



In the Matter of:

GARY W. EGBERT,

ARB CASE NO. 99-096

COMPLAINANT,

ALJ CASE NO. 99-TSC-1

v.

DATE: September 15, 2000

UNITED STATES AIR FORCE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Rhonda G. Thomas, Esq., *Oklahoma City, OK*

For the Respondent:

Maj. Sandra M. Wozniak, *Tinker Air Force Base, OK*

FINAL DECISION AND ORDER

Gary W. Egbert filed a complaint alleging that his employer, the United States Air Force, terminated his employment in retaliation for activities which Egbert asserted were protected by the whistleblower protection provision of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2622 (1988). The Administrative Law Judge to which the case was assigned recommended that we dismiss it because Egbert had not filed his complaint within TSCA's 30 day statute of limitations and no grounds existed to justify equitably tolling the limitations period. We agree that the complaint must be dismissed, but for a different reason.

BACKGROUND

Egbert was employed by the Air Force from 1994 until his termination on September 5, 1998. In the summer of 1998 Egbert complained to the Occupational Safety and Health Administration (OSHA) about health and safety hazards, including his alleged exposure to hazardous substances at his work site. Subsequently Egbert was terminated. Egbert filed a TSCA whistleblower complaint with OSHA in which he asserted that he was fired because he complained to OSHA about hazardous conditions at his place of work. The Air Force alleged that on the day

before the OSHA health and safety inspection, Egbert had intentionally caused leaks of hydraulic fluid near the inspection site, and Egbert was terminated for that reason alone. Egbert denied the allegation that he intentionally caused the fluid leaks.

OSHA denied Egbert's complaint on the ground that it was not timely filed, and Egbert requested a hearing. The Air Force moved to dismiss on the grounds that the Department of Labor lacked subject matter jurisdiction under TSCA because of sovereign immunity, and that, in any event, the complaint was not timely. The ALJ granted the motion to dismiss on timeliness grounds. He ruled that he need not decide whether sovereign immunity barred the complaint.

Egbert appealed the ALJ's recommended dismissal of his complaint to this Board.

DISCUSSION

As an entity of the United States government, the Air Force cannot be held liable unless the United States has waived its sovereign immunity under TSCA. Any waiver of sovereign immunity must be "unequivocal." *United States Dep't of Energy v. State of Ohio*, 503 U.S. 607, 615 (1992). As this Board has held previously, the United States has not waived its sovereign immunity under TSCA's employee protection provision, except for certain whistleblower complaints involving lead-based paint. *Berkman v. United States Coast Guard Academy*, ARB Case No. 98-056, ALJ Case Nos. 97-CAA-2, 97-CAA-9, Sec. Dec. and Rem. Ord., Feb. 29, 2000, slip op. at 13; *accord Stephenson v. NASA*, Case No. 94-TSC-5, Sec. Dec. and Ord. of Rem., July 3, 1995, slip op. at 6-8; *Johnson v. Oak Ridge Operations Office, United States Dep't of Energy*, ARB Case No. 97-057, ALJ Case Nos. 95-CAA-20, -21, -22, Final Dec. and Ord., Sept. 30, 1999, slip op. at 9. Therefore we do not have jurisdiction to decide this case.

Because we dismiss this case for lack of subject matter jurisdiction, we do not reach the issue whether Egbert filed his complaint in a timely manner.

CONCLUSION

For the foregoing reasons this complaint is **DISMISSED**.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member