U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 17 March 2010

CASE NO. 2009-SDW-00005

In the Matter of:

MICHAEL E. BOYD,
Complainant,

vs.

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA),
Respondent.

ORDER GRANTING RESPONDENT'S MOTIONS TO DISMISS AND FOR SUMMARY DECISION, DENYING COMPLAINANT'S MOTION TO DISMISS RESPONDENT'S MOTIONS, AND RECOMMENDING THAT COMPLAINANT'S COMPLAINT BE DISMISSED

This matter arises under the whistleblower protection provisions (collectively "whistleblower provisions") of the following statutes:

- The Safe Drinking Water Act of 1974 (SDWA), 42 U.S.C. § 300j-9(i);
- The Federal Water Pollution Control Act of 1972 (FWPCA), 33 U.S.C. § 1367;
- The Toxic Substances Control Act of 1976 (TSCA), 15 U.S.C. § 2622;
- The Solid Waste Disposal Act of 1976 (SWDA), 42 U.S.C. § 6971;
- The Clean Air Act of 1977 (CAA), 42 U.S.C. § 7622; and
- The Comprehensive Environmental Response, Compensation & Liability Act of 1980 (CERCLA), 42 U.S.C. § 9610.

This matter is scheduled for trial on March 30, 2010 in San Francisco, California.

On February 18, 2010, Respondent filed a Motion to Dismiss or, in the Alternative, for Summary Judgment (Resp. Motion). This is the third dispositive motion filed by Respondent. On August 14, 2009 and December 15, 2009, I denied Respondent's motions for summary decision because Respondent failed to demonstrate the absence of a triable issue of material fact as to whether Complainant is an "employee" within the meaning of the whistleblower provision.[1] In the motion to be decided here, Respondent argues that Complainant's initial complaint to the

[1] The motion that was denied by the August 14, 2009 order was submitted as a motion to dismiss. However, because it was supported by material outside the pleadings, I converted it into a motion for summary decision in accordance with Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 16(b).

U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) was untimely. This complaint alleges that Respondent failed to timely investigate Complainant's complaints under Title VI of the Civil Rights Act of 1964 in retaliation for his having publicly disseminated information about asbestos dust in the San Francisco, California community of Bay View Hunters Point. Respondent argues further that the failure to timely investigate Complainant's Title VI complaints is not an adverse employment action for which the whistleblower provisions provide a remedy. Respondent also argues that because Complainant's complaint to OSHA did not identify as an adverse action the termination of his work as a technical advisor under an EPA grant, the Office of Administrative Law Judges (OALJ) lacks jurisdiction over a claim proceeding from such termination. Finally, Respondent argues, that any complaint alleging this termination as an adverse employment action is untimely. Respondent's motion was accompanied by twelve exhibits (Ex. 1-12).

On March 1, 2010, Complainant filed a one page response to Respondent's motion (Comp. Resp.). It states, "Complainant does not have the resources to research and respond to this motion because of the complex discovery process and the development of the Pre-trial Statement which is due on March 10, 2010. Complainant therefore asks that the subject motion be dismissed and Complainant be allowed to spend its resources by preparing for the subject hearing." Comp. Resp., p. 1. Complainant's Response was not accompanied by any exhibits.

SUMMARY OF DECISION

Respondent's motion will not be dismissed.

Complainant's complaint should be dismissed. His allegation that Respondent violated the whistleblower provisions by failing to timely investigate his Title VI complaints is not an adverse employment action. Additionally, to the extent that Complainant has complained that Respondent directed its contractor CFC to terminate Complainant's employment, I find that such a complaint is untimely. As a result, Complainant cannot establish that he suffered an adverse employment action and thus, cannot make out a *prima facie* case of retaliatory discrimination.

BACKGROUND

Complainant was one of two associates who comprised Environmental Mitigation Unlimited (EMU), a non-profit public benefit association. Ex. 1, p. 1. On July 1, 2004, EMU entered into a contract with the Community First Coalition (CFC), which consisted of approximately 10 community environmental and activist organizations in the San Francisco, California community of Bay View Hunters Point. *Id.* The EMU-CFC contract provides that EMU was to provide technical advisory services to the coalition and assist in the review and analysis of environmental remediation activities at the Hunters Point Naval Shipyard Superfund site. *Id.* The contract was funded by monies provided by Respondent to CFC under a technical assistance grant (TAG). *Id.* at 4, 5.

By letter dated July 5, 2005, CFC Vice President Raymond J. Tompkins notified EMU that CFC intended to terminate the technical services contract with EMU. Ex. 2, p. 1. The letter was addressed to Complainant's associate, Mr. Clifton Smith, with a notation of a courtesy copy

to Complainant. *Id.* It explained that the contract was being terminated "for failure of Technical Advisor Contract to fulfill contractual obligations." *Id.*

By letter dated August 26, 2005, Complainant complained to Respondent's Region IX office in San Francisco that the termination of EMU's contract with CFC was the product of racial discrimination on the part of CFC's leadership. Ex. 3, pp. 1, 4. Complainant, who describes himself as "a person of Caucasian ethnicity," alleged in his letter that his "termination was motivated by discrimination on the basis of my race and Mr. Tompkins wished to have the TA position with CFC and his discrimination was economically motivated."[2] *Id.* at 1, 4. A slightly revised version of this letter was received by the EPA's Office of Civil Rights (OCR) on September 13, 2005.[3] Ex. 9, p. 1, Ex. 10, p. 1.

Mr. Thomas Walker, a case manager with EPA's OCR, supplied a declaration which states that he was assigned to Complainant's complaint in January 2006. Ex. 11, p. 1. He declares that between the filing of the complaint and March 2006, OCR had no contact with Complainant. *Id.* By letter dated March 13, 2006, Respondent's Office of Civil Rights (OCR) notified Complainant it had received his complaint dated September 8, 2005, alleging that CFC had violated Title VI of the Civil Rights Act of 1964. Ex. 4, p. 1. The letter explained that OCR would review the complaint and accept it, reject it, or refer it to another federal agency. *Id.* By letter dated June 23, 2006, OCR advised CFC that it had accepted for investigation the complaint that "CFC intentionally discriminated against Mr. Boyd by terminating its contract with Environmental Mitigation Unlimited (EMU) because one of EMU's owners (Mr. Boyd) is Caucasian." Ex. 5, p. 1. Mr. Walker declared that OCR then had no contact with Complainant until April 17, 2009, when Mr. Walker left Complainant a voice mail message. Ex. 11, p. 2. He added, however, that he began issuing information requests in February 2008, and that he interviewed Mr. Smith, Complainant's partner in EMU, in March 2009. *Id.* at 1-2; *see also* Ex. 12, p. 8.

By letter dated April 20, 2009, Complainant filed "a civil rights complaint against [Respondent] for failure to properly process one individual Title VI complaint in behalf of myself against the San Francisco based Community First Coalition ("CFC") a U.S. EPA contractor and a Whistleblower for additionally failing to properly process several other Title VI complaints brought as the President of a 501(c)(3) corporation Californians for Renewable Energy, Inc. . . ." Ex. 7, pp. 1-2. The complaint alleges that the failure to properly process Complainant's complaints was "based on race and age [discrimination] and in retaliation for engaging in protected activity including but not limited to disclosing the presence of dust containing naturally occurring asbestos and other hazardous materials . . ." *Id.* at 2-3. The April 20, 2009 letter was addressed to the U.S. Department of Justice, Civil Rights Division; the U.S. Environmental Protection Agency, Office of Inspector General Hotline, the U.S. Department of

[2] Complainant refers to the termination of EMU's contract with CFC as a "termination of employment." *See* Resp. Motion, Ex. 3, pp. 1, 4. Use of the term "employment" implies that Complainant was an employee of EMU or CFC, the parties to the contract, or of Respondent, which provided the funding under which the contract was concluded. Whether Complainant's status was that of an employee, an independent contractor, or something else has not yet been determined, and I decline to employ language which suggests that it has. Thus, except when referring to Complainant's allegation, I will refer to termination of the EMU-CFC contract.

[3] The revisions changed some dates and formatting, but did not materially change the allegations set forth in the earlier version of the letter.

Labor, Occupational Safety and Health Administration Region IX office in San Francisco; and the EPA's Office of Environmental Justice. *Id.* at 1.

By letter dated May 15, 2009, OSHA advised Complainant that his whistleblower complaint had been determined to be untimely and was, therefore, dismissed. Ex. 8, p. 1. The letter explains that Complainant "learned in 2003 that Respondent failed to investigate his Title VI claim," and that "Complainant filed with OSHA on April 20, 2009."[4] *Id.*

By letter dated May 18, 2009, EPA's OCR advised Complainant that it had referred Complainant's complaint filed on September 13, 2005 to the U.S. Equal Employment Opportunity Commission (EEOC). Ex. 9, p. 1. The letter explained that the complaint alleged that Complainant was terminated from employment as the Technical Advisor for CFC because of his race. *Id.* The letter also stated that because the complaint alleged employment discrimination solely by a recipient of EPA assistance, EEOC was the proper investigative authority. *Id.* According to Mr. Walker's declaration, on May 29, 2009, "EEOC rejected Mr. Boyd's complaint against CFC, finding that he was never an employee of the grantee [CFC], but rather an independent contractor, and that, under Title VII, EEOC's investigative authority was limited to 'employees' of alleged discriminating employees." Ex. 11, p. 3.

By letter dated May 29, 2009, Complainant appealed OSHA's determination that his whistleblower complaint was untimely and requested a hearing before an administrative law judge of the U.S. Department of Labor, Office of Administrative Law Judges (Comp. Hrng. Req.). In the letter, Complainant disputes OSHA's finding that he learned in 2003 that Respondent failed to investigate his Title VI claim, stating "I had no knowledge that the US EPA was conducting an investigation until I was contacted by my former partner in Environmental Mitigation Unlimited (EMU) Clifton Smith on April 13, 2009 who informed me that US EPA had contacted him in March 2009 asking questions about my [Title VI] complaint. . ." Comp. Hrng. Req., pp. 1-2.

In an opposition to Respondent's second motion for summary decision, filed September 16, 2009 (Comp. Sept. 16, 2009 Opp.), Complainant stated that Respondent directed Community First Coalition (CFC), to terminate Complainant's employment as a technical advisor in retaliation for Complainant's distribution of information regarding the alleged presence of asbestos dust in the Bay View Hunters Point community in San Francisco, California. Comp. Sept. 16, 2009 Opp., p. 4.

ANALYSIS

The employee protection provisions of the various environmental statutes prohibit an employer from taking adverse employment action against an employee because the employee has engaged in protected activity. *See, e.g., Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, 1988-SWD-00002, Slip op. at 15 (ARB Feb. 28, 2003). While the protections are not uniformly expressed, adverse employment actions generally include

[4] OSHA's statement that Complainant knew in 2003 that Respondent failed to investigate his Title VI complaint appears to be in error. The record indicates that Complainant filed his Title VI complaint in 2005. *See* Exs. 3, 10.

discharge and discrimination with respect to compensation, terms, conditions, or privileges of employment. *See* 42 U.S.C. § 300j-9(i)(1); 15 U.S.C. § 2622(a); 42 U.S.C. § 7622(a); 33 U.S.C. § 1367(a); 42 U.S.C. § 6971(a); 42 U.S.C. § 9610(a). Protected activities include initiating, preparing to initiate, or participating in the initiation of a proceeding to enforce the underlying environmental protection statute, or testifying or participating in such a proceeding. *See* 42 U.S.C. § 300j-9(i)(1)(A-C); 15 U.S.C. § 2622(a)(1-3); 42 U.S.C. § 7622(a); *see also* 33 U.S.C. § 1367(a); 42 U.S.C. § 6971(a); 42 U.S.C. § 9610(a).

To prevail on a complaint of unlawful discrimination under these environmental retaliation statutes, a complainant first must establish a *prima facie* case, thus raising an inference of unlawful discrimination. *Jenkins*, Slip op. at 16. A complainant meets this burden by showing: (1) that the employer is subject to the applicable retaliation statutes, (2) that the complainant engaged in protected activity, as defined by the statutes, of which the employer was aware, (3) that he suffered an adverse employment action, and (4) that a nexus existed between the protected activity and the adverse action. *Id*. Once the complainant establishes a *prima facie* case, then the respondent has the burden of producing evidence that the adverse action was motivated by legitimate, non-discriminatory reasons. *Id*. If the respondent is successful, the complainant, as the party bearing the ultimate burden of persuasion, must then show that the proffered reason was but a pretext for retaliation. *Id*.

The Office of Administrative Law Judges (OALJ) has jurisdiction only when complainants allege they have suffered termination or retaliation for engaging in protected activities. *See* 29 C.F.R. § 24.106. OALJ does not have jurisdiction to adjudicate claims of racial, ethnic, or age discrimination. Therefore, I have no jurisdiction to adjudicate whether Complainant suffered discrimination prohibited by Title VI of the Civil Rights Act of 1964. *See* 40 C.F.R. § 7.130(b)(2)(ii). The issue before me is whether Respondent's motion pleads appropriate grounds for dismissing Complainant's whistleblower complaint, and whether Respondent has met its burden to adequately support its motion.

I. COMPLAINANT'S REQUEST THAT RESPONDENT'S MOTION BE DISMISSED

Complainant requests that I "dismiss" Respondent's motion to allow Claimant to "spend its resources by preparing for the scheduled hearing."[5] Comp Resp. In so doing, Complainant states that it lacks the resources to respond to the motion "because of the complex discovery process and the development of the Pre-trial Statement . . ." *Id.* Complainant has cited no authority and has presented no evidence in support of its motion to dismiss Respondent's motion. Motions to dismiss and for summary decision are a foreseeable feature of any litigation. They help to conserve the resources of courts and parties alike. I find no basis in either the law or facts of this case warranting dismissal of Respondent's motion. Complainant's request is **DENIED**.

[5] Complainant's Response argues that Respondent has again failed to show that it is entitled to summary decision because Complainant is not an "employee" within the meaning of the whistleblower statutes. However, Complainant's status as an employee is not a basis of Respondent's motion.

II. TITLE VI INVESTIGATION

Failure to timely investigate Title VI complaints is not an adverse employment action under the whistleblower provisions. The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules) do not expressly provide for the dismissal of a claim. Therefore, Federal Rule of Civil Procedure 12(b)(6) may properly be applied when a party moves for dismissal. 29 C.F.R. § 18.1(a); *High v. Lockheed Martin Energy Sys.*, ARB No. 97-109, ALJ No. 1997-CAA-3, Slip op. at 3 (ARB Nov. 13, 1997). Such a motion is appropriate where the allegations show on the face of the complaint there is some insuperable bar to relief. *See generally* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (2009). Rule 12(b)(6) requires dismissal when, assuming the factual allegations in the challenged pleading to be true, the non-moving party is still not entitled to relief. *High*, Slip op. at 3-4.

Each of the whistleblower provisions requires that a Complainant demonstrate that he has suffered an adverse employment action. *See* 42 U.S.C. § 300j-9(i)(1); 15 U.S.C. § 2622(a); 42 U.S.C. § 7622(a); 33 U.S.C. § 1367(a); 42 U.S.C. § 6971(a); 42 U.S.C. § 9610(a). I find that Complainant's allegation that Respondent failed to timely investigate his Title VI complaints does not allege an adverse employment action within the meaning of the whistleblower provisions.

The Administrative Review Board (ARB) has adopted the standard articulated by the U.S. Supreme Court in *Burlington Northern & Santa Fe. Ry. Co. v. White*, 548 U.S. 53 (2006) for determining whether an employer's action is adverse within the meaning of all federal whistleblower anti-discrimination statutes enforced by the Secretary of Labor. *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, Slip op. at 24 (ARB Sept. 20, 2008). In *Melton*, the ARB held that "[f]or purposes of the retaliation statutes that the Labor Department adjudicates, the test is whether the employer action could dissuade a reasonable worker from engaging in protected activity."[6] *Id.* at 19-20 (quoting *Burlington Northern*, 548 U.S. at 57). The scope of this rule, however, is limited; it applies only to adverse *employment* actions. *Melton*, Final Dec. & Ord., Slip op. at 18 n.28 ("[A]s in all Labor Department cases, the scope of employer actions is not an issue because . . . it is limited to the workplace."); *see also Lewis v. Synagro Tech., Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-12, Slip op. at 12 (ARB Feb 27, 2004) (holding that "the whistleblower protection provisions . . . focus on discrimination that occurs in the employment context."); *Vander Boegh v. U.S. Dept. of Energy*, ALJ No. 2009-ERA-00011, Slip op. at 5-7 (ALJ Aug 27, 2009).

Respondent's failure to timely investigate Title VI claims is not an "employment action." Three of the six statutes under which Complainant claims protection prohibit discrimination with respect to "compensation, terms, conditions, or privileges of employment . . ." 42 U.S.C. § 300j-9(i)(1); 15 U.S.C. § 2622(a); 42 U.S.C. § 7622(a); 33 U.S.C. § 1367(a). Complainant has not offered, and I cannot find any authority that Respondent's shortcomings in investigating Title VI complaints are adverse to Complainant's compensation or the terms, conditions, or privileges of Complainant's employment under the CFC technical assistance grant.

[6] As it is not an issue before me, I do not reach whether Complainant was an employee of Respondent within the meaning of the whistleblower provisions.

The ARB has consistently found that actions associated with legal proceedings involving the employee and employer are not adverse *employment* actions subject to the whistleblower protection statutes. In *Friday v. Northwest Airlines, Inc.*, ARB No. 03-132, ALJ Nos. 2003-AIR-19 and 20, Slip op. at 7 (ARB July 29, 2005), the Board held that an employer's threat to report a former employee for the unauthorized practice of law is not actionable because it is not "related to the [employee's] compensation, terms, conditions, or privileges as a medically-retired former employee." In *Farnham v. Intl. Mfg. Solutions*, ARB No. 07-095, ALJ No. 2006-SOX-111, Slip op. at 10 (ARB Feb. 6, 2009), the Board held that an employer's filing a civil suit against a former employee alleging tortious interference, slander, and intentional infliction of emotional distress is not actionable because it does not relate to the terms and condition of his employment. Complainant's Title VI complaint here is against a third party, CFC. It would be incongruous with the holdings in *Friday* and *Farnham* to find that Respondent's failings as an evaluator of Complainant's complaint would be actionable against Respondent in its capacity as Complainant's alleged employer. *See Vander Boegh*, Slip op. at 5-7 (ALJ Aug 27, 2009).

The whistleblower provisions do not provide a remedy for every wrong suffered by a complainant at the hands of an employer.[7] Respondent's failure to timely investigate Title VI complaints against a third party is outside the scope of the actions for which the whistleblower provisions provide a remedy. I find, therefore, that Complainant's allegation in this regard fails to state a claim on which relief can be granted. Respondent's motion to dismiss is **GRANTED**.

III. TERMINATION OF EMU'S TECHNICAL ASSISTANCE GRANT WITH CFC

While Respondent's jurisdictional argument misperceives the relevant law, his argument that Complainant did not timely raise the directed termination allegation does not.[8] *See* Resp. Motion, pp. 7-9. If an allegation of an adverse employment action is not raised in a timely fashion, a complaint based on that action is not viable. This raises a mixed question of law and fact that requires consideration of material outside the pleadings. As such, Respondent's timeliness argument is properly treated as a motion for summary decision. Fed. R. Civ. P. 12(d); *Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir. 1997); *see also* 29 C.F.R. §§ 18.40, 18.46.

[7] Respondent also argues that Complainant's complaint regarding Title VI complaints is untimely. Resp. Motion, pp. 4-6. This argument, however, has been waived. Timeliness is a waivable affirmative defense. *See* Fed. R. Civ. P. 8(c)(1); *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, Slip op. at 11 (ARB Feb. 28, 2003). Because Respondent had the opportunity to raise the timeliness issue in his first two motions for summary decision and did not, I find that this argument has been waived.

[8] Respondent incorrectly argues that this court lacks jurisdiction over Claimant's allegation that Respondent directed the termination of EMU's technical assistance contract with CFC because Complainant did not include the allegation in his original complaint to OSHA. *See* Resp. Motion, pp. 6-7. The Administrative Review Board has held that a whistleblower complainant's failure to plead an essential element of a cause of action does not, as Respondent suggests, raise a jurisdictional concern. *Sasse v. United States Dep't of Justice*, ARB No. 99 053, ALJ No. 1998 CAA 7, Slip op. at 3-4 (ARB Aug. 31, 2000) (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946).). Furthermore, because the OALJ Rules contain permissive rules regarding amendment of complaints, the failure to plead an allegation in the initial complaint to OSHA does not, by itself, preclude that allegation from later being tried before an ALJ under that complaint. *See* 29 C.F.R. § 18.5(e).

An administrative law judge may grant summary decision when a moving party demonstrates that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. 29 C.F.R. § 18.40(d); Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that there is no genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). By moving for summary decision, a party asserts that based on the present record and without the need for further exploration of the facts and conceding all unfavorable inferences in favor of the non-moving party, there is no genuine issue of material fact to be decided and the moving party is entitled to a decision as a matter of law. Fed. R. Civ. P. 56, 29 C.F.R. § 18.40(d). When a motion is properly supported, the nonmoving party must go beyond the pleadings to overcome the motion. He may not merely rest upon allegations, but must set out specific facts showing a genuine issue for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Granting all inferences in favor of Complainant, I find that there is no genuine issue of fact regarding the timeliness of the directed termination allegation and that Respondent is entitled to judgment as a matter of law that the allegation was not timely raised. Although Claimant first raised the allegation in a filing dated September 16, 2009, under the most favorable circumstances this allegation would be treated as if it were raised in Complainant's original whistleblower complaint to OSHA, which was dated April 20, 2009. This is more than three years after the technical assistance contract was terminated. Because the whistleblower provisions require that a complaint be filed within 30 days after the adverse employment action, the allegation is untimely.

Under each of the six whistleblower provisions at issue here, a complaint alleging violation of the statute's whistleblower protection must be filed with OSHA "within 30 days" after the alleged violation. 42 U.S.C. § 300j-9(i)(2)(A); 15 U.S.C. § 2622(b)(1); 42 U.S.C. § 7622(b)(1); 33 U.S.C. § 1367(b); 42 U.S.C. § 6971(b); 42 U.S.C. § 9610(b); 29 C.F.R. § 24.103(c-d). The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. 29 C.F.R. § 24.103(d). The date of violation is the date that an employer communicates its decision to implement an adverse employment action, rather than the date the consequences are felt. *See Cante v. New York City Bd. Of Education*, ARB No. 08-012, ALJ No. 2007-CAA-004, Slip op. at 7-8, 10 (ARB July 31, 2009); *Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, Slip op. at 6 (ARB Jan. 30, 2004); *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-002, Slip op. at 14 (ARB Feb. 28, 2003).

Although CFC provided notice of its intent to terminate the contract with EMU in a letter dated July 5, 2005, that letter was addressed to Complainant's partner in EMU, Mr. Smith, with a copy to Complainant. Ex. 2, p. 1. Nothing in the record indicates when this letter was received by Complainant. However, in his Title VI complaint dated August 26, 2005, Complainant complained that the termination of EMU's contract with CFC was the product of racial discrimination on the part of CFC's leadership. Ex. 3, pp. 1, 4. Thus, even assuming that Complainant did not have notice of the contractual termination until this later date, any complaint regarding the directed termination should have been filed within 30 days, or by September 25, 2005. Even treating the directed termination as if it were raised in Complainant's original whistleblower complaint on April 20, 2009, this was still more than three years after the

filing period expired. Thus, Respondent is entitled to judgment as a matter of law that Complainant did not timely file his allegation that Respondent directed the termination of the EMU-CFC contract. Therefore, Respondent's motion on this issue is **GRANTED**.

CONCLUSION

Complainant's allegation that Respondent failed to timely investigate his Title VI complaint is not an adverse employment action cognizable under the whistleblower provisions. His allegation that Respondent directed the termination of EMU's contract with CFC was not timely raised. Therefore, Complainant cannot make out a *prima facie* case of retaliatory discrimination or termination.

ORDER

1. The trial in this matter, scheduled for March 30, 2010, is hereby **VACATED**.

2. It is recommended that his complaint be **DISMISSED**.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Department of Labor, Office of

Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).