyone else to review his mail. CP 136-37. About 30 other employees worked in the Sumner office. CP 132.

After Mr. Sabari returned to the office during the week of January 10, he started to review his accumulated mail. CP 133, 135-36. The mail that exceeded the capacity of his inbox had been left in piles on his desk. CP 135. It took Mr. Sabari "several days to go through" his mail. CP 135. The citation was at "the bottom of all the piles." CP 135. When he saw the envelope from the Department, he "opened it immediately" and sent it to Potelco's legal counsel. CP 132-33, 135. Potelco's counsel appealed

[2] Potelco states in its petition that Mr. Sabari was "away from the office at the time Potelco received the Citation." Pet. at 2 (citing CP 127). The record does not necessarily support this fact. Mr. Sabari's exact testimony was "[i]n the days leading up to the holiday I had time off both before Christmas and I had - - I took the entire week off between Christmas and New Year's." CP 127. It is not clear from this statement whether Mr. Sabari was "away from the office" on December 21 when Potelco received the citation. The receptionist could not recall whether Mr. Sabari was in the office on December 21. CP 118-19.

that same day. CP 133-34. The Department received the appeal on January 19, 2011. CP 150.

After a timeliness hearing, the Board of Industrial Insurance Appeals dismissed Potelco's appeal as untimely under RCW 49.17.140(1). CP 13, 34. Potelco appealed to superior court. The Department moved for summary judgment, arguing that the appeal was untimely. CP 154-162. Potelco filed a cross-motion for summary judgment, arguing that the superior court should apply equitable tolling and consider the merits of the appeal. CP 1-7. The superior court affirmed the Board's decision and granted the Department's motion for summary judgment. CP 8-9.

The Court of Appeals, Division One, affirmed the superior court in an unpublished opinion, concluding that there was no basis to apply equitable tolling. *Potelco, Inc. v. Dep't of Labor & Indus.*, No. 69219-4-I, slip op. at 7 (Nov. 12, 2013). The Court of Appeals found no ground for applying equity under controlling Supreme Court precedent, holding that Potelco did not point out any objectionable Department action or demonstrate diligence when it took Mr. Sabari several days to review his mail:

> Potelco can point to no Department action that deceived or confused the company into missing the deadline. Nor can Potelco show the diligence required by *Millay*.[3] Sabari,

[3] *Millay v. Cam*, 135 Wn.2d 193, 955 P.2d 791 (1998).

> Potelco's director of safety, testified that he was familiar with the timeframe for appealing citations because during his seven years with the company, Potelco had appealed every citation it received, about 20 total. He was aware of the inspection that led to the citation at issue here, and thought he was present at the closing conference on the citation. Nonetheless, Sabari and Potelco failed to arrange for someone to review Sabari's mail for citations during his extended absence from the office. Upon his return, it took Sabari several days to discover the citation "at the bottom of all the piles of mail." This does not amount to diligence.

Potelco, slip op. at 5-6.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Discretionary review is not warranted here. Potelco admits that it was not diligent and that there is no evidence of bad faith by the Department. Pet. at 1. Under well-established case law, courts do not apply equitable tolling in the absence of such evidence. Potelco presents no argument, and none exists, that this case law is not controlling. Nor does Potelco give any compelling reason why this Court should abandon its precedent on equitable tolling. No issue of substantial public interest is presented by a party that does not act diligently and that seeks review of a garden variety neglect case.

A. The Court of Appeals Correctly Rejected Potelco's Request For Equitable Tolling Because It Is Undisputed That Potelco Does Not Meet Either Predicate For Its Application

An employer has 15 working days from communication of a

WISHA citation to appeal the citation. RCW 49.17.140(1).[4] An employer's failure to appeal within this 15-day timeframe means that the citation "shall be deemed a final order of the department and not subject to review by any court or agency." RCW 49.17.140(1); *see also* WAC 296-900-17005; *accord Danzer v. Dep't of Labor & Indus.*, 104 Wn. App. 307, 317, 16 P.3d 35 (2000) (a WISHA citation became final and the employer "lost all rights to appeal it to the Board" when the employer did not comply with the 15-day appeal period in RCW 49.17.140(1)). Here, it is undisputed that Potelco did not appeal the citation within 15 days.

This Court has set forth well-accepted principles for applying equitable tolling. "The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." *Millay*, 135 Wn.2d at 206. Courts typically permit equitable tolling to occur only sparingly, and "should not extend it to a garden variety claim of excusable neglect." *Benyaminov v. City of Bellevue*, 144 Wn. App. 755, 761, 183 P.3d 1127 (2008) (internal quotations omitted).

As Potelco admits, the Department did not engage in bad faith, deception, or false assurances when it issued the citation. *See* Pet. at 1.

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[4] In 2011, the legislature amended RCW 49.17.140(1)'s mailing requirements in a manner that does not affect this case. *See* Laws of 2011, ch. 301, § 13. Accordingly, the Department cites the current version of RCW 49.17.140(1) throughout this brief.

Moreover, as Potelco also admits, it did not exercise diligence. Pet. at 1. Mr. Sabari, who was responsible for handling WISHA appeals, did not arrange for anyone else to review his mail during an extended absence from the office. *See* CP 136-37. He allowed his mail to pile up, unattended, and when he returned during the appeal period, he did not scan his accumulated mail for time-sensitive documents. *See* CP 132-33, 135-36. Such circumstances do not justify the application of equity. Accordingly, the superior court and Court of Appeals correctly applied *Millay* and *Benyaminov* and declined to apply equitable tolling.

B. This Case Does Not Involve An Issue Of Substantial Public Interest Because The Court Of Appeals Correctly Applied The Well-Established Doctrine Of Equitable Tolling

This case does not involve a matter of substantial public interest under RAP 13.4(b)(4), as Potelco asserts. Pet. at 4-6. Potelco asks this Court to apply equitable tolling to late appeals of WISHA citations when an employer files an appeal "shortly after" the 15-day appeal period, even when there is no evidence of bad faith or diligence. Pet. at 1. In its view, such a rule would serve WISHA's underlying purpose because it would "educat[e]" the Department, employers, and employees "about the application of the regulations at issue on appeal." Pet. at 1, 5. These arguments lack merit.

As the Court of Appeals recognized, Potelco's arguments would

require this Court to "fashion a new rule" that would extend the doctrine of equitable tolling to Potelco's "garden variety claim of excusable neglect." *See Potelco*, slip op. at 7 (quoting *Benyaminov*, 144 Wn. App. at 761) (internal quotation marks omitted). Potelco's new rule would require this Court to overrule *Millay*'s clear and sensible requirement that "[t]he predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." *Millay*, 135 Wn.2d at 206. Such a rule would dispense with the longstanding and important public policy that equity rewards the diligent, not the neglectful. *See Virtue v. Stanley*, 87 Wash. 167, 178, 151 P. 270 (1915); *Allen v. Abrahamson*, 12 Wn. App. 103, 106, 529 P.2d 469 (1974). And it would encourage litigation to discern what it means to "appeal shortly after" the 15-day deadline. *See* Pet. at 1.

By Potelco's logic, courts should *always* permit untimely WISHA appeals to proceed to the merits because litigating WISHA cases would be "educational." Such logic ignores the Legislature's prerogative to establish appeal deadlines and appellate courts' assumption that the legislature "means exactly what it says." *West v. Thurston County*, 168 Wn. App. 162, 183, 275 P.3d 1200 (2012) (quoting *Morgan v. Johnson*, 137 Wn.2d 887, 892, 976 P.2d 619 (1999) (internal quotation marks omitted).

The Legislature adopted WISHA because protecting safe and healthful working conditions serves the public interest. *See* RCW 49.17.010. To this end, the Legislature also enacted a 15-day appeal period to allow employers to appeal WISHA citations. RCW 49.17.140(1). The Legislature stated that the Department's citation would be final if there was no timely appeal. RCW 49.17.140(1). This appeal period furthers WISHA's public policy of protecting workers by providing a clear and unambiguous timeline for employer appeals. RCW 49.17.140(1). The Court of Appeals' decision applying this timeline furthers this public policy.

Potelco argues that this case involves a substantial issue of public interest because WISHA "was enacted specifically for the 'public interest.'" Pet. at 5 (quoting RCW 49.17.010). But this argument overlooks that the issue in this case is whether this Court should apply an equitable remedy to excuse Potelco's neglect. This is not a case involving the enforcement of health and safety regulations to protect workers. That Potelco missed a deadline is not a matter affecting worker health and safety.

Presumably, Potelco would argue that any WISHA appeal warrants review under RAP 13.4(b). This is patently not what this Court intended when it set forth RAP 13.4(b)'s requirement for review. A petitioner must

demonstrate specific reasons why his or her own particular case presents an issue of substantial public interest. No such interest is demonstrated by a party who, by its own admission, seeks equity in the absence of diligence.

Potelco has not identified an issue of substantial public interest that warrants this Court's review. The Court of Appeals correctly applied well-established precedent on equitable tolling to Potelco's late appeal. This Court should deny the petition.

V. CONCLUSION

For the reasons above, the Department asks this Court to deny Potelco's petition for review.

RESPECTFULLY SUBMITTED this 10th day of January, 2014.

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Subject: 89660-7; Potelco, Inc. v. DLI
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RE: ***Potelco, Inc. v. DLI***

Case Number: 89660-7

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Dear Mr. Carpenter,

Please file the Department's Answer to Petition for Review and Certificate of Service in the above referenced matter.

Sincerely,

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