In the Matter of:

MILLARD F. DAY, **ARB CASE NO. 02-032**

COMPLAINANT, **ALJ CASE NO. 99-CAA-23**

v. **DATE: July 25, 2003**

OAK RIDGE OPERATIONS,
U.S. DEPARTMENT OF ENERGY,
GEORGE BENEDICT,
DAN WILKEN, et al.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward A. Slavin, Jr., ***St. Augustine, Florida***

For the Respondent:
Ivan A. Boatner, ***U. S. Department of Energy, Oak Ridge, Tennessee***

FINAL DECISION AND ORDER

Millard F. Day brought this whistleblower case pursuant to the employee protection provisions of the Clean Air Act, 42 U.S.C.A. § 7622 (West 1995), the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9610, the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i) (West 2003), the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995), the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 1998), and the Water Pollution Control Act, 33 U.S.C.A. § 1367 (West 2001). Day was required to file his whistleblower complaint within 30 days after the Department of Energy (DOE) terminated his employment. *See* 29 C.F.R. § 24.3(b) (2000).

On October 3, 2001, an Administrative Law Judge (ALJ) conducted an evidentiary hearing, the scope of which was limited to "whether [Day] has made

equitable reasons why he did not file his complaint within 30 days of his termination." Recommended Decision and Order (R. D. & O.) at 1. The ALJ found that Day's whistleblower complaint was filed more than 30 days after he received notice that the DOE had terminated his employment. Moreover, he concluded that since the evidence did not support the application of either equitable estoppel or equitable tolling, Day's complaint should be dismissed for lack of jurisdiction. R. D. & O. at 7-14.[1]

The Secretary has delegated to the Administrative Review Board (ARB) authority to review ALJs' recommended decisions in complaints arising under the environmental whistleblower statutes. *See* 29 C.F.R. § 24.8(a) (2002) and Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). The ARB reviews the ALJ's findings of fact and conclusions of law de novo. *See* 5 U.S.C.A. § 557(b) (West 1996).

We affirm the R. D. & O. The record supports the ALJ's findings of fact, and we adopt the ALJ's conclusions of law because they are founded upon established legal precedent.[2] The record does not support Day's arguments concerning his "ADA" or

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[1] The 30-day limitation period for filing whistleblower complaints, however, is not jurisdictional. *See Whitaker v. CTI-Alaska, Inc.*, ARB No. 98-036, ALJ No. 1997-CAA-15, slip op. at 8 (ARB May 28, 1999).

[2] For additional authority that equitable tolling is generally inapplicable when a plaintiff is represented by counsel, *see, e.g., Hall v. E G & G Defense Materials, Inc.*, ARB No. 98-076, ALJ No. 97-SDW-9, slip op. at n.5 (ARB Sept. 30, 1998); *Lawrence v. City of Andalusia Waste Water Treatment Facility*, ARB No. 96-059, ALJ No. 95-WPC-6 (ARB Sept. 23, 1996); *Tracy v. Consol. Edison Co. of New York, Inc*., 89-CAA-1 (Sec'y July 8, 1992). The federal circuit courts support the general principle that "once a claimant retains counsel, tolling ceases because she has 'gained the 'means of knowledge' of her rights and can be charged with constructive knowledge of the law's requirements.' " *Leorna v. United States Dep't of State*, 105 F.3d 548, 551 (9th Cir. 1997), citing *Stallcop v. Kaiser Found. Hosps*., 820 F.2d 1044, 1050 (9th Cir. 1987); *Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 896 (1st Cir. 1992); *Daugherity v. Traylor Bros., Inc*., 970 F.2d 348, 353 n.8 (7th Cir. 1992); *Beshears v. Asbill*, 930 F.2d 1348, 1351 (8th Cir. 1991); *McClinton v. Alabama By-Products Corp.*, 743 F.2d 1483, 1486 n.4 (11th Cir. 1984); *Vance v. Whirlpool Corp.*, 716 F.2d 1010, 1012-13 (4th Cir. 1983); *Kocian v. Getty Refining & Mktg. Co.*, 707 F.2d 748, 755 (3d Cir. 1983); *Keyse v. California Texas Oil Corp.*, 590 F.2d 45, 47 (2d Cir. 1978); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1200 n.8 (5th Cir. 1975).

"EEO" case and his contention that DOE misled or prevented him from filing a timely complaint. We therefore adopt and attach the R. D. & O. and **DENY** Day's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
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Issue date: 31Dec2001

CASE NO.: 1999-CAA-23

In the Matter of

MILLARD F. DAY
Complainant

v.

OAK RIDGE OPERATIONS, U.S. DEPARTMENT OF ENERGY,
GEORGE BENEDICT, DAN WILKEN, et al.
Respondent

RECOMMENDED DECISION AND ORDER OF DISMISSAL

On or about July 21, 1999, Complainant, Millard F. Day, filed a complaint under various whistleblower statutes, namely: the Safe Drinking Water Act (SDWA); the Clean Air Act (CAA); the Federal Water Pollution Control Act (FWPCA); the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); the Resource Conservation and Recovery Act (RCRA); the Solid Waste Disposal Act (SWDA) and the Toxic Substances Control Act (TSCA). All contain a 30 day statute of limitations for filing a complaint. *See* 29 CFR § 24.3. On or about August 9, 1999, Arthur M. Johannes, Regional Supervisory Investigator, Occupational Safety and Health Administration, United States Department of Labor advised Complainant that his complaint was untimely since it was filed outside of the 30 day statutory filing requirement and that no documentation was submitted which established mitigating circumstances to toll the statutes in question.

By letter dated August 19, 1999, Complainant appealed Mr. Johannes' finding and requested a de novo hearing. An evidentiary hearing was conducted in Knoxville, Tennessee, on October 3, 2001. The scope of the evidentiary hearing was limited to the sole issue of "whether the Complainant has made equitable reasons why he did not file his complaint within 30 days of his termination." *See* April 2, 2001, Order at p. 1.[1] Prior to calling the first witness, the parties stipulated to the following facts: (1) the triggering event for the 30 day statute of limitations was the date that the Complainant, Mr. Millard Day, received notice of his removal from the Federal service -- January 23, 1999; (2) the Complainant did not file his "environmental whistleblower" complaint until July 21, 1999; and (3) all of

[1] The scope of discovery had been limited to the same issue. *See* March 7, 2000, Order at p. 1.

the statutes mentioned in the complaint have a 30 day statute of limitations. TR at pp.6-7.[2] Each party submitted documentary evidence and two witnesses testified.

ISSUES

1. Whether the 30 day filing requirement under the statutes mentioned in the complaint may be suspended by any of the tolling doctrines?

2. Whether Complainant's complaint of July 21, 1999 can be merged with an earlier EEOC complaint?

SUMMARY OF EVIDENCE

TESTIMONY OF BRENDA KAY DAY

Mrs. Day testified that she has been married to Complainant since 1967 and that after he received a letter from the Department of Energy (DOE) relating to his employment in 1998, it really changed him. He got real scared and she was very concerned. (TR 28) He was hospitalized overnight under the care of Dr. Kenneth Carpenter, a psychiatrist. Dr. Carpenter said her husband was paranoid. (TR 29) She did not believe that her husband was paranoid, but that he was unsure of himself and a changed person. On January 23, 1999, Mrs. Day was there when her husband received a letter from DOE informing him that he was fired. (TR 30) From January 1999 until July 1999, Mr. Day was unable to manage things and she took over everything that he usually did, like feeding the animals. It was like taking care of a two year old. (TR 31) He slept about 14 to 16 hours a day. When he wasn't asleep, he was very sad and couldn't do his normal routine. He was not in control of his legal affairs at all. He was afraid that he was not going to be able to provide for the family and it devastated him. Up until this point he was a very productive person. (TR 32) During this time, Mrs. Day also had health problems. She had major sinus surgery that required hospitalization and it took eight months to recover. (TR 33)

On cross examination, Mrs. Day testified that she did not believe her husband was hospitalized again for any kind of depression or mental problems. (TR 36) Although he was not hospitalized, he was treated. He was never declared to be incompetent by a court of law. From January 1999 until July 1999, he had at times operated a motor vehicle but mostly he stayed around the house. Somebody had to drive, and Mrs. Day was in bad health, too. (TR 38)

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[2] TR - Transcript of the October 3, 2001 Evidentiary Hearing.

TESTIMONY OF MILLARD FRANKLIN DAY

In December 1998, Mr. Day received a package from DOE. Upon opening the package, he felt a numbing sensation in his legs, and took the letter back to the bedroom, where he read the full letter several times and then essentially collapsed. The letter stated that he was going to be terminated within 30 days and that he had a chance to submit documentation that would present his case on why he should not be terminated. (TR 41) Specifically, he was fired because he had been away from his job too long. After he received the letter, he was hospitalized at Park West Hospital in West Knoxville, Tennessee. He spent the night in the hospital and in the morning he saw Dr. Carpenter. Mr. Day told the doctor that he was being terminated with the Department of Energy at Oak Ridge, that he had been suffering from depression because of the job for quite some time and that he had, upon receiving the letter the day before, suffered a major anxiety attack. (TR 42) Eventually, Mr. Day had a meeting with Mr. Richardson which lasted 15 or 20 minutes and Mr. Richardson was unwilling to give him his job back. (TR 51) Mr. Day received a letter from DOE on January 23, 1999 which essentially said he was fired. He felt about the same way when he got the other letter. He called his psychiatrist, Dr. Peterson, whom he was seeing about every two weeks. (TR 54) Dr. Peterson was increasing his medication levels. Mr. Day was sleeping anywhere from 16 to 18 hours a day. He would leave the house to avoid stress and go to the barn, which had a little room where he would spend his time. He would see a good friend of his and talk to him. This friend acted like a second psychiatrist. He would get home at 4 or 5 o'clock in the morning and he would sometimes finally be tired enough to go to sleep. (TR 55)

On cross-examination, Mr. Day testified that during his meeting with Steven Richardson, who was acting manager of the Department of Energy, the subject of statute of limitations for environmental whistleblower laws did not come up. No one else with the Department of Energy made any statements to Mr. Day about how long the statute of limitations was or how long he had to file a complaint. (TR 67) Mr. Day understood that his personal attorney, Mr. Slavin, filed a lawsuit against Steven Hyder for legal malpractice. (TR 70) Mr. Day called Mr. Hyder on January 25, 1999, two days after he received the termination letter from DOE. (TR 79) Mr. Day told him he was fired and he wanted to pursue whatever legal actions he had. (TR 80) Mr. Hyder is a licensed attorney. (TR 81) Once he made the phone call to Mr. Hyder and told him that he had been fired, Mr. Hyder indicated that "I'll take care of everything," so from that point on he didn't worry about it and left it at that. (TR 81) Mr. Hyder was retained in August 1998 and he was aware of Mr. Day's alleged whistleblowing activity and alleged discrimination. (TR 89) Mr. Hyder brought up the subject of a whistleblower lawsuit against DOE in August 1998. After being terminated, Mr. Day once again discussed with Mr. Hyder the possibility of a whistleblower lawsuit against DOE. (TR 90-91) Mr. Day met with Attorney Hyder about three or four times and he spoke to him on the phone perhaps five or six times. Mr. Day was not aware whether Mr. Hyder was hospitalized during the time that he worked for him. (TR 97) Regarding the health of Attorney Hyder, it was Mr. Day's belief that he had suffered a stroke at some prior time, which resulted in loss of use of the right or left side of his body. (TR 98-99) However, he seemed to have a good-sized work load, although there were a couple of times when Mr. Day talked to him on the telephone and Mr. Hyder didn't seem to be doing very well. (TR 99)

Mr. Day testified that he was presently receiving workman's compensation in the amount of 75% of his salary. (TR 75) Mr. Day's disability began prior to his termination. Once the workman's compensation terminates, he can apply for permanent disability. (TR 76) The disability is based upon depression, anxiety and panic. Aside from paying an income, workman's compensation is paying for him to see Dr. Peterson on a monthly basis, as well as all medications. (TR 77)

COMPLAINANT'S EXHIBITS

Complainant's Exhibit 1A

Complainant's Exhibit 1A is the expert report and declaration of Dr. Glenn R. Peterson, M.D. dated September 25, 2001. It states as follows: Dr. Peterson is a Board-certified psychiatrist practicing in Oak Ridge, Tennessee and has been treating Mr. Day since 1997 when he was sent to see him by the Department of Energy Employee Assistance Program. For many months, both before and after his firing, Mr. Day was virtually incapacitated by major depression, panic attacks, and anxiety, which Mr. Day attributed to what he described as hostile treatment at work. His employer refused to reasonably accommodate his disability (major depression) even after Dr. Peterson wrote to DOE with medical restrictions and requested that Mr. Day be transferred to a non-hostile working environment away from George Benedict. To Dr. Peterson's knowledge, DOE never honored these restrictions. This exacerbated the depression. Mr. Day was notified of his impending termination and afforded a chance to respond. When he arrived at the Oak Ridge Federal Building in December 1998 to rebut the reasons stated for his impending firing, he was in the throes of a major depressive incident of having severe panic attacks causing him to bang his head against the wall. Mr. Day was extremely fearful, exacerbating his anxiety, depression and panic attacks after he was threatened with arrest by his employer and subjected to intimidation and humiliation in the lobby of the Oak Ridge Federal Building by DOE Security. Having DOE fire him and eject him from its building was devastating to Mr. Day and exacerbated his illness. Mr. Day became extremely lethargic due to his depression and anxiety, entirely losing the ability to concentrate or manage his affairs for some seven or eight months, until July 1999. He still suffers to a degree in this manner today. Under circumstances of intimidation, firing, major depression, panic attacks, anxiety, hospitalization, near-arrest by his employer in an embarrassing incident in the Federal Building in Oak Ridge, labels of paranoia by DOE's consulting psychiatrist and resulting self-doubt, lethargy and lack of energy, it is Dr. Peterson's conclusion to a reasonable degree of medical certainty that Mr. Day did not have the ability to manage his own legal affairs until July 1999, when he recovered sufficiently from his major depression to learn that no whistleblower complaint was filed, found another lawyer and filed his environmental whistleblower complaint against DOE. Due to Mr. Day's illness and his treatment by DOE, his failure to file a DOL environmental whistleblower case within 30 days was out of his hands because of his major depression, anxiety, panic attacks and fear of DOE retribution. His failure to file within 30 days should be excused.

Complainant's Exhibit 1B

Dr. Peterson's Curriculum Vitae appears at Complainant's Exhibit 1B. Dr. Peterson received his medical degree in June 1975 from Georgetown University Medical School, Washington, D.C. He

attended John Hopkins University, Baltimore, Maryland and majored in psychology and pre-med. His Bachelor of Arts Degree was awarded in 1970. He received a Master's Degree in Psychology in June 1971 from Temple University Grade School Psychology Department, Philadelphia, Pennsylvania. He is presently in private practice in Knoxville, Tennessee and was Board-certified in October 1980 by the American Board of Psychiatry and Neurology.

Complainant's Exhibit 2A

Complainant's Exhibit 2A is a Psychiatric Evaluation by Dr. Daniel Y. Patterson dated September 20, 2001. The complainant, Millard Franklin Day, was referred to Dr. Patterson by Mr. Day's attorney, Edward A. Slavin, Jr. for psychiatric evaluation. Mr. Day gave Dr. Patterson the following psychiatric history: Mr. Day knew of no significant mental illness in his family except that his mother may have had postpartum depression. Mr. Day graduated from the University of Tennessee with a degree in electrical engineering and his resume showed that he received multiple honors for his intelligence and diligence in the workplace. Prior to entering college, Mr. Day served three years and eight months in the United States Air Force. After graduating college, Mr. Day served three more years in the United States Air Force. He married and had two children. Mr. Day made multiple recommendations to Martin Marietta regarding proposals for cleanup and the need thereof. His proposals were often rejected which led to a constant feeling of frustration and a feeling that he was working at cross purposes from his bosses and coworkers, and whether in fun or in malice, coworkers and a supervisor began to send him Delbert cartoons which Mr. Day felt were derogatory. Mr. Day became increasingly depressed and sought the help of Dr. Glenn Peterson in Oak Ridge who treated him from September 1997 until the present time. Mr. Day took sick leave after developing chest pains, shaking spells, anxiety and panic attacks from August 11, 1997 to October 2, 1997. The following June, Mr. Day was evaluated by Dr. Russell D. McKnight for the Department of Labor fitness for duty evaluation. Dr. McKnight felt that Mr. Day was able to return to work. Six months later on December 11, 1999, Mr. Day was notified that he was being terminated by his employer, the U.S. Department of Energy. Mr. Day was so depressed that he was hospitalized at a facility near his home under the care of Dr. Kenneth Carpenter, a contract psychiatrist for Martin Marietta and the U.S. Department of Energy. Dr. Carpenter diagnosed Mr. Day as "personality disorder NOS with paranoid and obsessive compulsive trends." According to Mr. Day, Dr. Carpenter was unwilling to hear the history of his problems and never told Mr. Day that he was associated with the Department of Energy or Martin Marietta. Mr. Day stated that he continued to have panic symptoms and depression but felt quite comfortable in the care of his primary care psychiatrist physician.

Dr. Patterson's impression was: major depression, moderate recurrent; obsessive compulsive personality; hypertension, tendonitis, kidney stones and joint problems; occupational problems. It was Dr. Patterson's opinion that Mr. Day has a high expectation of himself and others in terms of work productivity and "doing things the right way." His relatively long tenure with companies like General Electric, Dupont and Martin Marietta belie serious personality problems. His obsessive-compulsive personality in fact was put to positive use given the area of work he chose. Mr. Day is not a "go along get along" individual. He tends to make demands of others but those demands are not beyond the

demands he makes of himself. Dr. Patterson would clearly disagree with Dr. Carpenter's inclusion of "paranoid," Axis I diagnosis, and in fact, his Axis II diagnosis should have been his personality and Axis I should have been depression.

Complainant's Exhibit 2B

Dr. Patterson's Curriculum Vitae appears at Complainant's Exhibit 2B. I note that he attended the University of Kentucky Medical School, Lexington, Kentucky and received his medical degree in 1966. He was Board-certified by the American Board of Psychiatry and Neurology in October 1973. He is presently a clinical psychiatrist and consultant in managed health care. He has numerous publications and he was formerly Chairman, HMO Psychiatry Task Force, American Psychiatric Association from 1981 until 1985.

With regard to Complainant's Exhibit 3, there was an objection to this exhibit during the hearing. (TR 16) Complainant filed a post-trial motion requesting that I reconsider sustaining the objection to Complainant's Exhibit 3. After considering Complainant's post-trial motion, I continue to sustain the objection. Judge Daniel F. Sutton's Recommended Decision and Order of July 31, 2001 has absolutely nothing to do with the issues before me.

RESPONDENT'S EXHIBITS

Respondent's Exhibit 2

Respondent's Exhibit 2 is the Department of Energy's First Request for Admissions mailed to the Complainant on January 18, 2000. Apparently the Complainant never responded and/or denied the Respondent's request for admissions, therefore, the statements set out in Exhibit 2 are admitted. (TR 20-21) These statements are as follows:

Admit that Exhibit A is a true and exact copy of the DOE's January 22, 1999, decision to remove Mr. Millard Day from the federal service.

Admit that Exhibit B is a true and exact copy of the U.S. Postal Service Return Receipt which Mr. Millard Day signed on January 23, 1999.

Admit that the signature on Exhibit B is Mr. Millard Day's signature.

Admit that on January 23, 1999, Mr. Millard Day received DOE's letter informing him of its decision to remove him from the federal service.

Admit that Exhibit C is a true and exact copy of this complaint which Mr. Millard Day filed with OSHA.

Admit that Mr. Millard Day filed his complaint on July 21, 1999.

Admit that DOE mailed Mr. Day written notice of his firing by certified mail on Friday, January 22, 1999, informing him that he was to be fired from his position in the Department of Energy. Paragraph 5 of July 21, 1999, Complaint.

Admit that July 21, 1999, is more than thirty (30) days after January 23, 1999.

The above considered, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. As of January 23, 1999, Complainant, Millard F. Day, was employed by the Department of Energy (DOE). The parties stipulated to the following facts: (1) the triggering event for the 30 day statute of limitations was the date that the Complainant received notice of his removal from the Federal service - - January 23, 1999; (2) the Complainant did not file his "environmental whistleblower" complaint until July 21, 1999; and (3) all of the statutes mentioned in the complaint have a 30 day statute of limitations. (TR at pp. 6-7).

2. Complainant submits that the 30 day statute of limitations should be equitably tolled. Complainant correctly states:

> Courts distinguish between equitable tolling and equitable estoppel:
>
> Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act. By contrast, equitable estoppel examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights. *Felty v. Graves-Humphreys Co.*, 785 F.2d 516, 519 (4th Cir. 1986) (footnote omitted). Complainant's post-hearing brief at p. 4.

3. Addressing the issue of equitable estoppel, in order for equitable estoppel to apply the Respondent must take "active steps to prevent the Complainant from suing on time." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th cir. 1990). I find nothing in the record that Respondent herein did anything wrong or "actively mislead" Complainant. Complainant argues that DOE never notified its employees of the statute of limitations for environmental whistleblower complaints (30 days) while posting minimal information regarding the Energy Reorganization Act (ERA) statue of limitations (180 days), therefore, without further explanation of the 30 day statute of limitations for federal employees under environmental whistleblower laws, this constitutes misinformation .

4. I find that there is no evidence in the record that supports this argument. Mr. Day never testified he was mislead by DOE posting of ERA statute of limitations. The only time the subject was mentioned, Mr. Day testified as follows:

Q. Okay. I believe you testified that in December of 1998 you met with Mr. Steven Richardson who was the acting manager or assistant manager of the Department of Energy, is that correct?

A. Yes.

Q. And I believe you made a statement that the issue of the statute of limitations of environmental whistleblower laws did not come up in the conversation, is that right?

A. That's correct, uh-huh.

Q. So Mr. Richardson made no statements one way or the other about what the statute of limitations is?

A. No, sir.

Q. For an environmental whistle-blower case?

A. No. That's correct.

Q. Okay.

A. He only had a couple, three statements, period.

Q. Okay. Did anyone else with the Department of Energy make any statements to you about how long the statute of limitations is or how long you have to file a complaint?

A. No, sir. (*See* Tr. 67)

The above considered, on the issue of equitable estoppel, I find against the Complainant and for the Respondent.

5. Equitable tolling permits a plaintiff to avoid the bar of the statute of limitations if, despite all due diligence, he is unable to obtain vital information bearing on the existence of his claims. *Cada*, 920 F.2d at 451. There have been instances where courts have held that equitable tolling could be applied under circumstances where the Complainant was suffering from a mental disabiality.

6. I have to accept as true Complainant's evidence on whether he was suffering from a mental disability because this evidence was not contested. Mrs. Day testified that after her husband received the January 23, 1999 letter of termination, Mr. Day was unable to manage things and she took over

everything. He slept 14 to 16 hours a day and when he wasn't asleep he was very sad and couldn't do his normal routine. He was not in control of his legal affairs. Millard Day testified that after receiving the termination letter, Dr. Peterson increased his medication levels. He was sleeping anywhere from 16 to 18 hours a day and would leave the house to avoid stress and go to the barn. Dr. Glenn Peterson stated in his report of September 25, 2001, that after Mr. Day was fired, Mr. Day became extremely lethargic due to his depression and anxiety, entirely losing his ability to concentrate or manage his affairs for some seven or eight months until July 1999. That due to major depression, panic attacks, anxiety, hospitalization, lethargy and lack of energy, it was Dr. Peterson's conclusion that Mr. Day did not have the ability to manage his own legal affairs until July 1999 when he recovered sufficiently from his major depression to learn that no whistleblower complaint was filed.

7. I find, based upon the above evidence, that Millard Day was disabled due to major depression, panic attacks, anxiety, resulting self-doubt, lethargy and lack of energy from on or about the date of his termination, January 23, 1999 until sometime in July 1999 when he discovered that no whistleblower complaint was filed on his behalf.

8. Although mental incapacity could qualify to toll the statute of limitations, Complainant must make a particularly strong showing. The 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. *See Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996). The more stringent standard allows tolling only if Complainant has been adjudged mentally incompetent or was institutionalized[3] during the filing period. The Court in *Hall v. E G & G Materials, Inc.* (10th Cir. 1999), 1999 U. S. App. Lexis 25568, at 7 stated that, "tolling for mental incapacity would be allowed only under 'exceptional' circumstances. We identified two such circumstances as adjudication of incompetency or institutionalization."

9. There has been no evidence that Complainant has been adjudicated to be incompetent or that he was institutionalized; however, as I have previously held, he was disabled due to depression during the relevant time. The depression notwithstanding, Mr. Day was well enough to contact his then attorney, Steven Hyder, on January 25, 1999, two days after he received the termination letter from DOE. (TR 79) Mr. Day told him he was fired and he wanted to pursue whatever legal actions he had. (TR 80) Mr. Hyder is a licensed attorney. (TR 81) Once he made the phone call to Mr. Hyder and told him that he had been fired, Mr. Hyder indicated that "I'll take care of everything," so from that point on he didn't worry about it and left it at that. (TR 81) Mr. Hyder was retained in August 1998 and he was aware of Mr. Day's alleged whistleblowing activity and alleged discrimination. (TR 89) Mr. Hyder brought up the subject of a whistleblower lawsuit against DOE in August 1998. After being terminated, Mr. Day once again discussed with Mr. Hyder the possibility of a whistleblower lawsuit against DOE. (TR 90-91)

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[3] Day was apparently hospitalized for one night at Park West Hospital before the filing period.

10. The Secretary of Labor has previously held that the doctrine of equitable tolling is generally inapplicable where a plaintiff is represented by counsel, that once a claimant consults an attorney, he has "access to a means of acquiring knowledge of his rights and responsibilities" precluding application of equitable tolling considerations. *Kent v. Barton Protective Services*, 84-WPC-2 (Sec'y Sept. 28, 1990). This principle was reaffirmed by the Secretary in *Mitchell v. E G & G Services, et al.*, 87-ERA-22 (Sec'y July 22, 1993). The Secretary stated, "Equitable tolling is inappropriate when plaintiff has consulted counsel during the statutory period. Counsel are presumptively aware of whatever legal recourse may be available to their client, and this constructive knowledge of the law's requirements is imputed to plaintiff." (citations omitted)

11. Further, I find that by consulting his attorney, Mr. Day did what a well person would do. Thus, his disabling depression and anxiety during the relevant time is irrelevant. I further find that whether Mr. Day would have discovered and/or could have alerted his attorney to that short period of the statute of limitations, during that small window from January 25, 1999 until on or about February 23, 1999, had he not been disabled, to be speculation. This was a subject that was not even argued by counsel.

12. The doctrine of equitable tolling may have applied if Complainant could have shown that his former attorney, Mr. Hyder, was mentally ill. *Gillian v. TVA*, 91-ERA-31, 34 (Sec'y August 28, 1995). Further, the Sixth Circuit has held that: "If a plaintiff pursued his claim diligently, yet was abandoned by his attorney due to his attorney's mental illness, equitable tolling of the limitation period may be appropriate." *Cantrell v. Knoxville Community Dev. Corp.*, 60 F.3d 1177, 1179 (6th Cir. 1995). While this was a subject partially raised during the hearing (*see* TR 96-100), it was never developed. There is insufficient evidence in the record concerning the mental state of Complainant's former attorney, Mr. Hyder.

The above considered, on the issue of equitable tolling, I find against the Complainant and for the Respondent.

13. Finally, Complainant argues that he filed a complaint challenging his transfer to being required to work for George Benedict with the wrong forum, EEOC, and that the cause of the transfer was retaliation for environmental protected activity. In citing *Atkins v. Schmultz Mfg., Inc.*, 435 F.2d 527 (4th Cir. 1970) (en banc), cert. denied, 402 U.S. 932 (1971), Complainant sets forth the Court's reasoning:

> This is not a case where time lapse between the end of one suit and the commencement of another might cause the defendant to think that the litigation has come to an end. From the initial filing of the complaint in the District Court in Kentucky, these parties have been continual adversaries before one federal tribunal or another in pressing their respective claims. More importantly, Atkins asserted his claim in a court of competent jurisdiction

> within the period prescribed by Virginia and both parties prepared for litigation on the merits.

4357 F.2d at 530.

Complainant states further that Mr. Day and Respondents have been "continual adversaries before one federal tribunal or another in pressing their respective claims," thus making Day's claim analogous to *Atkins*.

14. While I have Mr. Day's "whistleblower" complaint, dated July 21, 1999, before me, I do not know what his EEOC complaint was about other than what is argued in Complainant's brief. Mr. Day's whistleblower complaint states in pertinent part:

> 1. Complainant Millard Day was an ethical Department of Energy (DOE) Oak Ridge Operations (ORO) federal employee who raised concerns about the cost and scheduling of environmental cleanup operations and "sick building syndrome" in Government buildings in Oak Ridge.
>
> 2. These concerns are all protected under the Safe Drinking Water Act (SDWA) and also under the Clean Air Act (CAA), Federal Water Pollution Control Act (FWPCA), Comprehensive Environmental Response and Liability Act (CERCLA), Resource Conversation (sic) and Recovery Act (RCRA), Solid Waste Disposal Act (SWCA) AND Toxic Substance Control Act (TSCA).
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> . . .
>
> 4. The Respondents retaliated against Mr. Day for raising protected concerns about cost and scheduling of environmental cleanup operations, with Respondents' actions risking great waste of funds at the Oak Ridge Superfund cleanup sites, which are among the most hazardous places on Earth.
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> 5. Respondents mailed Mr. Day written notice of his firing by certified mail on Friday, January 22, 1999, informing him that he was to be fired from his position in the Department of Energy, rejecting Mr. Day's reponse to the Respondents' plan to fire him from his DOE ORO position.
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> . . .

7. Downstream communities such as Kingston, Tennessee draw their drinking water from waters actually or potentially polluted by the Department of Energy's Oak Ridge Operations, including the world's largest mercury pollution event, involving 4.2 million pounds, only

declassified by DOE at the Appalachian Observer's request of May 17, 1983.

8. The quality, cost, speed, and thoroughness of the Oak Ridge cleanup and the safety of drinking water downstream is dependent on following proper cost and scheduling principles.

. . .

10. Mr. Day suffers from panic and anxiety attacks that are the sequelae of workplace intimidation, harassment and idling him, with little or no assigned duties. Respondents failed to reasonably accommodate Mr. Day's panic and anxiety attacks. Respondents' their harassment increased their frequency and severity. (sic) Mr. Day was an experienced and respected defense contractor manager when he was recruited by DOE. His firing by DOE has been a shattering event, effectively destroying a distinguished career in service to his country. Dr. Day took a pay cut to go to work as a GS-13 for DOE.

11. Mr. Day respectfully and earnestly expressed his concerns about cost and scheduling matters to Respondents. These cost and scheduling matters involve potential waste of hundreds of millions or billions of dollars by Respondents on environmental cleanup. The potential waste on cleanup expenditures ranges from cost overruns to double billing. Respondents showed great diffidence at implementing Congressional requirements on cost and scheduling controls. In fact, on at least one occasion, in Mr. Day's presence, the Respondent George Benedict, who was at all relevant times the Assistant Manager for Construction and Engineering (AMCE), gave orders to destroy documents and to leave no permanent records about an audit with over 100 critical findings about Oak Ridge cost and schedule control by DOE ORO and its contractors.

. . .

13. In fact, in the presence of witnesses in late 1996, Mr. Day overheard Respondent Dan Wilken, DOE ORO Assistant Manger

for Administration and other DOE employees, speaking with contractor managers and employees at Jefferson Drug store in Oak Ridge, Tennessee. Some of the DOE and contractor employees and managers were bragging about getting around cost and scheduling limitations. They were speaking in hostile, defiant and brazenly contemptuous terms of cost and scheduling controls demanded by Congress.

14. Not knowing who the men were and surprised at their comments in the Jefferson Drug Store that day, Mr. Day engaged in protected activity under the environmental whistleblower laws. Then and there, Mr. Day approachd the men at the table and some constructive words were exchanged. One Oak Ridge National Laboratory (ORNL) contractor manager who was participating in the discussion of cost and scheduling even apologized to Mr. Day.

15. However, then and there at the Jefferson Drug Store, Respondent Dan Wilken introduced himself and asked Mr. Day he was and who he; (sic) Mr. Day identified himself and Respondent Benedict as his boss.

. . .

19. Mr. Day was subjected to an extremely hostile working environment by Respondents, including assignment of a new supervisor, posting and leaving of hostile cartoons in public places and Mr. Day's private office, leading to panic and anxiety attacks, failure to pay overtime, failure to reasonably accommodate his wife's surgery by demanding he be at work, and other standard Oak Ridge management "SOOTC treatment."[4]

. . .

21. On or about December 15, 1998, Mr. Day went to have a meeting with Acting DOE ORO Manager Steven Richardson, affording him the supposed opportunity to supposedly rebut his Notice of Proposed Removal. Mr. Day welcomed the opportunity to meet with DOE ORO management to discuss the proposal. Instead, he was escorted out of the Oak Ridge Federal Building by DOE Security Manager James H. Ware, with Oak Ridge Police standing by as backup. The meeting was

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[4] The Complaint explained "SOOTC treatment" as "senseless, obnoxious, offensive, thoughtless and cruel." See Complaint at p. 4, footnote 2.

finally held on December 22, 1998. Mr. Day again requested a transfer to a non-hostile working environment.

22. The firing letter sent by certified mail on Friday, January 22, 1999 gave Mr. Day notice of his firing, which was not effective until its receipt.

15. While reference was made to an EEOC complaint filed by Mr. Day during his testimony (*see* Tr. 68, 69, 80, 82, 83-91) it is unclear what the subject matter of this complaint entailed other than it was filed prior to December 1998 (TR 82) and that it documented Mr. Day's hostile work environment. (TR 84) Mr. Day was testifying from memory and I do not have the EEOC complaint, I do not know whether I have subject matter jurisdiction of the allegations made in said complaint and I have no idea if there is connection between the allegations raised therein and the complaint before me. Therefore, on the issue of whether the complaint dated July 21, 1999, ought to be merged with an EEOC complaint filed before December 1998, I have no alternative but to find against the Complainant.

CONCLUSION

Having considered all of the evidence, having read the parties' briefs and being otherwise fully informed, I recommend that Complainant's Complaint, filed on or about July 21, 1999, be dismissed for lack of jurisdiction.

MICHAEL P. LESNIAK
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8