**U.S. Department of Labor**

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

**JOHN RUSSELL HALL,** **ARB CASE NO. 98-076**

**COMPLAINANT,** **ALJ CASE NO. 97-SDW-9**

**v.** **DATE: September 30, 1998**

**EG&G DEFENSE MATERIALS, INC.,**

**RESPONDENT.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

## FINAL DECISION AND ORDER

This case arises under the environmental whistleblower laws.[1/] Complainant John Russell Hall (Hall) worked for Respondent EG&G Defense Materials, Inc. (EG&G) as an engineer technician at the Tooele (Utah) Chemical Demilitarization Facility from 1994 until his termination on November 14, 1996. Hall had been on disability leave for one year and was notified of his termination by a November 14, 1996 letter from EG&G, which Hall received on November 15, 1996. Hall filed a complaint with the Wage and Hour Division on January 7, 1997, alleging that he had been discriminated against for engaging in activities protected by the environmental whistleblower provisions. EG&G moved to dismiss on the ground that the complaint was untimely filed, and the ALJ granted that motion. Recommended Order of Dismissal (R. O.) at 16. We agree with the ALJ's analysis, and the complaint will be dismissed.

---

[1/] Complainant Hall cited the following employee protection provisions in his complaint filed with the Wage and Hour Division on January 7, 1997: the Toxic Substances Control Act, 15 U.S.C. § 2622 (1994); the Resource Conservation and Recovery Act, 42 U.S.C. § 6971 (1994); the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (1994); the Clean Water Act, 33 U.S.C. § 1367 (1994); the Clean Air Act, 42 U.S.C. § 7622 (1994); and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610 (1994). We have referred to these statutes collectively as "the Acts" or "the environmental whistleblower laws."

## DISCUSSION

Each of the employee protection provisions of the environmental whistleblower laws invoked by Hall requires that a complaint of retaliation be filed within 30 days of the date of discrimination. *See, e.g.,* the Clean Air Act, 42 U.S.C. §7622(b)(1) (1994); the Toxic Substances Control Act, 15 U.S.C. §2622(b)(1) (1994). Therefore, unless there is a basis for equitably tolling the statute of limitations, Hall's complaint was untimely, as it was not filed by December 15, 1996. Hall claims that prior to and continuing through the filing period he suffered from severe depression which prevented him from pursuing his rights.[2/]

The ALJ treated EG&G's motion to dismiss as a motion for summary decision, apparently because EG&G submitted numerous exhibits in support of its motion. The test for granting a motion for summary decision is that "there is no genuine issue as to any material fact and that a party is entitled to summary decision." 29 C.F.R. § 18.40(d) (1998). A party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. §18.40(c). *See Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42, Sec'y Dec. Jul. 17, 1995, slip op. at 4-6. As we discuss below, summary decision was appropriate in this case on the issue of equitable tolling, because Hall failed to show that there was a genuine issue of fact, and EG&G prevailed on that issue as a matter of law.

The Board follows the standards for equitable tolling of the statute of limitations in whistleblower cases articulated by the Court of Appeals in *School District of City of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981); *see Immanuel v. Wyoming Concrete Industries, Inc.,* ARB Case No. 96-022, ALJ Case No. 95-WPC-3, ARB Dec. May 28, 1997, slip op. at 3; *Yap v. Bay Area Environmental, Inc.*, Case No. 90-SWD-4, Sec'y Dec. Aug. 30, 1991, slip op. at 2. The statute of limitations may be tolled only where: (1) the defendant has actively misled the plaintiff respecting the cause of action; (2) the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Mental incapacity could qualify under the second prong of these tests, but the complainant must make a particularly strong showing. "[T]he traditional rule [is] that mental illness tolls a statute of limitations only if the illness *in fact* prevents the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them." *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996), *cert. denied* 117 S.Ct. 316 (emphasis in original) (citing numerous cases.). Some courts have applied an even more stringent standard, holding

---

[2/] Hall also asserted before the ALJ that the 30 day limitations period should be tolled because EG&G did not post notices of complainants' right to file complaints with the Department of Labor. Hall apparently has abandoned that claim before us; he does not raise it in his briefs before the Board.

that a statute of limitations will be tolled in the case of mental illness of the plaintiff only where he has been adjudged mentally incompetent or was institutionalized during the filing period. *Biester v. Midwest Health Services, Inc.,* 77 F.3d 1264, 1268 (10th Cir. 1996); *Bassett v. Sterling Drug, Inc.*, 578 F. Supp. 1244, 1247-48 (S.D. Ohio 1984). Hall clearly has not met the *Biester* test, having submitted nothing in response to EG&G's motion which indicates that he was adjudged incompetent or was institutionalized during the filing period.[3/] Moreover, the record does not suggest that Hall meets the less-stringent standard articulated in *Miller, supra.*

In response to EG&G's motion to dismiss, Hall introduced a report by a psychiatrist who treated him from November 1995 through April 1997. That report diagnoses Hall as suffering from major depression. According to the treating psychiatrist, Hall was suffering from "depressive disorder or adjustment disorder with depressed mood." Over a period of a year seeing the psychiatrist, Hall was put on various medications. On the visits to the psychiatrist closest in time to the filing period, September 13, 1996, November 5, 1996, and January 28, 1997, the psychiatrist reported that Hall still felt depressed but "was better overall," that Hall asked to be prescribed a particular medication, and that he reported that "he was somewhat better" even though he was off his medications. Nothing in the psychiatrist's report indicates that Hall was not capable of handling his affairs or understanding his legal rights.

Hall also submitted an affidavit attached to his Opposition to Respondent's Motion to Dismiss in which he states that at the time of his termination from employment he was "suffering from a particularly difficult time of depression and was unable to do anything beyond my basic needs." Hall affidavit at 2. But the affidavit does not assert that Hall was unable to understand his legal rights, and is insufficient to raise a genuine issue of fact as to whether he was capable of filing a complaint with the Department of Labor.

There is other evidence in the record, moreover, which indicates that Hall was capable of understanding and addressing his legal rights during the environmental whistleblower filing period. On November 29, 1996, during the 30 day filing period, Hall signed a settlement agreement in a divorce proceeding brought by his wife. In addition, Hall testified in a worker's compensation proceeding before the Industrial Commission of Utah on December 19, 1996, just four days after the filing period in this case closed.[4/] We agree with the ALJ that Hall has not raised a genuine issue of material fact that he was mentally incapacitated and unable to understand or act upon his rights under the environmental whistleblower statutes of limitations.[5/]

---

[3/] Hall was institutionalized for a short period of time in March or April 1997, several months after the running of the statute of limitations here.

[4/] Hall also filed a complaint of discrimination on the basis of disability and religion with the Utah Industrial Commission (date illegible) and a claim for disability benefits on February 2, 1996.

[5/] Even if we were to conclude that Hall's mental condition provided a basis for equitably tolling the statutes of limitations, Hall would face an additional hurdle posed by the fact that he was represented

(continued...)

Hall asserts in his Initial Brief that he filed complaints raising environmental concerns with the Occupational Safety and Health Administration that would bring him within the third prong of the *Allentown* test for equitable tolling. But Hall did not submit a copy of these complaints or even assert that they were filed within the 30 day limitations period. As the court in *Allentown v. Marshall* held, "the filing of a claim in the wrong forum must also be timely before it will toll the appropriate limitations period." 657 F.2d at 20.

Hall also claims that strict application of the 30 day time limit violates the Due Process Clause of the Constitution. That argument is more appropriately addressed to Congress, or the courts. An administrative agency does not have the authority to declare an act of Congress unconstitutional. *Branch v. Federal Communications Comm'n*, 824 F.2d 37, 47 (D.C. Cir. 1987).

We are mindful of the admonition in *Allentown v. Marshall* that "[t]he restrictions on equitable tolling . . . must be scrupulously observed," and

> [t]he tolling exception is not an open-ended invitation to the courts to disregard limitations periods simply because they bar what may otherwise be a meritorious cause. We may not ignore the legislative intent to grant the defendant a period of repose after the limitations period has expired.

57 F.2d at 19-20. Accordingly, for the reasons discussed above, we adopt the ALJ's recommendation and the complaint in this case is dismissed.

**SO ORDERED.**

**PAUL GREENBERG**
Member

**CYNTHIA L. ATTWOOD**
Acting Member

---

[5/](...continued)
by counsel during that period. *See, e.g., Lopez v. Citibank, N.A.*, 808 F.2d 905 (1st Cir. 1987) (Mental illness does not toll statute of limitations where plaintiff presented no strong reason why, despite the assistance of counsel, he was unable to bring suit). *See also Tracy v. Consolidated Edison Co.*, Case No. 89-CAA-1, Sec. Dec. and Ord., July 8, 1992 (Fact that complainant was represented by counsel supports finding that complainant cannot invoke equitable tolling); *Mitchell v. EG&G*, Case No. 87-ERA-22, Sec. Dec. and Ord., July 22, 1993 (same).