



In The Matter of:

**DOUG GRACE AND CLAUDE LAWRENCE,**

**ARB CASE NO. 96-059**

**COMPLAINANT,**

**ALJ CASE NO. 95-WPC-6**

**v.**

**DATE: September 23, 1996**

**CITY OF ANDALUSIA WASTE WATER  
TREATMENT FACILITY,**

**RESPONDENT.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1/</sup>

### **FINAL DECISION AND ORDER**

This case arises under the employee protection provision of the Water Pollution Control Act (WPCA), 33 U.S.C. § 1367 (1988). Respondent filed a Motion for Summary Judgment on August 8, 1995, which was granted by the Administrative Law Judge (ALJ) in a Recommended Decision and Order (R. D. and O.). After a thorough review of the record, we agree with the ALJ's recommendation that the complaint be dismissed.

### **BACKGROUND**

The facts pertinent to the resolution of this motion are not in dispute. R. D. and O at 1. Complainants were initially notified at a Pre-Determination Hearing on January 13, 1995 of Respondent's intention to terminate them. Complainants each received notice on February 2, 1995 of their termination effective February 1, 1995. Affidavit of Pam Steele, Personnel Officer for Respondent, Exhibit A, Nos. 1, 5, 10 and 13. Complaints appealed the termination decisions at a

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<sup>1/</sup> On April 17, 1996 a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization were also promulgated on this date.

final termination hearing before the Andalusia City Commission on March 15, 1995. The Commission issued a final decision on March 22, 1995, in which Complainants' request for reinstatement was denied. On April 12, 1995, Complainants notified the District Director of the Wage and Hour Division (Wage and Hour) of their intention to file claims pursuant to the WPCA. Respondent thereafter filed a Motion for Summary Judgment alleging that Complainants failed to file their complaints within the thirty day limitation period imposed by the Act. Complainants contend that: (1) the limitation period should be tolled because they pursued their claims in the wrong forum; and (2) Respondent's failure to reinstate them constitutes an act of discrimination separate and distinct from their initial retaliatory discharge. As noted above, the ALJ granted Respondent's motion.

### **EQUITABLE TOLLING**

In their Response to Respondent's Motion for Summary Judgment, Complainants cite *School Dist. of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981) as support for their request for equitable tolling. In *Allentown*, the court noted the principal situations where tolling is appropriate, relying on *Smith v. American President Lines, LTD.*, 571 F.2d 102 (2d Cir. 1978), a case decided under Title VII of the Civil Rights Act of 1964. *Smith* interpreted Supreme Court precedent as implying that tolling is appropriate where a plaintiff has raised the precise statutory claim in issue, but has mistakenly done so in the wrong forum. *Id.* at 19-20. Complainants contend that, pursuant to *Allentown*, tolling is appropriate in their case because they pursued their claim in the wrong forum.

Complainants engaged in an administrative appeal process before the Andalusia City Commission during the period they could have pursued claims with Wage and Hour. However, Complainants offer no proof that they pursued their WPCA claims before the Andalusia City Commission, nor do they allege that they thought they were in the correct forum to make a claim for discrimination under the WPCA. Complainant's failure to offer any evidence in support of this allegation precludes tolling. *See* 29 C.F.R. 18.40(c) (a party opposing a motion for summary decision may not rest on mere allegations).

Moreover, Complainants were represented by counsel at their Pre-Determination Hearing. The doctrine of equitable tolling is generally inapplicable where a plaintiff is represented by counsel. *Kent v. Barton Protective Services*, Case No. 84-WPC-2, Sec. Final Dec. and Order, Sept. 28, 1990, slip op. at 11-12, *aff'd*, *Kent v. U.S. Department of Labor*, (11th Cir. Oct. 3, 1991). Once a claimant consults an attorney, he has "access to a means of acquiring knowledge of his rights and responsibilities," thereby precluding application of equitable tolling considerations. *Smith v. American President-Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978). The Board sees no reason to stray from the general rule in this matter.

### **FAILURE TO REINSTATE**

Complainants also allege that Respondent's failure to reinstate them after their administrative appeals constituted a separate act of discrimination under the WPCA. Respondent has no obligation

to reinstate Complainants unless they prove that Respondent violated the WPCA. Since Complainants' action was not timely filed, they lost the opportunity to prove a violation of the WPCA. Accordingly, this complaint is hereby DISMISSED.

**SO ORDERED.**

**DAVID A. O'BRIEN**  
Chair

**KARL J. SANDSTROM**  
Member

**JOYCE D. MILLER**  
Alternate Member