**In the Matter of:**

**CORNELIUS CASEY DROOG,** **ARB CASE NO. 11-075**

**COMPLAINANT,** **ALJ CASE NO. 2011-CER-001**

**v.** **DATE: September 13, 2012**

**INGERSOLL-RAND HUSSMAN,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant*:**
**Cornelius Casey Droog, *pro se,* Chino Hills, California**

***For the Respondent:***
**Joel Kelly, Esq., and Nikki Wilson, Esq.; Jackson Lewis, LLP, Los Angeles, California**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge.***

## FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (Thomson/West 2005). On March 2, 2011, Cornelius Casey Droog (Droog or Complainant) filed a complaint with the Occupational Safety and Health Administration (OSHA) against Ingersoll-Rand Hussman (Ingersoll-Rand or Respondent) alleging retaliatory discharge, harassment, and blacklisting. Following an investigation, OSHA dismissed the complaint on March 28, 2011. The Complainant filed objections and requested a formal hearing before a Department of Labor Administrative Law Judge (ALJ). Prior to hearing, the Respondent filed a

motion to dismiss the complaint because the statute of limitations had expired prior to the Complainant's filing with OSHA. On August 5, 2011, the presiding ALJ granted the Respondent's motion, and dismissed the Complainant's complaint. For the following reasons, the Board affirms the ALJ's Decision and Order.

## BACKGROUND

Ingersoll-Rand employed Droog as an industrial refrigeration service technician from 1985 until his employment termination on or about November 17, 2005. While still employed by Ingersoll-Rand, in 2004, Droog experienced respiratory and digestive problems that he attributed to jobsite chemical exposure and for which he filed a workers' compensation claim. Following his discharge by Ingersoll-Rand, Droog continued to pursue his workers' compensation claim and filed two separate complaints in California state court, the first alleging discrimination in violation of California state law, the second alleging violation of the Fair Employment and Housing Act. Both state court suits were dismissed in May of 2008.

Between 2006 and 2009, Droog sought and obtained employment with three different companies. With each employment, he was subsequently discharged from employment, for differing reasons each time. His last employment termination was on December 31, 2010.[1]

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under CERCLA and its implementing regulations at 29 C.F.R. Part 24.[2] The ARB "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."[3] We are bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole.[4] The ARB reviews the ALJ's conclusions of law de novo.[5]

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[1] Droog's last employment was with DSG Mechanical Corporation. While Droog worked for DSB until December 31, 2010, the last alleged occurrence of retaliation took place on November 29, 2010. See ALJ Decision and Order Dismissing Complaint (D. & O.), slip op. at 8.

[2] Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 24.110(a).

[3] *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted).

[4] 29 C.F.R. § 24.110(b).

[5] *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

## DISCUSSION

Droog filed his complaint with OSHA on March 2, 2011. He alleged that Ingersoll-Rand terminated his employment in November 2005 in retaliation for engaging in CERCLA whistleblower-protected activity, and that Ingersoll-Rand blacklisted him through use of a former company official who facilitated his subsequent terminations from employment and otherwise impeded his ability to secure gainful employment. Upon the Respondent's filing of its motion to dismiss for failure by Droog to file a timely complaint with OSHA, followed by various submissions by the parties, the ALJ dismissed Droog's complaint as untimely for not having been filed within thirty days of the alleged violations, as required by 42 U.S.C.A. § 9610(b).

On appeal, Droog challenges the ALJ's decision arguing, in essence, that the actions following his discharge from employment by the Respondent that resulted in his subsequent difficulties in securing and/or maintaining employment with other companies constituted blacklisting. Given that Droog appears pro se, we also liberally construe Droog's brief to argue that equitable principles entitle him to proceed with his claims notwithstanding his failure to timely file his complaint.

The ALJ assumed, without deciding, that Droog presented a valid blacklisting claim. However, because the ALJ found that Droog was aware of the alleged blacklisting activity by 2008 when he was terminated from his then-current employment, Droog's claim was time-barred since he did not file it at that time. We give Droog the benefit of the doubt, in light of his pro se status, and assume that he presents a valid blacklisting claim that took place on a continuing basis up through and including his last employment engagement with DSG Mechanical Corp., which terminated on December 31, 2010. Even so, Droog would have had to file his claim of unlawful blacklisting within thirty days of December 31st, or on or before January 31, 2011, which he failed to do.

In addressing the question of the timeliness in the filing of whistleblower complaints, the ARB has repeatedly recognized that the statutory limitations period is not jurisdictional in the sense that noncompliance serves as an absolute bar to administrative action, and that the filing deadline is thus subject to equitable modification, i.e., tolling or estoppel. *Hyman v. KD Resources*, ARB No. 09-076, ALJ No. 2009-SOX-020 (ARB Mar. 31, 2010) (citations omitted).[6] Accordingly, the ARB has followed the tolling principles set forth in *School District of*

[6] "Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act. Equitable estoppel, in contrast, examines the defendant's conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights." *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir. 1991) (quoting *Felty v. Graves-Humphreys*, 785 F.2d 516, 519 (4th Cir. 1986)). As the First Circuit has explained, while equitable tolling focuses upon a plaintiff's excusable ignorance of the facts underlying his or her claim, "equitable estoppel occurs where an employee is aware of his [statutory] rights but does not make a timely filing due to his reasonable reliance on his employer's misleading or confusing representations or conduct." *Kale v. Combined Ins. Co. of Am.*, 861 F.2d 746, 752 (1st Cir. 1988).

*Allentown v. Marshall*, 657 F.2d 16 (3rd Cir. 1981), in determining whether or not to toll the running of a statute of limitations period, when:

> (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.

*Allentown*, 657 F.2d at 20. In *Hyman*, the Board recognized a fourth equitable principle, i.e., "where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights." *Hyman*, ARB No. 09-076, slip op. at 4 (quoting *Bonham v. Dresser Indus.*, 569 F.2d 187, 193 (3d Cir. 1978)).

Construing Droog's arguments on appeal in the light most favorable to him as an assertion that the foregoing equitable principles, either or all, apply to justify his not having filed his complaint within the statutorily mandated thirty-day period, we nevertheless find the record devoid of any evidence that would justify invoking these equitable principle to toll the running of the statute of limitations in this case.

## CONCLUSION

Accordingly, the ALJ's Decision and Order Dismissing Complaint is **AFFIRMED.**

**SO ORDERED.**

**E. COOPER BROWN**
**Deputy Chief Administrative Appeals Judge**

**PAUL M. IGASAKI**
**Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**
**Administrative Appeals Judge**