



Issue Date: 09 February 2009

Case No.: 2009-TSC-00001

In the Matter of:

RICHARD STACHOWSKI,
Complainant,

v.

RUPP MASONRY, INC.,
Respondent.

ORDER DISMISSING COMPLAINT

Procedural History

This matter arises out of a complaint filed by Richard Stachowski (Complainant) against Rupp Masonry, Inc. (Respondent) under the employee protection provisions of the Toxic Substances Control Act of 1986 (TSCA), 15 U.S.C. §§ 2622, et seq., as amended, and the regulations promulgated thereunder at 29 C.F.R. Part 24. The Area Director of the Occupational Safety and Health Administration dismissed the complaint, and Complainant filed objections and a request for hearing. After receipt of Complainant's request for a hearing, I conducted a preliminary review of the file and, on January 8, 2009, issued an Order to Show Cause why the complaint should not be dismissed either on the basis that it was untimely filed, or on the basis that it failed to state a claim on which relief could be granted. Complainant responded to the Order to Show Cause with a comprehensive 15-page pleading accompanied by 30 exhibits. Employer has submitted no response.¹ This matter is now ripe for decision.

Employment History and Post-Employment Complaints

Complainant began working for Respondent in 1995 as a laborer and foreman in masonry construction. [Exhibit B, Exhibit C at 10:4-6.]² In the course of his employment, Complainant

¹ There is some question whether there is a viable Respondent in this matter, as Respondent's sole owner, director, officer, and shareholder died in February of 2007. Because the issue of whether there is a viable Respondent was not identified in my Order to Show Cause, I will not address it in this Order. However, in light of the circumstances, I find it appropriate not to delay this decision for purposes of determining whether a response to Complainant's submission is forthcoming from Respondent.

² The exhibits referred to in this Decision and Order are those that were submitted by Complainant with his pleading in response to my Order to Show Cause.

was required to work on occasion with a masonry admixture known as Dry Block II. [Exhibit C.] Dry Block II included formaldehyde as one of its ingredients. [Exhibit I, p. 5; Exhibit DD.]

In May of 2002, Complainant discovered a mass which, upon removal and analysis, was determined to be a malignant mixed germ-cell tumor, embryonal carcinoma and yolk sac tumor.[Exhibit W.] Complainant's cancer was treated by surgery and chemotherapy, and Complainant's cancer eventually went into remission. Complainant reported to Respondent that he believed his cancer had been caused by exposure to industrial chemicals in the course of his employment. [Exhibit C (MIOSHA Form 300).]

Complainant's last day of employment with Respondent was May 31, 2002, after which he underwent his medical treatment. [Exhibit B, Exhibit E at 24:4-13.] He was not terminated, but simply stopped working, apparently due to his medical condition. He has not worked since that date. [Exhibit B.]

On September 16, 2002, Complainant filed a complaint with the Michigan Occupational Health and Safety Administration (MIOSHA), alleging that he had been exposed to a potentially hazardous material (Dry Block II) and had developed cancer as a result. [Exhibit H at 11:16-23 and 38:5-21.] MIOSHA requested an investigation and response from Respondent, who submitted such response in November of 2002. [*Id.* at 42:9-17.] MIOSHA deemed Respondent's response satisfactory and closed the complaint on December 2, 2002. [*Id.* at 30:5-10 and 41:15-19.]

In 2003, Complainant filed a second complaint with MIOSHA alleging that Respondent had failed to conduct initial formaldehyde exposure management and to provide respirators. [Exhibit H at 59:7-60:8, 70:19-71:10.] MIOSHA conducted an investigation, and determined that Respondent had in fact failed to take the management steps required when formaldehyde was present in the workplace. [*Id.* at 74:5-16.] Because Respondent represented that it had stopped using materials containing formaldehyde, however, MIOSHA issued a citation but did not impose any fines or penalties. [*Id.* at 74:25-75:7.]

On February 28, 2006, Complainant filed a claim for Michigan workers' compensation benefits on an "Application for Mediation or Hearing" form, alleging that he was injured on May 31, 2002. [Exhibit B.] The work-related injuries claimed were cancer, spine, and soft tissue disease. [*Ibid.*] After extensive discovery, a hearing was held on May 2, 2007 before a state magistrate. [Exhibit H.] By a decision dated May 24, 2007, the magistrate denied the claim for workers' compensation, finding that Complainant had not shown that his illnesses were work-related. [Exhibit I.]

In December of 2007, Complainant filed a second claim for Michigan workers' compensation benefits. [Exhibit L.] A telephonic mediation was scheduled for March 12, 2008 [Exhibit O], but Respondent did not appear for that mediation. [Exhibits R and S1³.] The mediator filed a document indicating that Complainant had withdrawn his benefits claim [Exhibit

³ Complainant submitted three separate documents bearing the notation "Exhibit S," all of which were dated March 13, 2008, but which are all different from each other. For clarity of the record, I have added a "1," "2," and "3" to Complainant's exhibit markings.

X]; however, Complainant objected to that representation and a hearing was later scheduled. [Exhibit V.] Prior to any hearing, the same magistrate who had denied Complainant's first claim dismissed the second claim. [Exhibit Z.]

Throughout the pendency of the above-described proceedings, Complainant made every attempt to have Respondent held accountable for a purported failure to file certain required injury-related forms with MIOSHA and to provide Complainant with copies of them. For example, he filed numerous hand-written pleadings in connection with his second workers' compensation claim citing to various Michigan record-keeping statutes which he believed that Respondent had violated. [Exhibits J, K, P, R, S3, T, U, W.] Additionally, on March 14, 2008, Complainant filed a complaint against Respondent in the U.S. District Court for the Eastern District of Michigan, alleging that Respondent had concealed information contained in certain MIOSHA forms, and had failed to file an Employer Basic Report of Injury.⁴ Although it is not entirely clear, it appears that Complainant attempted to have the Court issue an order requiring Respondent to comply with the form-filing requirements. That complaint was ultimately dismissed for lack of jurisdiction.

The Current Complaint

Complainant filed a document with the Area Director of the Occupational Safety and Health Administration on September 23, 2008, which the Area Director deemed to be a complaint under the Act. After conducting an investigation, the Area Director dismissed the complaint because (1) it was filed more than 30 days after any possible discriminatory or retaliatory employment action, and (2) Complainant failed to make out a *prima facie* case that he had been subjected to an adverse action after engaging in a protected activity. Complainant filed a timely objection and request for hearing. After conducting a preliminary review of the file, I issued an Order to Show Cause why the complaint should not be dismissed for (1) untimeliness, or (2) failure to state a claim upon which relief can be granted.

1. *Applicable Law*

The Act provides in pertinent part:

No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has-

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act;

(2) testified or is about to testify in any such proceeding; or

⁴ I take official notice of the court docket in *Stachowski v. Rupp Masonry, Inc.* Case No. 08-cv-11121, E.D. Mich. for purposes of this Order.

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

15 U.S.C. § 2622(a). The regulations implementing the Act in turn provide:

(a) No employer subject to the provisions of any of the statutes listed in Sec. 24.100(a)⁵, or to the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 et seq., may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in this section.

(b) It is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner retaliate against any employee because the employee has:

(1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the statutes listed in Sec. 24.100(a) or a proceeding for the administration or enforcement of any requirement imposed under such statute;

(2) Testified or is about to testify in any such proceeding; or

(3) Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such statute.

29 CFR § 24.102. The Administrative Review Board has, in a recent decision, expanded on the literal terms of the statute and regulation. In *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, the ARB held that in a claim of retaliation, an employer's action is "materially adverse" if it is such that it "could well dissuade a reasonable worker from making or supporting a charge of discrimination." See *Melton*, slip op. at 19, quoting *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 57 (2006). The U.S. Court of Appeals for the Sixth Circuit, in whose jurisdiction this matter arises, has not ruled on the applicability of *Burlington Northern* to environmental whistleblower cases; thus, the ARB's decision in *Melton* is binding.⁶

2. Timeliness of Complaint

The Act provides in pertinent part:

1) Any employee who believes that the employee has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within 30 days after such alleged violation occurs, file (or have any person file on the employee's behalf) a complaint with the Secretary of Labor

⁵ The listed statutes include the Act, and this matter is therefore subject to the quoted regulation.

⁶ The Sixth Circuit has assumed without deciding in one unreported case that the *Burlington Northern* formulation is applicable to environmental whistleblower cases. See *McNeill v. U.S. Dep't of Labor*, Case No. 05-4190, 243 Fed. Appx. 93, 98, 2007 WL 1880599 (6th Cir. June 27, 2007) at **3.

(hereinafter in this section referred to as the "Secretary") alleging such discharge or discrimination.

15 U.S.C. § 2622(b). Likewise, the implementing regulations provide:

(d) Time for Filing. (1) Except as provided in paragraph (d)(2) of this section,⁷ within 30 days after an alleged violation of any of the statutes listed in Sec. 24.100(a) occurs (i.e., when the retaliatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been retaliated against in violation of any of the statutes listed in Sec. 24.100(a) may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation....

29 CFR § 24.103(d).

The document filed by Complainant that was deemed to be a complaint under the Act was filed on September 23, 2008. To be timely, then, Complainant must show, or at least allege, that an adverse employment action occurred on or after August 24, 2008.

Complainant last worked for Respondent on May 31, 2002, and does not claim that the termination of his employment was discriminatory or retaliatory. Given the lapse of time since Complainant last worked for Respondent, none of the definitions of adverse employment action that are specifically set out in the statute or regulation is available to him – there is no action whatsoever alleged to have been taken with respect to his “compensation, terms, conditions, or privileges of employment” between 1995, when he was hired, and September 23, 2008, when he filed his complaint under the Act. Likewise, there are no acts that are alleged to qualify as intimidation, threat, restraint, coercion, or blacklisting.

Thus, only if some act by Respondent qualifies as a “materially adverse” act under *Melton, supra*, can Complainant show a violation. A close review of the voluminous documents submitted by Complainant, however, does not show that any act at all occurred in the 30-day period prior to the filing of his complaint. To the extent that Respondent took any “materially adverse” act against Complainant, it must have been before August 24, 2008, and therefore more than 30 days before Complainant filed his complaint. The complaint, therefore, was untimely.

3. Failure to State a Claim

Because I have found that the complaint was untimely and will order this matter dismissed on that basis, I need not reach the issue whether the complaint states a claim on which relief can be granted, and I decline to do so.

⁷ Paragraph (d)(2) applies to a statute that is not at issue herein, and therefore the exception is not applicable.

ORDER

Based on the foregoing, Respondent's Motion to Dismiss is GRANTED, and this matter is DISMISSED WITH PREJUDICE.

SO ORDERED.

A

PAUL C. JOHNSON, JR.
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. Dept. 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.