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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JAMES TROY WALKER, )  
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Plaintiff(s), )  
 )  
v. )  
 )  
PACIFIC MARITIME ASSOC., et )  
al., )  
 )  
Defendant(s). )  
\_\_\_\_\_ )

No. C07-3100 BZ  
**ORDERING GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

On June 13, 2007, plaintiff James Troy Walker ("plaintiff"), acting *pro se*, filed a complaint against C&H Sugar Co., Inc. ("defendant"), and other defendants alleging employment discrimination under Title VII of the Civil Rights Act. After I granted various motions to dismiss based, in part, on the untimeliness of plaintiff's claims, I permitted plaintiff to amend his complaint against defendant C&H to invoke the doctrine of equitable tolling on the grounds that he "lost legal competency for several years." (See Doc. No. 45.)

Defendant has moved for summary judgment on the ground that plaintiff's claim is barred by the applicable three year

1 statute of limitations under 46 U.S.C. § 763(a), recently re-  
2 codified at 46 U.S.C. § 30106.<sup>1</sup> More specifically, defendant  
3 argues that no exceptional circumstances exist that would  
4 support equitable tolling of the applicable three-year statute  
5 of limitations.

6 Plaintiff's opposition to defendant's motion was due on  
7 April 1, 2009. As required by Rand v. Rowland, 154 F.3d 952,  
8 963 (9th Cir. 1998), plaintiff has been cautioned about the  
9 importance of submitting evidence in opposition to a motion  
10 for summary judgment to show that there is a genuine issue of  
11 material fact for trial, and was advised that if summary  
12 judgment is granted, the case would be dismissed and there  
13 would be no trial. (See Doc. No. 89.) No opposition was  
14 filed; however, as plaintiff is *pro se*, the Court has reviewed  
15 the record in deciding defendant's motion.<sup>2</sup>

16 Viewing the record in the light most favorable to  
17 plaintiff and drawing all reasonable inferences therefrom, the  
18 factual background to this case is as follows:

19 On May 1, 2002, plaintiff, as an employee of former  
20 defendant Marine Terminals Corporation ("MTC"), was scraping  
21 raw sugar off of the hull of a ship at the C&H Sugar refinery.  
22 Plaintiff was injured when a backhoe, operated by another  
23 employee of MTC, malfunctioned and collided with a piece of

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25 <sup>1</sup> All parties have consented to my jurisdiction for all  
26 proceedings including entry of final judgment, pursuant to 28  
U.S.C. § 636(c).

27 <sup>2</sup> For the purposes of this review, I have assumed that  
28 the various documents in the file were properly before the  
Court. See Orr v. Bank of Am., 285 F.3d 764 (9th Cir. 2002).

1 metal, causing the piece of metal to strike plaintiff in the  
2 face.<sup>3</sup> The backhoe was owned by defendant C&H.

3 The incident resulted in substantial and chronic brain  
4 damage to plaintiff, who has continued to suffer from physical  
5 and mental symptoms such as severe headaches, dizziness,  
6 ataxia, and memory problems. Plaintiff testified in his  
7 deposition that he was never declared legally incompetent by  
8 any court and that none of his doctors ever recommended that  
9 he be confined to a mental institution.

10 Two weeks after plaintiff's accident, he retained an  
11 attorney, Cory Birnberg ("Birnberg"), to represent him in a  
12 claim for Longshoreman and Harbor Workers Compensation Act  
13 benefits. Plaintiff also filed a union grievance regarding  
14 the backhoe operator and personally attended the grievance  
15 hearing. In November 2004, plaintiff became dissatisfied with  
16 Birnberg's legal representation, and in early December 2004,  
17 plaintiff filed a complaint with the State Bar of California  
18 against Birnberg for professional misconduct.<sup>4</sup> Subsequently,  
19 plaintiff retained Phil Weltin ("Weltin"), an attorney  
20 plaintiff believed to be an expert in third party negligence  
21 actions.

22 Plaintiff testified that he mistakenly believed that both  
23 Birnberg (while he was acting as plaintiff's attorney) and  
24 Weltin had been pursuing a civil third party action against

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25 <sup>3</sup> The nature of the malfunction is unknown.

26 <sup>4</sup> The complaint against Birnberg was closed in April  
27 2005 after the State Bar determined that there was insufficient  
28 evidence to establish that professional misconduct was  
committed.

1 defendant on his behalf.<sup>5</sup> (Decl. of Andrew J. Sommer Exh. A,  
2 Walker Dep., 111:3-21, 112:10-23.) Once plaintiff realized  
3 that his third-party action was not being pursued, he  
4 attempted to find another attorney to represent him. (Id. at  
5 112:15-23.) Failing to find an attorney, plaintiff filed this  
6 complaint *pro se* on June 13, 2007.

7 Plaintiff's negligence claim against defendant is  
8 governed by the uniform three-year statute of limitations,  
9 which applies to suits for recovery of damages for personal  
10 injury or death, arising out of a maritime tort. 46 U.S.C. §  
11 30106; Usher v. M/V Ocean Wave, 27 F.3d 370 (9th Cir. 1994).  
12 As set forth in my earlier ruling (Doc. No. 45), the Supreme  
13 Court has held that there is a rebuttable presumption that all  
14 federal statutes of limitations contain an implied equitable  
15 tolling provision. Irwin v. Dep't of Veterans Affairs, 498  
16 U.S. 89, 96-97 (1990); *see also* Walck v. Discavage, 741  
17 F.Supp. 88, 90 (E.D. Pa. 1990) (stating it is a "general  
18 principle" that equitable tolling is "'read into every federal  
19 statute of limitation.'" (quoting Holmberg v. Armbrecht, 327  
20 U.S. 392, 397 (1946))).

21 Equitable tolling of a limitations period is appropriate  
22 in three circumstances: (1) where the plaintiff has actively  
23 pursued his judicial remedies by filing a timely but defective  
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25 <sup>5</sup> In a letter from Weltin to plaintiff dated December  
26 28, 2006, Weltin informed plaintiff that he did not believe  
27 that plaintiff had a third-party claim. The letter suggests  
28 that plaintiff and Weltin had previously discussed other  
possible legal actions for plaintiff to pursue, but that  
plaintiff was not satisfied with the answers that he had  
received from Weltin.

1 pleading (Burnett v. New York Cent. R. Co., 380 U.S. 424, 430  
2 (1965)); (2) where extraordinary circumstances outside the  
3 plaintiff's control made it impossible for the plaintiff to  
4 timely assert his claim (Stoll v. Runyon, 165 F.3d 1238, 1242  
5 (9th Cir. 1999); or (3) where the plaintiff, by exercising  
6 reasonable diligence, could not have discovered essential  
7 information bearing on his claim (Cada v. Baxter Healthcare  
8 Corp., 920 F.2d 446, 452 (7th Cir. 1990)); see also Logwood v.  
9 Apollo Marine Specialists, Inc., 772 F.Supp. 925, 927 (E.D.  
10 La. 1999) (“[e]quitable tolling applies principally when the  
11 plaintiff was actively misled about the cause of action by the  
12 defendant, was prevented in some extraordinary way from  
13 asserting his or her rights, or filed the same claim in the  
14 wrong forum.”).

15 Mental incapacity and the effect it has upon the ability  
16 to file a lawsuit can be an “extraordinary circumstance” that  
17 supports the application of the doctrine of equitable tolling.  
18 Robles v. Leppke, No. 06-0219, 2007 WL 2462058 \* 1 (E.D. Cal.  
19 Aug. 28, 2007); see also United States v. Brockamp, 519 U.S.  
20 347, 348 (1997) (“[mental disability], we assume, would permit  
21 a court to toll the statutory limitations period”); Laws v.  
22 Lamarque, 351 F.3d 919 (9th Cir. 2003) (mental incompetence  
23 may warrant equitable tolling for the period the prisoner was  
24 incompetent if he can show that the incompetency in fact  
25 caused the filing delay).

26 In the Ninth Circuit, “[e]quitable tolling is unavailable  
27 in most cases. . . .”, Miles v. Prunty, 187 F.3d 1104, 1107  
28 (9th Cir. 1999) (citing Calderon v. United States Dist. Court

1 (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled in*  
2 *part on other grounds by* Calderon v. United States Dist.  
3 Court, (Kelly), 163 F.3d 530 (9th Cir. 1998)), and has been  
4 found appropriate "when extraordinary circumstances beyond the  
5 plaintiff's control [make] it impossible to file a claim on  
6 time." Stoll, 165 F.3d at 1242 (citing Alvarez-Machain v.  
7 United States, 107 F.3d 696, 700 (9th Cir. 1996))<sup>6</sup>; *see also*  
8 Irwin, 498 U.S. at 95-96 ("Federal courts have typically  
9 extended equitable relief only sparingly.") (footnotes  
10 omitted).

11 Even taking the evidence offered in a light most  
12 favorable to plaintiff, there is insufficient evidence that  
13 would create a genuine issue of material fact of  
14 "extraordinary circumstances" that made it "impossible" for  
15 plaintiff to file within the statutory period.<sup>7</sup>

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17 <sup>6</sup> The limited application of the doctrine of equitable  
18 tolling in the Ninth Circuit is consistent with other circuit  
19 courts. *See, e.g.,* Biester v. Midwest Health Serv., Inc., 77  
20 F.3d 1264, 1268 (10th Cir. 1996) (declining to toll 90 day EEOC  
21 filing period for mental incapacity due to "major depression"  
22 where no "exceptional circumstances" were alleged and "the  
23 evidence demonstrate[d] that, in spite of his mental condition,  
24 [plaintiff] 'was capable of pursuing his own claim,'" inasmuch  
25 as he "wrote to the EEOC . . . to request a right to sue  
notice"); Miller v. Runyon, 77 F.3d 189, 191 (7th Cir. 1996)  
("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. . . . Most mental illnesses today are treatable by drugs  
that restore the patient to at least a reasonable approximation  
of normal mentation and behavior.") (emphasis in original).

26 <sup>7</sup> Plaintiff does not present any of the other  
27 situations set forth in Irwin that would permit equitable  
28 tolling of the applicable statute in this case: he neither  
filed a timely though defective pleading within the applicable  
statutory period, nor is there any evidence that he was he  
tricked by defendant into allowing the deadline to pass.

1           There is scant evidence that during the period from May  
2 1, 2002, the date of plaintiff's injury, to May 1, 2005, the  
3 last day within the applicable statutory period, plaintiff  
4 could not have filed a timely complaint against defendant or  
5 that plaintiff was mentally (or physically) incapable of  
6 filing a complaint against defendant.<sup>8</sup> If anything, the  
7 opposite is true. The record demonstrates that during the  
8 three year period at issue, plaintiff was fully capable of  
9 managing his legal affairs: after plaintiff was injured, he  
10 obtained legal counsel to pursue his worker's compensation  
11 claim; he pursued a union grievance and attended the grievance  
12 hearing; he filed a complaint with the State Bar against  
13 Birnberg; and he obtained new counsel upon becoming  
14 dissatisfied with Birnberg's legal representation, counsel  
15 whom he believed would handle any third-party lawsuits that he  
16 potentially could have brought. Plaintiff also filed a charge  
17 of discrimination in 2007 with the EEOC against former

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19           <sup>8</sup> The record contains letters from various healthcare  
20 providers that state that plaintiff has been suffering from  
21 chronic brain injuries. These letters, however, do not  
22 establish that plaintiff's medical condition prevented him from  
23 sufficiently articulating his claims or that plaintiff was too  
24 incompetent to tend to either his daily or legal affairs. On  
25 September 17, 2008, a psychologist at the Department of  
26 Psychiatry at Kaiser Hospital in Vallejo, California, who had  
27 been treating plaintiff for several years, wrote a letter to  
28 the Court in support of plaintiff's motion for appointment of  
counsel stating that plaintiff suffered from "significant  
chronic head pain, dizziness, and other symptoms" that impact  
his ability to concentrate and his ability "to deal with  
complex matters." Based on these mental and physical issues,  
the psychiatrist concluded that plaintiff was "incapable of  
representing himself." This letter, however, was written well  
after the applicable statutory period had expired and presents  
no explanation for plaintiff's failure to pursue his claim  
within the prescribed limitations period. See Grant v.  
McDonnell Douglas Corp., 163 F.3d 1136, 1137 (9th Cir. 1998).

1 defendant Pacific Maritime Association ("PMA") and requested a  
2 right to sue letter, and on June 13, 2007, plaintiff,  
3 proceeding in *pro se*, filed a Title VII discrimination claim  
4 against PMA, MTC, his union, and defendant, which is the  
5 origin of the current dispute.

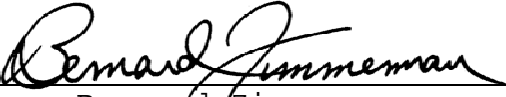
6 Plaintiff has failed to offer any evidence or allege  
7 specific facts, and the Court has found none, that would  
8 create a "genuine issue of material fact" that his physical  
9 and emotional injuries were "exceptional circumstances" that  
10 prevented him from proceeding with his claims, especially in  
11 light of all of the contrary evidence listed above. Nor do  
12 plaintiff's mental and emotional injuries rise to the level of  
13 the mental or physical incapacities contemplated by courts  
14 that have tolled limitations periods as a result of such  
15 incapacities. See, e.g., Stoll, 165 F.3d at 1242 (equitable  
16 tolling was proper where "overwhelming evidence" demonstrated  
17 that complainant was completely disabled during the  
18 limitations period and incapable of communicating with her  
19 lawyer); Cf., Langner v. Simpson, 533 N.W.2d 511, 523 (Iowa  
20 1995) ("The statute of limitations is not tolled if the person  
21 has a mental illness not rising to the level of a disability  
22 such as to prevent the person from filing a lawsuit. In short,  
23 the disability must be such that the plaintiff is not capable  
24 of understanding the plaintiff's rights."); Lopez v. Citibank,  
25 N.A., 808 F.2d 905, 906-07 (1st Cir. 1987). Plaintiff's  
26 ability to consult with attorneys and file various other  
27 claims, such as with his union and with the State Bar, during  
28 his alleged period of legal incompetency undermines his claims



1 of legal incompetency.

2 I find no need for argument and vacate the hearing  
3 scheduled for April 29, 2009. It is **ORDERED** that defendant's  
4 motion for summary judgment is **GRANTED**.

5 Dated: April 20, 2009

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8 Bernard Zimmerman  
9 United States Magistrate Judge

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