In the Matter of:

DONALD RANDY HOWELL, **ARB CASE NO. 05-094**

COMPLAINANT, **ALJ CASE NO. 2005-ERA-14**

v. **DATE: February 28, 2007**

PPL SERVICES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Nuria Sjolund, Esq., Bethlehem, Pennsylvania

FINAL DECISION AND ORDER

Donald Randy Howell filed a complaint with the U.S. Department of Labor alleging that his employer, PPL Services, Inc., violated the employee protection provisions of the Energy Reorganization Act (ERA) when it terminated his employment because he made safety complaints.[1] A U.S. Department of Labor Administrative Law Judge (ALJ) recommended, in effect, that Howell's complaint be dismissed. We reverse in part and affirm in part the ALJ's recommendation.

[1] The statute provides, in pertinent part, that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . [notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions or proposed provisions of the ERA or AEA, or commences, causes to be commenced or testifies, assists or participates in a proceeding under the ERA or AEA]." 42 U.S.C.A. § 5851 (a)(1) (West 2003).

BACKGROUND

PPL fired Howell on October 23, 2002. Howell filed his ERA complaint on February 25, 2005. The ERA permits a complainant like Howell to file a complaint within 180 days of the alleged adverse action, here the October 23, 2002 termination.[2] Thus, on March 9, 2005, after investigating Howell's complaint, the Labor Department's Occupational Safety and Health Administration (OSHA) found that the complaint had been untimely filed and dismissed it.[3] And pursuant to regulation, OSHA advised Howell that should he object to its decision to dismiss his complaint, he had five days to file an objection and request a hearing, in writing, with the Chief Administrative Law Judge (CALJ) at the Labor Department's Office of Administrative Law Judges.[4] OSHA also notified Howell that he must send a written copy of any objection and request for hearing to PPS and OSHA.[5]

By a March 15, 2005 letter to the CALJ, Howell objected to OSHA's decision to dismiss his complaint. Therein Howell explained that after PPG fired him, he had hired an attorney who filed an age discrimination complaint against PPL. But this same attorney did not file (or advise Howell to file) an ERA whistleblower complaint because "he apparently had no knowledge of the nuclear safety issues" and was ignorant of the ERA filing requirements.[6] This letter indicated that Howell had sent a copy to OSHA, but not to PPL[7].

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[2] 42 U.S.C.A. § 5851 (b)(1).

[3] OSHA investigates ERA whistleblower complaints and determines whether the employer violated the ERA's employee protection section. OSHA then notifies both parties by certified mail of its findings and conclusions as to whether the employer violated the ERA. 29 C.F.R. §§ 24.4, 24.5 (2006).

[4] 29 C.F.R. § 24.4 (d)(2). See March 9, 2005 Secretary's [OSHA's] Findings Re: PPL Services, Inc./Howell/3-0110-05-002.

[5] "A copy of the request for a hearing shall be sent by the party requesting a hearing to the complainant or the respondent (employer), as appropriate, on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service." 29 C.F.R. § 24.4 (d)(3).

[6] March 15, 2005 Appeal From Dismissal of Complaint, page 1.

[7] *Id.*, page 2.

On March 23, 2005, the ALJ assigned to Howell's case notified the parties of a April 14, 2005 hearing date and also ordered Howell to show cause why his complaint should not be dismissed for failure to timely file it. On April 4, 2005, Howell, represented by counsel, responded in writing to the ALJ's show cause order. He argued that he had not timely filed the ERA complaint because his previous lawyer had provided "inadequate notice" to him concerning when to file an ERA complaint. Therefore, Howell contended, the ALJ should toll the 180-day limitations period and hear the merits of his whistleblower claim.[8] PPL responded that equitable tolling was not appropriate. Furthermore, it argued, the ALJ lacked jurisdiction to hear Howell's case because Howell had not served PPL with his March 15 letter to the CALJ objecting to OSHA's decision to dismiss his complaint.[9]

In her Recommended Decision and Order (R. D. & O.), the ALJ held that "the quality of Complainant's counsel's advice" was not a sufficient ground to toll the statute of limitations. She therefore recommended that Howell's request for a hearing, and thus his complaint, be dismissed.[10] The ALJ also concluded that she did not have jurisdiction to hear the merits of Howell's case because he did not comply with 29 C.F.R. § 24.4 (d)(3) when he did not serve PPL with a copy of his March 15 letter to the CALJ objecting to the OSHA decision to dismiss his complaint.[11] Howell appealed the ALJ's recommended decision and order. We have jurisdiction to review, de novo, the ALJ's recommended decision.[12]

DISCUSSION

1. *29 C.F.R. § 24.4 (d)(3).*

Our recent decision in *Shirani v. Calvert Cliffs Nuclear Power Plant, Inc. (Constellation Energy Group)* held that a party's failure to comply with the service requirements of 29 C.F.R. § 24.4 (d)(3) does not deprive the ALJ of jurisdiction to hear

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[8] April 4, 2005 letter from Howell's attorney to ALJ.

[9] PPL's Opposition to Complainant's Letter Response to Order to Show Cause.

[10] R. D. & O. at 4-5.

[11] *Id*. at 4. "This procedural requirement is jurisdictional in nature, and without compliance therewith, I am deprived of authority to hear the merits of his complaint."

[12] *See* 29 C.F.R. § 24.8; Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the Administrative Review Board the Secretary of Labor's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)); 5 U.S.C.A. § 557(b) (West 2003) ("On appeal from or review of the initial [ALJ's] decision, the agency [Administrative Review Board] has all the powers it would have in making the initial decision . . . .").

and decide the merits of a whistleblower case brought under the ERA or any other statute that 29 C.F.R. Part 24 covers. We concluded that the plain meaning of the language contained in sections 24.4 (d)(2) and (d)(3) and the regulatory history of these rules cannot be construed as indicating that the Secretary of Labor intended the service requirement to be jurisdictional. Moreover, we held that failure to properly serve a copy of the request for a hearing is not inherently prejudicial.[13] Therefore, applying that holding to this case, we reverse the ALJ's conclusion that because Howell did not properly serve PPL, she lacks jurisdiction to hear Howell's case and his complaint must be dismissed.

2. *Equitable Tolling Based Upon Attorney Error*

In determining whether a statute of limitations should be tolled, the Board has been guided by the discussion of equitable modification of statutory time limits in *School Dist. of Allentown v. Marshall.*[14] In that case, which arose under the whistleblower provisions of the Toxic Substances Control Act,[15] 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."[16] Howell bears the burden of justifying the application of equitable modification principles.[17] Furthermore, ignorance of the law will generally not support a finding of entitlement to equitable tolling, especially in a case in which a party is represented by counsel.[18]

Howell argued below and argues to us that his first attorney's "inadequate representation" caused his failure to file a timely ERA complaint and, for that reason, we

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[13] ARB No. 04-101, ALJ No. 2004-ERA-9, slip op. at 9 (ARB Oct. 31, 2005).

[14] 657 F. 2d 16, 19-21 (3d Cir. 1981). *See e.g. Ilgenfritz v. U.S. Coast Guard Acad.*, ARB No. 99-066, ALJ No. 99-WPC-3 (ARB Aug. 28, 2001); *Hall v. E. G. & G. Def. Materials,* ARB No. 98-076, ALJ No. 97-SDW-9 (ARB Sept. 30, 1998).

[15] 15 U.S.C.A. § 2622 (West 2004).

[16] *Allentown,* 657 F. 2d at 20 (internal quotations omitted).

[17] *Accord Wilson v. Sec'y , Dep't of Veterans Affairs,* 65 f. 3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

[18] *Accord Wakefield v. R.R. Retirement Bd.*, 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway v. Northeast. Utils.*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4-5 (ARB Aug. 31, 2000).

should reverse the ALJ, apply the doctrine of equitable tolling, and remand the case to the ALJ for a hearing on the merits.[19]

But we affirm the ALJ's conclusion that equitable tolling should not apply here. Interpreting his argument in light of the *Allentown* factors, Howell is essentially arguing that his first lawyer's ignorance of the ERA filing requirements or his malpractice in not advising Howell of those requirements constitutes an extraordinary factor that prevented him from timely filing the complaint and therefore qualifies for equitable tolling. We have consistently held, however, that attorney error does not constitute an extraordinary factor because "[u]ltimately, clients are accountable for the acts and omissions of their attorneys."[20]

Thus, like the ALJ, we will not toll the ERA's 180-day limitation period. Accordingly, we **DISMISS** Howell's complaint because he did not timely file it.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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[19] Howell's Brief, entitled "Brief In Response To Order To Show Cause," at 1-2 (arguing that Howell's first attorney "either knew nothing about available administrative remedies or knew about them but did not convey the information to Howell").

[20] *See Higgins v. Glen Raven Mills, Inc.*, ARB No 05-143, ALJ No. 2005-SDW-7, slip op. at 9 (ARB Sept. 29, 2006); *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-6, slip op. at 5-6 (ARB Aug. 27, 2002). *Accord Blodgett v. Tenn. Dep't of Env't & Conservation*, ARB No. 03-043, ALJ No. 03-CAA-7, slip op. at 2-3 (ARB Mar. 19, 2004); *Steffenhagen v. Securitas Sverige, AR*, ARB No. 03-139, ALJ No. 03-SOX-024, slip op. at 4, (ARB Jan. 13, 2004); *Herchak v. Am. W. Airlines, Inc.*, ARB No. 03-057; ALJ No. 02-AIR-12 slip op. at 6 (ARB May 14, 2003); *Hemingway v. Northeast Utils.*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 99-ERA-015 (ARB Aug. 31, 2000). The Supreme Court did note in *Link v. Wabash R. R. Co.* however, that "if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. 626, 634 n.10 (1962).