

**IN THE UNITED STATES DISTRICT COURT**  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

<b>ROBERT E. JONES</b>	:	<b>CIVIL ACTION</b>
vs.	:	
MARSHA S. BOYD; SANDRA J. SQUIRE, Administrative Law Judge; U.S. MERIT SYSTEMS PROTECTION BOARD; BRUCE BABBIT, Secretary of the Interior; ROGER KENNEDY, Director National Park Service; and MARTHA ANSTY, Esquire, Counsel, Department of the Interior	: : : : :	No. 97-3363

**ORDER AND MEMORANDUM**  
**ORDER**

**AND NOW**, to wit, this 10<sup>th</sup> day of June, 1998, upon consideration of defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted (Doc. No. 10, filed Sep. 4, 1997), plaintiff's "Motion for Dismissal of the Defendants Motion for Dismiss" (Doc. No. 12, filed Sep. 24, 1997), defendants' Reply in Support of the Motion to Dismiss the Complaint (Doc. No. 13, filed Oct. 6 1997), and plaintiff's "Motion for Dismissal of the Defendants Motion for Dismiss" (Doc. No. 14, filed Oct. 14, 1997) (raising the identical claims and defenses raised in Document No. 12), for the reasons set forth in the accompanying Memorandum, **IT IS ORDERED** as follows:

Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted (Doc. No. 10, filed Sep. 4, 1997), treated by the Court in part as a Motion to Dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and in part as a Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), is **GRANTED** and plaintiff's Complaint is **DISMISSED**.

Plaintiff's "Motion for Dismissal of the Defendants Motion for Dismiss" (Doc. No. 12, filed Sep. 24, 1997) is **DENIED**.

Plaintiff's "Motion for Dismissal of the Defendants Motion for Dismiss" (Doc. No. 14, filed Oct. 14, 1997) is **DENIED**.

**MEMORANDUM**

Background: On August 4, 1992, plaintiff, Robert E. Jones, was terminated from his job as a park ranger with the United States Department of the Interior. On July 29, 1992 – prior to his termination – plaintiff filed a complaint with the Interior Department alleging that he had been discriminated against on account of his race (Celt), color (white), age (40), mental or physical handicap (bad back and learning disability), and in reprisal for complaining to an Equal Employment Opportunity ("EEO") counselor. Following his termination, plaintiff filed another complaint – on November 17, 1992 – with the Interior Department, raising similar claims.

The Interior Department issued a decision on December 17, 1993, finding that there had been no discrimination. Plaintiff appealed this decision to the Equal Employment Opportunity Commission ("EEOC"). He presented the EEOC with claims of discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et. seq.*, the Age Discrimination and Employment Act ("ADEA"), 29 U.S.C. § 621 *et. seq.*, and the Rehabilitation Act, 29 U.S.C. § 791, *et. seq.* In a decision dated November 1, 1994, the EEOC affirmed a finding of no discrimination. Plaintiff requested reconsideration of that decision on December 2, 1994, which request was denied by the EEOC on June 7, 1996.

At the same time plaintiff was pursuing his claims of discrimination before the EEOC, he sought review by the Merit Systems Protection Board ("MSPB") of the Interior Department's decision to terminate him. After a threshold jurisdictional question was raised and answered in a series of opinions, plaintiff was ordered reinstated by Administrative Judge Sandra J. Squire on April 21, 1994. The basis of the order of reinstatement was that the agency had failed to provide plaintiff with adequate procedural protections before terminating him. There was another series of appeals before the MSPB, first by the agency and later by the plaintiff who alleged that the department had failed to abide by the MSPB's reinstatement order. On October 31, 1996, plaintiff was terminated for the second time. He no longer works for the Department of the Interior.

Plaintiff filed a Complaint in the District of Maryland which was transferred to this Court by order dated May 5, 1997 of Senior Judge Young. Plaintiff's Complaint

consists of a form provided by the District of Maryland entitled “Complaint for Employment Discrimination” and an appended document entitled “Statement of Federal Jurisdiction” which sets forth the facts and arguments relied on by plaintiff. Plaintiff also attached various documents to his Complaint. The Complaint, and plaintiff’s response to defendants’ Motion to Dismiss, set forth numerous grounds for relief, most of which concern either the regulatory requirements for terminating a federal employee – those issues addressed by the MSPB – or the appropriate standard of review of an MSPB decision. In addition, plaintiff asserts that he does not wish to abandon his discrimination claims and – in the body of the document entitled “Statement of Federal Jurisdiction” – contends that he was discriminated against on the basis of his “learning disabilities” and bad back. On the form entitled “Complaint for Employment Discrimination,” plaintiff placed a check in the space next to a line for a cause of action under the Americans with Disabilities Act, 42 U.S.C. § 12101, et. seq.. Because plaintiff is a federal employee, this claim should more appropriately have been raised pursuant to the Rehabilitation Act, 29 U.S.C. § 791, et. seq.. See 42 U.S.C. § 12111(5)(B); see also Spench v. Straw, 54 F.3d 196, 202 (3d Cir.1995). On the same “Complaint for Employment Discrimination” form, plaintiff placed a check next to the line for a cause of action under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et. seq., and, although he did not check the equivalent line next to the Age Discrimination and Employment Act (“ADEA”), 29 U.S.C. § 621 et. seq., he indicated his intention to challenge his termination on the basis of age discrimination elsewhere on the “Complaint for Employment Discrimination” form, a challenge properly brought pursuant to the ADEA. The facts and theories underlying these latter claims – under Title VII and the ADEA – are not set forth either in plaintiff’s “Statement of Federal Jurisdiction” or in the “Complaint for Employment Discrimination” form.

Defendants base their motion to dismiss on two grounds. First, defendants contend that this is not a “mixed case” – one in which the MSPB heard claims of both discrimination and procedural deficiencies – and this Court therefore lacks jurisdiction pursuant to 5 U.S.C. § 7703(b). Second, defendants argue that plaintiff’s discrimination claims are not timely because he filed this case more than ninety (90) days after the final decision of the EEOC. See 42 U.S.C. § 2000e-16(c).

**2. Legal Standard:** Defendants move pursuant to Federal Rule of Civil Procedure 12(b)(6). To the extent defendants challenge plaintiff’s discrimination claims as untimely, the Motion was properly filed under Rule 12(b)(6). When considering a Motion under Rule 12(b)(6), “the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint may also be taken into account.” 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2d § 1357 (1990); see also Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808, 812 (3rd Cir.1990). Generally, the court must accept as true the facts alleged in the complaint and must draw all reasonable inferences from those facts in the light most favorable to the plaintiff. See, e.g., Markowitz v. Northeast Land Co., 906 F.2d 100, 103

(3rd Cir.1990).

In this case, defendant contends that some of plaintiff's claims are untimely. Normally, "a 12(b)(6) motion should not be granted on limitations grounds unless the complaint facially shows noncompliance with the limitations period." Clark v. Sears Roebuck & Co., 816 F.Supp. 1064, 1067 (E.D. Pa. 1993) (citing Morgan v. Kobrin Securities, Inc., 649 F.Supp. 1023, 1027-1028 (N.D.Ill.1986)). As stated, however, on a Rule 12(b)(6) motion – even one based on a statute of limitations – a court may consider "matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994) (citing 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2d § 1357 (1990)); accord Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied, 510 U.S. 1042 (1994).

In addition, defendants have challenged this Court's subject matter jurisdiction with respect to plaintiff's appeal from the MSPB decision. This challenge should more properly have been filed pursuant to Federal Rule of Civil Procedure 12(b)(1) and the Court will treat the challenge to its jurisdiction as having been filed under that Rule. When considering a motion pursuant to Rule 12(b)(1), "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." Mortensen v. First Federal Savings and Loan, Assn., 549 F.2d 884, 891 (3d Cir.1977).

**Analysis:** Plaintiff is seeking, in part, judicial review of the decision of the MSPB. Defendants are correct when they assert that this Court has jurisdiction over appeals from decisions by the MSPB only if the MSPB decided a "mixed" case, that is, a case involving both claims of discrimination and claims of procedural deficiencies. See 7 U.S.C. § 7703(b)(1)-(2); see also Cohen v. Austin, 833 F.Supp 512, 515 (E.D. Pa. 1993); Gollis v. Garrett, 819 F.Supp. 446, 449 (E.D. Pa. 1993). Exclusive jurisdiction is vested in the Federal Circuit for those appeals from an MSPB decision which are not "mixed." See id.

In this case, plaintiff may have raised discrimination claims before the MSPB. There is a passing reference to discrimination in the Appeal Form filed with the MSPB. See Defendants' Ex. 4, attached to Defendants' Motion to Dismiss. Plaintiff also contends that he "did have the EEO claims enter [sic] into the MSPB appeal." Plaintiff's "Motion for the Dismissal of the Defendants Motion for Dismiss" at 3. Moreover, plaintiff claims that this is a "mixbag case" and that he does not wish to abandon his discrimination claims. Regardless of whether discrimination claims were presented to the MSPB, however, it is apparent that they were never adjudicated by that body and "the Federal Circuit retains exclusive jurisdiction to review Board decisions on procedural or

threshold matters in mixed case appeals until the Board reaches the merits of the discrimination claim.” M.C. Cherry v. Dep’t of Energy, 1994 WL 745462, \*2 (Fed. Cir. Feb. 17, 1994) (emphasis added). The Court therefore agrees with defendants that this is not a “mixed case” and the Court concludes that it lacks jurisdiction to entertain plaintiff’s appeal from the MSPB decision.

However, plaintiff has also alleged that his termination was the result of discrimination on account of his “learning disabilities” and bad back – a claim properly brought under the Rehabilitation Act. In addition, plaintiff appears to assert claims under Title VII and the ADEA, although he sets forth no facts to support those claims in his Complaint. Defendants argue that all such claims are time barred because plaintiff was required to file them within ninety (90) days of the EEOC’s final decision. In support, defendants cite 42 U.S.C. § 2000e-16(c). This provision expressly governs Title VII claims; Rehabilitation Act claims also use Title VII’s procedural scheme. See 29 U.S.C. § 794a(a)(1) (1994) (“The remedies, procedures and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16), including the application of sections 706(f) and 706(k) (42 U.S.C. § 2000e-5(f) though (k)), shall be available” to claims brought under the Rehabilitation Act). Plaintiff’s claims pursuant to Title VII and the Rehabilitation Act are therefore clearly governed by a ninety (90) day limit.

The ADEA, on the other hand, contains no statute of limitations for federal employees who choose to pursue their claims with the EEOC before filing in federal court. See 29 U.S.C. § 633a. The Third Circuit has not addressed the question of what limitations period to apply, so the Court must adopt one from an analogous federal or state provision. See Stevens v. Department of Treasury, 500 U.S. 1, 7-8 (1991).

Most of the circuits that have addressed the issue have elected to apply the limitations period of Title VII, 42 U.S.C.A. § 2000e-16(c) . . . , requiring the litigant to file a civil action within [ninety] days of receipt of notice of final agency action. Jones v. Runyon, 32 F.3d 1454, 1456 (10th Cir.1994); Long v. Frank, 22 F.3d 54, 56-59 (2d Cir.1994), cert. denied, --- U.S. ---, 63 U.S.L.W. 3563 (U.S. Jan. 23, 1995) (No. 94-6226); Lavery v. Marsh, 918 F.2d 1022, 1024-27 (1st Cir.1990); see Edwards v. Shalala, 64 F.3d 601, 603-06 (11th Cir.1995) (holding that Title VII is most analogous to the ADEA, and provides the most appropriate statute of limitations to borrow).

Rawlett v. Runyon, 104 F.3d 359 (Table), 1996 WL 733153, \*1 (4<sup>th</sup> Cir. 1996) (adopting ninety (90) day period); but see Lubniewski v. Lehman, 891 F.2d 216, 220-21 (9<sup>th</sup> Cir.1989) (adopting the six-year general statute of limitations for non-tort civil claims against the government). The Court concludes that the ADEA is most analogous to Title VII and adopts a ninety (90) day limitations period for plaintiff’s ADEA claim.

On June 7, 1996 the EEOC denied plaintiff’s “Request for Reconsideration.” This was a final decision and plaintiff was clearly informed in the denial letter that he had ninety (90) days in which to file a civil action in district court. As the instant case was not filed until March 25, 1997 (in the District of Maryland), well more than ninety (90) days passed between the time the EEOC issued its final decision and the time plaintiff filed his Complaint.

This is not the end of the matter, however, for the ninety (90) day time limit is not jurisdictional in nature and is therefore subject to equitable tolling. See Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 95-96 (1990). Equitable tolling is granted only in limited circumstances. See id. at 96. Some of the circumstances in which equitable tolling of the ninety day period might be justified are: (1) where notice from the EEOC does not adequately inform plaintiff of the requirement that suit be commenced within the statutory period; (2) where the court itself has led plaintiff to believe that he has satisfied all statutory prerequisites to suit; and (3) where the defendants have, through affirmative misconduct, lulled the plaintiff into inaction. See Baldwin County Welcome Center v.

Brown, 466 U.S. 147, 151 (1984). None of those circumstances exist in this case.

Plaintiff's claim that he suffers from a learning disability does raise the question of whether such a disability can serve as a basis for equitable tolling. However, the Court need not answer this question because plaintiff has filed voluminous papers with the Court and, for a *pro se* litigant, conducted himself adequately. There is simply no evidence that any learning disability has "rendered [him] incapable of . . . pursuing [his] claim." Nunnally v. MacCausland, 996 F.2d 1, 6 (1<sup>st</sup> Cir. 1993); see also Arizmendi v. Lawson, 914 F.Supp. 1157, 1162 (E.D. Pa. 1996) (noting that "[s]ome courts have recognized mental illness as a ground for equitable tolling, although only in rather extreme circumstances" and collecting cases). Because there is no evidence that plaintiff's learning disability prevented him from pursuing his claims in a timely manner, the Court concludes that plaintiff's claims are not subject to equitable tolling. His discrimination claims are, therefore, untimely.

For the reasons set forth above, the Court has dismissed plaintiff's Complaint and denied plaintiff's two Motions "for Dismissal of Defendants Motion for Dismiss."

**BY THE COURT:**

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**JAN E. DUBOIS**