**U.S. Department of Labor**

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**Issue Date: 22 July 2004**

CASE NO.: 2004-STA-00035

In the Matter of

HENRY W. THISSEN
Complainant

v.

TRI-BORO CONSTRUCTION SUPPLIES, INC.
Respondent

Appearances: Complainant Pro Se — William H. Poole, Jr., Esquire, For Respondent

Before: Administrative Law Judge Janice K. Bullard

RECOMMENDED DECISION AND ORDER
DISMISSING APPEAL AND REQUEST FOR HEARING

This proceeding arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 ("the Act" hereinafter), and implementing regulations set forth at 29 C.F.R. part 1978. The pertinent provisions of the Act prohibit the discharge, discipline, or discrimination of employees who refuse to operate a commercial motor vehicle because of apprehension of serious injury due to unsafe conditions or health matters.

This decision and order is also governed by those provisions, and the provisions of 29 C.F.R. Part 18.

Procedural Background[1]

Henry Thissen ("Complainant" hereinafter) was employed by Tri-Boro Construction Supplies, Inc. ("Respondent" hereinafter) from January 25, 1999 until he was terminated on

[1] I have confined my factual review to evidence material to the question of whether Complainant's complaint and appeal were timely filed, and have not addressed the facts pertinent to the merits of Complainant's allegations.

October 25, 2000. On November 8, 2000, Complainant filed a complaint with the Department of Labor's Office of Occupational Safety and Health Administration ("OSHA" hereinafter) alleging that he had been discriminated against by Respondent for engaging in whistle blowing activities. That complaint was settled between the parties informally by OSHA. On December 11, 2003, Complainant filed the instant complaint with OSHA, alleging that Respondent continued to discriminate against him in violation of the Act. On February 3, 2004, OSHA notified Respondent of Complainant's complaint, but then on that same date denied his complaint as untimely. On March 24, 2004, Complainant filed an appeal of that determination with the Office of Administrative Law Judges ("OALJ" hereinafter). The case was assigned to me for adjudication, and hearing was scheduled by Notice issued by me on March 29, 2004.

In my Notice of Hearing, I referred to the issue of the timeliness of Complainant's appeal. On April 23, 2004, Complainant's counsel withdrew his appearance. On April 29, 2004, Respondent filed an answer to Complainant's appeal, and moved for dismissal of the complaint on the issues of timeliness both before OSHA and before OALJ. On May 7, 2004, I conducted a pre-hearing conference with the parties by telephone to discuss whether Complainant would obtain substitute counsel. At the telephone conference, Complainant advised that he would represent himself at the hearing. Because Complainant is no longer represented by counsel, I asked Respondent to file a formal motion addressing the issues involving timeliness. On May 10, 2004, Respondent moved for Summary Decision and dismissal of the Complaint pursuant to 49 U.S.C. section 31105(b)(1). Complainant did not file a response.

Because the record was not entirely clear regarding the issue of the timeliness of Complainant's filings, I held a hearing on that issue on May 19, 2004 in Harrisburg, Pennsylvania. Complainant appeared and represented himself. William H. Poole, Jr., Esquire appeared on behalf of Respondent. At the hearing, I Ordered the record to remain open until June 1, 2004 to allow Complainant time to provide additional proof that his appeal was timely filed. I advised the parties that I would consider correspondence from the Regional Administrator of the U.S. Department of Labor, Occupational Safety and Health Administration that confirms receipt by that office before March 10, 2004, of correspondence from Complainant's counsel Joseph L. Hitchings. I would also consider as evidence of timely filing an envelope with Mr. Hitchings' return address, postmarked February 25, 2004 or February 26, 2004. I issued an Order to that effect on May 24, 2004. On June 1, 2004, Complainant submitted additional evidence, including an affidavit from attorney Joseph L. Hitchings. The evidence was marked and admitted to the record, and is described herein, below.

## ISSUE

Whether summary decision in favor of the Respondent is appropriate and Complainant's complaint should be dismissed because Complainant failed to file a timely complaint with OSHA and his appeal with OALJ.

## CONTENTIONS OF THE PARTIES

*Complainant*

Complainant contends that he injured his back in July, 2000, while unloading rebar while employed by Respondent. On October 24, 2000, he suffered a reinjury to his back and was advised by his doctor not to drive. On October 25, 2000, he advised his supervisor of his inability to drive his tractor trailer and was terminated for refusing to do so. Complainant filed a complaint with OSHA, asserting that he was discharged for refusing to operate his truck with an injured back, which would have posed a safety hazard to him and the public. After his discharge, Complainant also filed claims with the Commonwealth of Pennsylvania for unemployment and workers' compensation benefits.

Complainant's OSHA complaint was settled between the parties, and OSHA concluded its investigation. Complainant's attorney Fred Hait represented him throughout that investigation. Complainant contends that he was not provided a written copy of the terms of his settlement complaint with OSHA, and received a written summary of those terms in conjunction with discovery conducted pursuant to a civil action he filed against Respondent in federal district court. Complainant alleges that his most recent complaint with OSHA alleged a breach of that settlement agreement, which he asserts is a continuing and ongoing adverse action. Accordingly, Complainant contends that his current complaint was timely filed.

Complainant further maintains that his appeal with OALJ should be construed as timely filed. Complainant's attorney Mr. Hitchings used the wrong address for OALJ when he filed the complaint, and did not learn of the mistake until after the time for timely filing. Attorney Hitchings filed a copy of the appeal dated February 25, 2004 by FAX with OALJ on March 24, 2004.

*Respondent*

Respondent denied engaging in ongoing and continuing violations of the Act, and argued that it had never violated the Act. Respondent maintained that Complainant did not advise his supervisor of his back injury until after he was ordered to drive his truck or clean it out. Nevertheless, Respondent agreed to settle Complainant's November 9, 2000 complaint, and contends that it had fulfilled its obligations under the settlement agreement it reached with Complainant through his counsel, Fred Hait. Respondent further argues that Complainant had knowledge of the terms of the settlement agreement and had opportunity to file a complaint regarding compliance with its terms well before the instant filing on December 11, 2003.

Respondent further contends that I have no jurisdiction in this matter because Complainant's appeal to OALJ was untimely filed. Respondent argued that Complainant's counsel had ample time to verify that his complaint was timely filed with OALJ, but did not act until the appeal was returned undelivered. Respondent also contended that although Mr. Hitchings' letter notes a copy had been sent to Respondent in February, 2004, its first notice of the appeal was a copy sent after it was docketed with OALJ on March 24, 2004.

## FINDINGS AND CONCLUSION

### Summary of the Evidence

Filings and Pleadings of the parties shall be referred to by description herein.

Complainant submitted Exhibits that I have marked CX 1-CX 15[2]

CX 1 (a) Photograph of truck

(b) December 8, 2003 complaint to OSHA

(c) Letter of February 3, 2004 to Complainant from OSHA

(d) 2nd letter of February 3, 2004 to Complainant from OSHA

(e) Report of OSHA's investigation dated February 3, 2004

CX 2 Final Investigative Report from OSHA dated January 23, 2001

CX 3 Correspondence between OSHA and Complainant regarding his complaint of 2000

CX 4 (a) Copy of settlement agreement dated February 28, 2002 between Respondent and Federal Motor Carrier Safety Administration

(b) Letter of September 19, 2001 to Complainant from Alan L. Stoops of the U.S. Department of Transportation

(c) Letter of January 9, 2002 to Complainant from Joe Evans of U.S. Department of Transportation

(d) Freedom of Information Act ("FOIA" hereinafter) request dated May 23, 2003

(e) Letter of March 26, 2003 from Congressman Shuster to Complainant

(f) A document that appears to be Complainant's time card for workweek ending October 14, 2000

CX 5 Letter of July 23, 2003 from attorney Fred H. Hait to Complainant

CX 6 Respondent's motion to dismiss Complainant's federal civil action

CX 7 Certificate to Return to work dated 11/8/00

[2] Although I accepted Complainant's submissions, I confined my consideration of his evidence to those documents that affect my determination on the issue of timeliness:

CX 8 (a) Correspondence regarding reinstatement of Complainant's medical coverage

(b) Letter regarding short term disability benefits

(c) Letter regarding pension benefits

CX 9 Respondent's answer to Petition for workers' compensation

CX 10 Determination in Unemployment case and related documents

CX 11 Filing with OALJ and letter postmarked in March 2004

CX 12 OALJ case tracking events showing case docketed on March 24, 2004

CX 13 Letter from Attorney Hitchings dated February 25, 2004

CX 14 Copy of envelope from Hitchings to Complainant, postmark indecipherable

CX 15 Affidavit from Attorney Hitchings dated 6-01-04

Respondent submitted documents in support of its motion for summary decision, and then submitted other documents at the hearing on the motion. The documents were consolidated and labeled Exhibits A through M. I have marked them RX 1 through 13.

RX 1 Worker's compensation denial notice dated 11/01/2000

RX 2 OSHA discrimination case activity worksheet and documents dated 11/8/00

RX 3 Unemployment compensation appeal documents from January 9, 2001

RX 4 OSHA final report dated January 23, 2001

RX 5 Letter of January 19, 2001 from Respondent's counsel to Complainant's counsel

RX 6 Letter of January 10, 2001from Respondent and documents

RX 7 Letter of January 17, 2001 from Complainant's counsel to Respondent and documents

RX 8 Letter of March 4, 2003 from Respondent's counsel to Complainant's counsel

RX 9 Fax from William D. Seguin and November 21, 2003 from Ronald Whiting

RX 10 Findings of Pennsylvania Human Relations Commission dated February 4, 2003

RX 11 Complainant's response to investigator dated February 13, 2003

RX 12 Complainant's federal civil action filed February 10, 2003, 1:CV 03-245

RX 13 Order of Magistrate Judge dated March 8, 2004 in civil action 1: CV 03-245

Discussion

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. 29 C.F.R. § 18.40; *see also,* Federal Rule of Civil Procedure 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way or an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc*., 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U. S. 317, 323-34 (1986).

If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988).

*Complainant's appeal with OALJ is deemed to be timely filed*

The Act and the regulations provide individuals with 30 days after the issuance of OSHA's investigative findings within which to "file objections…and request a hearing on the record…Where a hearing is not timely requested, the preliminary order shall be deemed a final order which is not subject to judicial review." 49 U.S.C. app. 2305(c)(2)(A). The date of postmark shall determine whether a request for a hearing has been timely filed in cases brought under the Act. 29 C.F.R. 1978.105(a); *Spearman v. Roadway Express, Inc.*, 92-STA-1 (Sec'y Aug. 5, 1992). The thirty day time period may be tolled where: (1) a claimant has received inadequate notice; (2) a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted on; (3) the court has led the plaintiff to believe that he had done everything required; (4) affirmative misconduct on the part of a defendant lulled the plaintiff into inaction; (5) a claimant actively has pursued his judicial remedies by filing a defective pleading during the statutory period. *Spearman v. Roadway Express, Inc.,* 92-STA-1 (Sec'y Aug. 5, 1992), citing Baldwin *County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (per curiam); *Irwin v. Veterans Administration*, 498 U.S. 89, 112 L.Ed.2d 435, at 444 and n.3 (1990).

In the instant matter, OSHA's investigative report was issued on February 3, 2004. At the hearing on Respondent's motion for summary decision, I advised Complainant that I would consider the date that OSHA's determination in his complaint was docketed with OALJ, February 10, 2004, as the date commencing the period within which he had to file his appeal. My initial notice of hearing addressed to Complainant and Respondent similarly advised the parties that the appeal would have to be shown to have been filed within 30 days of that date, March 10th. The record establishes that the appeal was first docketed with OALJ on March 24, 2004. CX 12. Complainant maintained that the appeal was mailed to OALJ in a timely fashion by his attorney on February 25, 2004, but was misaddressed and not received by OALJ. His lawyer first became aware that the appeal was not filed when it was returned undelivered to his office. CX 15. Respondent asserted that it did not receive a copy of the letter dated February 25, 2004, until after it was docketed by OALJ on March 24, 2004 and faxed to Respondent's counsel. The document dated February 25, 2004 denotes that copies of the letter were sent to Complainant and Respondent's counsel.

I further advised Complainant that I would accept as evidence of timely filing of his appeal either (a) a copy of an envelope from Complainant's counsel postmarked either February 25, 2004 or the day after or (b) verification from OSHA that Complainant's counsel had sent a copy of the appeal to OSHA sometime close to February 25, 2004. Complainant did not submit either of those items as evidence of his timely filing, but instead, submitted (a) a copy of a request for information under the Freedom of Information Act ("FOIA") that he sent to OSHA; (b) the results of a FOIA request that he sent to OALJ, which yielded the docket of his case; and (c) an affidavit from counsel Joseph Hitchings, which included a copy of an envelope misaddressed to OALJ with the wrong address. The envelope showed two postmarks, but they were not decipherable.

Although I accept Mr. Hitchings' assertion that he sent the appeal letter of February 25, 2004 to OALJ within the regulatory time period, the evidence is undisputed that the appeal was not received by OALJ until March 24, 2004. In addition, Mr. Hitchings did nothing to ascertain its receipt within the mandatory timeframe. In fact, it was Complainant himself who endeavored to make sure that his appeal was filed. At the hearing before me Complainant stated:

> We had 30 days to file the appeal. And of course, I was in touch with the attorney, with my attorney, on this other stuff going on, and I asked him, I said did you file that? And he said yes, at the 800 K Street. And I told him, I said I just got off the phone with Beverly Queen and she told me that she has not received it, but that's not the right address. And I even had to mark on one of my papers here. And he asked me what the right address was, and I said, well, by the time you send it, it's not going to be filed timely. We have to do it, it has to be done today. So I did it, faxed it to her, the appeal, as well as Mr. Hitchings.

Tr. at 19-21.

Despite the irrefutable conclusion that the appeal was not timely filed, I find grounds exist to support equitable tolling of the filing requirements for an appeal before OALJ.

Complainant has produced a copy of an envelope that is misaddressed to OALJ and returned to Mr. Hitchings sometime in March, 2004. CX 14. Although the exact date of the postmark is illegible, I find the evidence sufficient to conclude that the envelope contained the letter dated February 25, 2004 from Complainant's counsel to OALJ, which represented Complainant's attempt to file his appeal. Both the letter and envelope are similarly misaddressed. Complainant exercised diligence in determining the status of his complaint by contacting OALJ and then immediately filing his appeal. Although I wish he had been better served by his attorney, who should have undertaken the responsibility to confirm that the appeal was received by OALJ, it is clear that Complainant attempted to comply with the filing deadline. It would be inequitable in these circumstances to deny Complainant the opportunity to be heard because of defective mailing.

I also note the apparent failure of Complainant's attorney to serve Respondent with notice of the complaint when it was purportedly filed in February, 2004. Respondent was immediately served when Complainant cured his defective filing in March, 2004. I find no undue prejudice to Respondent in accepting Complainant's appeal nunc pro tunc, as only a brief period elapsed between the filing deadline and the actual filing. In addition, Respondent was not unaware of Complainant's assertions in this matter, as the parties have participated in ongoing litigation regarding Complainant's employment with Respondent. Accordingly, I find that Complainant's appeal is properly before OALJ.

*Complainant did not timely file his complaint with OSHA*

Pursuant to 29 C.F.R. § 2305, "any employee who believes he has been discharged…by any person in violation of [the Act] may, within one hundred and eight days after such alleged violation occurs file…a complaint with the Secretary of Labor alleging such…" 29 C.F.R. § 2305(c)(1). The time within which the complaint must be filed begins to run "at the time of the challenged conduct and its notification, rather than the time its painful consequences are ultimately felt…" *English v. Whitfield*, 858 F. 2d 957, 961 (4th Cir. 1988). However, the period for filing an administrative complaint may be subject to equitable tolling in certain instances. 29 C.F.R. section 1978.102(d)(2), (3). Among those situations recognized as appropriate for equitable tolling of the filing limitation are where the employer has concealed or mislead the employee regarding the grounds for the adverse action, where the adverse action constitutes a continuing violation, where the employee has mistakenly raised the issue in the wrong forum, or where he has been prevented in some extraordinary way from filing his complaint. See, 29 C.F.R. section 1978.102(d)(3); *School District of City of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981); *Hicks v. Colonial Motor Freight Lines*, Case No. 84-STA20, Sec. Dec., Dec. 10, 1985, slip op. 7-8.

Complainant has asserted that his complaint with OSHA was timely filed because it alleges continuing and ongoing violations, specifically, the failure of Respondent to implement the terms of a settlement agreement reached between the parties in resolution of Complainant's OSHA complaint of November, 2000. Respondent disputes this construction of the history of the relationship between the parties. The evidence sets forth the chronology of the relationship since Complainant's termination on October 25, 2000.

Following his complaint to OSHA on November 9, 2000, OSHA conducted an investigation and effected a settlement between the parties which is summarized in the agency's "Final Investigative Report STAA (Full Settlement) dated January 23, 2001. The terms of the settlement are set forth as follows:

> Back wages are not an issue because the complainant has not been able to work from the time he filed the STAA complaint, but the respondent has allowed him to collect worker's compensation benefits for the injury. The respondent agreed to settle the matter and restored the complainant's fringe benefits shortly after he filed the complaint. The respondent has also agreed to reinstate the complainant when his physician releases him to work. The settlement makes the complainant whole.

RX 4. The report also reflects that the OSHA investigator held a conference with representatives of the Complainant and Respondent on January 18, 2001, whereat the parties agreed to the settlement terms. Id.

A letter from Respondent's Administrative Assistant to Respondent's attorney dated January 8, 2001 advised that the company had reinstated Complainant's medical coverage. RX 6. By letter of January 19, 2001, counsel for Respondent informed counsel for Complainant that his position was available immediately. RX 5. By letter of January 10, 2001, Complainant's counsel advised Respondent's counsel that Complainant was ready to return to work, but was restricted from lifting by his doctor. In addition to office work, or inside or outside sales work, counsel represented that Complainant could perform his driving job with the accommodation of a forklift. RX 6.

Complainant has agreed that he received medical benefits and disability benefits, but contended that by contesting his workers' compensation claim, Respondent failed to comply with the terms of the settlement agreement. Respondent has stated that it allowed Complainant to collect unemployment compensation under his claim, but that the workers' compensation claim was disputed. This contention is supported by the documentary evidence. EX 1, 3, 7. Respondent contended that the OSHA investigator confused the two types of benefits in his summary of the terms of the settlement agreement. In support of this contention, Respondent points to the fact that a hearing on the unemployment compensation matter was held on January 9, 2001, just a few days before the OSHA settlement conference, at which Respondent withdrew its contest to Complainant's award of unemployment compensation benefits. EX 3. The record also contains evidence and pleadings relating to the ongoing litigation in Complainant's workers' compensation claim. EX 7.

I find that the evidence supports Respondent's position that the OSHA investigator confused the nature of the type of benefits that they agreed to concede to Complainant. In the final investigative report, Investigator James R. Connell specifically stated that "back wages were not an issue because Complainant was collecting workers' compensation benefits." EX 4. The record establishes that at the time of the settlement, Complainant was collecting unemployment compensation benefits. Therefore, I do not infer failure to comply with the settlement agreement from this misstatement of the benefits that Complainant was receiving.

However, this finding is immaterial to whether Complainant filed his complaint in a timely fashion.

Complainant argued that he was unaware of the terms of the settlement agreement until he was provided with a copy of Mr. Connell's final investigative report of January in conjunction with a civil action he brought against Respondent in federal court. Tr. at 46. Complainant simultaneously denied being party to a settlement agreement with Respondent, and asserted that OSHA did not advise him about the conditions of the settlement. Id. at 47. He then charged Respondent with not complying with the terms of a settlement. Id. at 33. He believes his instant complaint with OSHA is timely filed because Respondent has not fully complied with the settlement.

I reject Mr. Thissen's assertion that he was unaware that his case had been settled. His contentions are inherently contradictory and inconsistent with the record. His attorney represented him throughout the negotiations, and correspondence between his attorneys and Respondent's attorneys reflect the initiation of settlement terms. EX.5, 6. Although the terms of the settlement were not reduced to writing and signed by the parties, Complainant admitted having received the benefit of some of the terms, including the reinstatement of his medical and disability insurance and Respondent's withdrawal of its unemployment compensation appeal. He further contended that he contacted members of Congress, OSHA and other governmental entities an attempt to learn how to enforce the settlement agreement. Tr. at 75. Indeed, he filed a suit against Respondent in federal district court that referred to the basis for his complaint of November, 2000. Mr. Thissen agreed that he received a letter from OSHA in January, 2001 that stated that his complaint would be dismissed because of a settlement of the dispute. Tr. at 50. He admitted that he discussed the letter with his lawyers, and that they discussed the terms of the agreement. Tr. 50-52. Complainant stated that he did not accept the settlement terms, as he understood them. Tr. at 53. Complainant acknowledged that he received the beneficial effects of the settlement when his insurance was reinstated in January, 2001. Id. at 57. He also admitted receiving a letter offering him a position if he was medically able to accept it.

Complainant relies solely upon a poorly worded statement in an investigator's report to infer that Respondent did not meet its obligations under a settlement agreement, of which Complainant has, on the first hand, denied knowledge. Complainant clarified that he understood an agreement existed, but said that he never really knew the terms. Although Complainant stated that he repeatedly contacted OSHA to learn how to enforce the settlement agreement, he did not file a complaint until he was provided a copy of the final investigative report which erroneously identifies workers' compensation as a term that the parties agreed to resolve. When asked directly by me why he did not file a complaint with OSHA before November, 2003, his only answer was that he did not know the terms of the agreement. However, he agreed that he received from Respondent all the items identified in the final investigative report as settlement terms, except for workers' compensation benefits. At the same time he denied knowledge of the terms of the settlement agreement Tr. at 68-70. Complainant did not bring this action with OSHA in the almost three years following the resolution of his initial complaint, and brought the action only after receiving the investigative report.

Complainant's contentions are convoluted and irrational. I find that the evidence shows that Mr. Thissen had a reasonable understanding of the terms of the settlement agreement made with Respondent in January, 2001, and used a misidentification of a benefit noted in an after-discovered investigative report to bring the instant complaint. The record establishes that Respondent had every intention to dispute workers' compensation benefits and Complainant was involved in the ensuing litigation. I further find that, if indeed, Respondent had agreed to drop its dispute on that claim as part of the settlement agreement, then its failure to do constitutes a discrete adverse action, and not a continuing violation. I find also that Complainant had knowledge of that action long before he was provided with a copy of the final investigative report in March, 2003. It is clear that Complainant hoped to return to his position with Respondent, and made efforts toward that end, even filing a civil action. However, it was not until he was provided with a copy of the investigative report that he initiated his instant complaint. I find that Complainant has not established that he filed a timely complaint with OSHA.

At the hearing, I advised Complainant that an explanation from Mr. Hait regarding his understanding of the settlement terms would be helpful. I held a prehearing conference with the parties where I clearly advised Complainant about the purpose of the hearing and the need for him to gather all evidence, and have all witnesses that would help his case at the hearing on May 19, 2004. See, Transcript of Pre-hearing Conference of May 5, 2004. At the hearing, Complainant asked for subpoenas to be issued to Mr. Hait and Mr. Hitchings. I advised him to contact my legal assistant who would advise him how to request a subpoena. I did caution Complainant that he had notice to have all witnesses ready to testify that day at the hearing. Complainant did not seek subpoenas, but did secure and submit Mr. Hitchings' affidavit. Although he asserted that Mr. Hait could clarify the discussions regarding the settlement terms, Complainant chose not to secure any evidence from him.

Even accepting Complainant's version of events, and even if Mr. Hait testified in full support of Complainant's contentions regarding the settlement agreement, I find that his complaint was untimely filed. Complainant contends that he had no knowledge of the terms of the settlement agreement until he received a copy of the final investigative report. A letter to Complainant from his lawyer Fred Hait dated July 23, 2003 refers to OSHA's final investigative report and the settlement. Tr. at 60. The objective evidence reveals that Complainant and his counsel at the time, Mr. Hitchings, were provided with the report by Respondent's counsel sometime in March, 2003. EX 8. Complainant through his counsel Mr. Hitchings filed a civil action against Respondent in United States district court. Before the case was dismissed, and in preparation of its defense in that matter, Respondent made a FOIA request to OSHA and received the final investigative report at issue herein. Respondent referred to that report in counsel's letter to Complainant's counsel of March, 4 2003, and provided a copy thereof to Mr. Hitchings.

Therefore, allowing seven days for that letter to reach Complainant's counsel, I find that Complainant had 180 days from March 11, 2003 to file his complaint with OSHA regarding whether Respondent violated the terms of the settlement agreement in his prior case. Complainant filed the instant action on December 11, 2003, 60 days beyond September 11, 2003,

which constitutes 180 days after March 11, 2003. I do not find that the circumstances herein warrant tolling of the time within which a complaint should be filed.

Accordingly, I find that Complainant's instant complaint is not timely filed, and I have no jurisdiction to make a determination on the merits of Complainant's complaint. I find no genuine issues of material fact on the issue of whether Mr. Thissen's complaint was timely filed or whether equitable tolling is applicable. Therefore, Respondent's motion for summary judgment is hereby GRANTED.

ORDER

It is hereby recommended that Complainant's Case No. 2004-STA-00035 be dismissed as untimely.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

**NOTICE:** This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board, United States Department of Labor, briefs in support of or in opposition to Recommended Decision and Order within thirty days of the issuance of this Recommended Decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).