



**Issue Date: 10 July 2009**

Case No.: **2009-CAA-00003**

*In the Matter of:*

**JIM SOUTHERLIN,**  
Complainant,

v.

**NESTLE PREPARED FOODS COMPANY,**  
Respondent.

**RECOMMENDED DECISION AND ORDER DISMISSING THE CLAIM AS  
BEING UNTIMELY FILED**

This proceeding arises under the Clean Air Act, 42 U.S.C. § 7622 (hereinafter “the Act”), and implementing regulations at Title 29 Code of Federal Regulations Part 24.

The statute is implemented by regulations providing procedures for handling of discrimination complaints. 29 C.F.R. § 24. An employee who believes that he or she has been discriminated against in violation of the Act may file a written complaint within 30 days after the occurrence of the alleged violation. 29 C.F.R. § 24.3(b), (c).

The Respondent states that

Southerlin was employed as Head of Facility Safety at Nestle Prepared Foods Company’s Gaffney, South Carolina factory. Southerlin’s position was the highest ranking safety and environmental position in the Gaffney factory. Southerlin is a seasoned safety and environmental professional with almost thirty years of experience and numerous OSHA and environmental certifications. On April 3, 2008, Southerlin was suspended, with pay, from his employment at Nestle for various issues related to his job performance and personal conduct.

In late April 2008, the Respondent scheduled a meeting with the Complainant and his counsel. The meeting did not take place and, on May 5, 2008, Nestle wrote to Southerlin, through his attorney, confirming his termination.

The Complainant states that

In a letter dated May 5, 2008, Carol Cooley, HR Manager for Nestle stated that Mr. Southerlin's employment had "been terminated, effective April 30, 2008." Shortly thereafter, Mr. Southerlin contacted the Hodge Law Firm about filing a complaint with OSHA for retaliation. On May 14-15, 2008, Mr. Southerlin and Nestle participated in a global mediation of Mr. Southerlin's claims, but the negotiations fell short of a resolution:

After the mediation, on or around May 19, 2008, Mr. Southerlin telephoned the South Carolina Department of Labor, Licensing and Regulation (SC LLR) and requested information on how to file a retaliatory discrimination complaint based on workplace safety and environmental concerns. Mr. Southerlin was told that South Carolina administered its own OSHA and that he needed to fax a letter to the South Carolina Office of Occupational Safety and Health (SCOSH) in Columbia, South Carolina. Based on the information he received from the SC LLR, Mr. Southerlin believed that a filing of a retaliation complaint at the state level was sufficient to seek enforcement of all his state and federal rights.

On May 30, 2008, Mr. Southerlin faxed a complaint addressed to the "Secretary of Labor or Duly Authorized representative" articulating Mr. Southerlin's desire to file a claim for violation of provision 11(c) of the Occupational Safety & Health Administration Act of 1970 based on retaliation against him by his employer Nestle USA for raising EPA and OSHA violations connected to deadly ammonia leaks. South Carolina LLR investigated the complaint but determined that it could not connect the adverse action against Mr. Southerlin to occupational health complaints. Mr. Southerlin appealed the decision of shortly after receiving it.

According to the Complainant, on or about June 10, 2008, South Carolina LLR put the U.S. Department of Labor on notice of Mr. Southerlin's claims.

The Complainant's exhibit nine is a June 10, 2008 letter from the South Carolina LLR to the Complainant. A courtesy copy was sent to the U. S. Department of Labor-person and address unidentified.

This letter stated in part:

On May 30, 2008, the South Carolina Department of Labor, Licensing & Regulation, Office of Occupational Safety and Health, received your complaint alleging discrimination against you by "International Paper Company."

Careful review revealed that your complaint may possibly fall within the protected activity of 11c discrimination (OSH-11c).

On or about October 2, 2008, Complainant's counsel had a discussion with Dale Boyd, a federal OSHA investigator. Mr. Boyd informed me that another case filed with the state of South Carolina, which was filed in the same manner that Mr. Southerlin had filed his complaint, had been transferred to Mr. Boyd at the federal level. I inquired of Mr. Boyd how this was possible based on my understanding that filing of a retaliation complaint at the state level was sufficient to enforce state and federal rights. Mr. Boyd informed me that I was mistaken and needed to talk to Sharon Dantzler at South Carolina LLR. I immediately called Ms. Dantzler and explained to her the situation. Ms. Dantzler stated that there had been some confusion in her office given recent changes to the system and apologized for any misunderstanding. On October 6, 2008, Ms. Dantzler sent a letter to federal OSHA stating: "We would not want our actions to prejudice Mr. Southerlin in any way. Therefore, I am enclosing a copy of the complaint received by us on May 30, 2008, and ask that you accept it as timely."

On or about October 8, 2008, Mr. Southerlin received a letter dated October 6, 2008, from Adrienne Youmans of South Carolina LLR denying Mr. Southerlin's appeal of the initial decision made by SC LLR.

On October 17, 2008, I received a letter from Dale Boyd acknowledging receipt of Mr. Southerlin's complaint of discrimination. On or about October 23, 2008, Mr. Boyd, Mr. Southerlin and I had a telephone discussion in which this case was discussed. In that conversation Mr. Boyd stated that he discussed this case with a staff member at South Carolina LLR and that South Carolina LLR did not dispute that they had represented to Mr. Southerlin and me that filing of a retaliation complaint at the state level was sufficient to enforce state and federal rights. I sent Mr. Boyd and Sharon Dantzler a letter articulating what Mr. Boyd had stated. Mr. Boyd contacted me shortly thereafter and disputed that he had made the above statements. Ms. Dantzler never contacted me about the letter.

On or about January 18, 2009, I received a letter dated January 16, 2009, from the U.S. Department of Labor that included Secretary's Findings. In short, the Secretary issued a finding that there was "no reasonable cause to believe that the Respondent violated" the law and that Mr. Southerlin's complaint was untimely filed. On January 30, 2009, I sent a letter objecting to the Secretary's Findings and requested a hearing in this matter.

The letter from OSHA dated January 16, 2009 stated in part

On April 25, 2008, Respondent sent Complainant a letter instructing him to attend a scheduled meeting with management on April 29, 2008 to discuss work-related issues. Complainant was informed that failure to attend the meeting would be considered as Complainant voluntarily resigning his

employment. Complainant did not attend scheduled April 29, 2008 meeting. Subsequently, Complainant's employment was terminated effective April 30, 2008.

The evidence demonstrated that Complainant filed his May 30, 2008 complaint with SCLLR 31 days after learning that failure to attend the meeting would terminate his employment. As a result of his failure to attend the scheduled meeting, his employment terminated effective April 30, 2008. Therefore, this complaint is dismissed for untimely filing.

Following the appeal to the Office of Administrative Law Judges by the Complainant, the case was assigned to the undersigned Administrative Law Judge. In early March 2009, a conference call was held with the parties. The parties were granted time to file briefs on the issue of timeliness of the filing of the federal complaint.

The Complainant argues that he raised the precise statutory claim in issue in the wrong forum.

Counsel described the misconception that the filing with the state included any federal environmental complaints. It was not until early October 2008 that Dale Boyd, a federal OSHA investigator, informed the Complainant that a federal action had not been filed.

Counsel noted that

On October 6, 2008, Ms. Dantzler sent a letter to federal OSHA stating: "We would not want our actions to prejudice Mr. Southerlin in any way. Therefore, I am enclosing a copy of the complaint received by us on May 30, 2008, and ask that you accept it as timely."

The federal complaint was filed in mid-October 2008, and a January 2009 letter from the U.S. Department of Labor included the Secretary's Findings. In short, the Secretary issued a finding that there was "no reasonable cause to believe that the Respondent violated" the law and that Mr. Southerlin's complaint was untimely filed.

Complainant's counsel argues that

The U.S. Supreme Court has noted that the remedial purpose of employee-rights legislation would be defeated if aggrieved plaintiffs were absolutely barred from pursuing judicial remedies by reason of excusable failure to meet time requirements. Accordingly, the Supreme Court has allowed equitable tolling of the statute of limitations in situations where the claimant has actively pursued his judicial remedies by timely filing the complaint in the wrong forum. Specifically, the Supreme Court has held that a timely complaint of a state liability action tolled the statute of limitations of analogous federal provisions "during the pendency of the state suit."

As noted by Nestlé's brief, Complainant is required to raise the precise statutory claims in order to make a claim for equitable estoppel. Although Mr. Southerlin did not make "precise" reference to the environmental statutes in his complaint to the SCOSH, he did reference the Environmental Protection Act several times, which provided notice to the SCOSH of his environmental concerns. This is undisputed as Ms. Dantzler acknowledged these representations and agreed that Mr. Southerlin's letter could be construed to allege discrimination based on an environmental statute.

Equitable tolling is appropriate in the case at bar as Mr. Southerlin's complaint was timely submitted in the wrong forum and it acknowledged his environmental concerns to an extent that put the SC LLR on actual notice of those issues.

The Respondent reports that the complaint to the South Carolina LLR

states "[i]t is my desire to file a claim for Violation [sic] of the Occupational Safety & Health Administration (OSHA) Act of 1970 provision 11(c), based on discrimination my employer Nestle systematically pursued against me." In support of the 11(c) complaint, Southerlin alleged that he had raised concerns about ammonia releases in May 2007 and August 2007 and began being "harassed" by Pat Emrich thereafter. The complaint alleged only a violation of OSHA § 11(c) and did not allege any violation of any Environmental Whistleblower statute. The first sentence of Southerlin's complaint states that the intent was only to file an OSHA § 11(c) complaint. There is no other reference to any other statute, including the Environmental Whistleblower statutes that Southerlin now seeks to pursue.

Ms. Dantzler did not intend to suggest in her correspondence that anyone had given incorrect advice or misled Southerlin or his attorney in any way. (Dantzler Dep. At 72:15-22). Ms. Dantzler had not independently interpreted the May 30 complaint as raising any allegations under the Environmental Whistleblower statutes or as reflecting a timely filing of Environmental Whistleblower claims. (Dantzler Dep. at 104:5-12, 106:16-107:4).

The Respondent also notes that Complainant's counsel

agreed that he never specifically mentioned any of the Environmental Whistleblower statutes in any conversation with a representative of SC LLR. (Langley Dep. 91:23-93:11). It is clear that Mr. Langley simply misunderstood the relationship between OSHA § 11(c) and the Environmental Whistleblower statutes. Mr. Langley believed that § 11(c) "is the vehicle through which [each of the Environmental Whistleblower] statutes are enforced." (Langley Dep. at 72:9-11). Mr. Langley did not indicate that he was told by any representative of SC LLR that § 11(c) was the appropriate vehicle to implicate the six Environmental

Whistleblower statutes. (Langley Dep. at 87:11-90:17). Mr. Langley could not identify any misrepresentation made by any individual associated with SC LLR. Mr. Langley believed incorrectly that § 11(c) was “enabling” legislation for all of the Environmental Whistleblower statutes or the “mechanism Mr. Southerlin should use to enforce his employment rights under any statute.” (Langley Dep. at 93 :24-94:2).

The Respondent states that

Contrary to Southerlin’s assertions, there is no basis whatsoever to invoke principles of equitable tolling. The decisions addressing equitable tolling have recognized only three situations in which it may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; and (3) when “the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.” School District of City of Allentown v. Marshall, 657 F.2d 16, 19-20 (3d Cir. 1981).

Initially, the undersigned would note that during her deposition, Ms. Dantzler testified that state personnel understood the letter in May to be a violation of OSHA section 11(c), which came under state jurisdiction.

In a letter dated October 6, 2008 to the U. S. Department of Labor-OSHA Regional Office, Ms. Dantzler stated

On October 2,2008, Ryan Langley, attorney for Mr. Southerlin, contacted this office and informed me that the original complaint letter was intended to trigger both an OSHA and an EPA based discrimination investigation. He also informed me that he had telephoned and been told that one complaint would be sufficient before he helped Mr. Southerlin file with the state on May 30, 2008.

Since the South Carolina Department of Labor, Licensing and Regulation has no jurisdiction over discrimination based upon activities protected under clean air or water statutes, our investigation did not address those issues. We would not want our actions to prejudice Mr. Southerlin in any way. Therefore, I am enclosing a copy of the complaint received by us on May 30, 2008, and ask that you accept it as timely.

Ms. Dantzler was deposed in April 2009 and she was asked to read the Complainant’s May 30, 2008 letter.

A. It is my desire it file a claim for violation of the Occupational Safety and Health Administration Act of 1970, Provision 11-C, based on discrimination my employer Nestle systematically pursued against me. And then it sets out facts.

Q. Okay. And was it clear to you from reading this letter that Mr. Southerlin was filing a claim for violation of OSHA 11-C?

A. We took it as a violation of OSHA 11-C. We investigated it as a -- yes, we felt that's what it was.

Q. Okay. Did you read this letter to allege discrimination or retaliation under any of the federal environment protection statutes?

A. No, I did not.

Q. And if you had, would you have retained jurisdiction over that aspect of it?

A. Of course not.

Q. Okay. Are you aware of anybody throughout the investigative process, following receipt of this letter at South Carolina OSHA or LLR, who believed that Mr. Southerlin was complaining of retaliation under any of the federal environmental protection statutes?

A. No one reported that to me.

Q. Okay. Are you aware of anyone at LLR or South Carolina OSHA who would have told Mr. Southerlin or his attorneys that LLR or South Carolina OSHA had the jurisdiction to investigate any complaint under any environmental protection statute?

A. No, I don't think so.

It appears that the Complainant made a timely filing with the State of South Carolina in late May 2008. However, state officials considered the filing to be under the State OSHA regulations as there was no clear identification of any of the federal environmental whistleblower acts.

In early October 2008, over four months later, Complainant's counsel contacted Mr. Boyd, a federal employee. It appears that this is the first direct contact with the U. S. Department of Labor regarding a violation of a federal act. The June 10, 2008 letter from the State to the Complainant with a courtesy copy to the U. S. Department of Labor did not identify a federal violation.

The undersigned has considered the case law cited by the parties. Decisions have not been kind to Complainants who are represented by counsel regarding the concept of equitable tolling.

The Complainant filed in the wrong forum. His contacts with the state agency during the next four months did not lead that agency to believe that he was alleging a violation of a federal environmental whistleblower act.

The undersigned concludes that the concept of “equitable tolling” is not so broad as to excuse the delay in filing of the federal complaint for some five months after the Complainant’s dismissal by the Respondent. The Complainant did not raise the precise statutory federal claim until October 2008.

### **ORDER**

It is recommended that the complaint of Jim Southerlin be dismissed as being untimely under the Clean Air Act.

**A**

RICHARD K. MALAMPHY  
Administrative Law Judge

RKM/ccb  
Newport News, Virginia

**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(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).