

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 November 2009

Case No.: 2009-CAA-00007

In the Matter of:

BASSEY J. UDOFOT,
Complainant,

v.

NASA / GODDARD SPACE CENTER,
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).

Available evidence indicates that the Complainant began working for the Respondent in March 2008 and that his dismissal became effective on December 5, 2008. OSHA received a complaint under the Clean Air Act on February 19, 2009.

On March 18, 2009, the Regional Administrator of OSHA denied the complaint as being untimely filed.

The Complainant filed a timely appeal with the Office of Administrative Law Judges and the case was assigned to the undersigned Administrative Law Judge.

During a conference call with the parties in August 2009, the Respondent raised the issue of timeliness of the complaint and that party argued that the case should be dismissed.

The undersigned issued an order allowing the parties to address the issue of timeliness under the concept referred to as “equitable tolling” which holds that the 30 day filing requirement is not a jurisdictional prerequisite for maintaining a cause of action.

The Complainant has responded and stated

During the months of October and November, 2008, when the air sampling tests were being conducted, I was assured by my superiors and the Industrial Hygienist that I would be provided with a copy of the results when they were published. On November, 24, I was notified I that my employment was being terminated for a number of reasons. However, my supervisor failed to notify me that the test results had been published, as promised.

It was not until February, 2009, that I found out that the cause of my termination was the results of the internal air sampling investigation which I had initiated. On February 16, 2009, Mr. Bien Chain, the Industrial Hygienist in charge of the air sampling test~ called me to confirm the date he submitted the air sampling test to the deputy, Mr. Hinkle- November 17, 2008, just 7 days before I was notified I was being terminated.

I was actively misled by my superiors in their failure to inform me of the published test results. Because I was not informed, I could not know that the results were a contributing factor in my termination and that I had been retaliated against for disclosing health and safety violations. Had I known that the investigation on the air sampling had been reported in November when I was fired, I would have filed a complaint with OSHA at that time. However, because I lacked this information, I filed my case with the OSHA on February 19, 2009, three days after finding out that the air sampling results had been given to my superiors a week prior to my termination.

I was prevented from asserting my rights within the 30 day statutory filing period because I was not given the sampling results in November, and therefore had no way of knowing that the publication of the results had anything to do with my employment termination. As such, I did not discover the injury until after the expiration of the limitations period.

The Respondent states that

NASA's air sampling report dated November 17, 2008, which the Complainant claims to have received from the OSC on June 12, 2009, did not reveal to him any new information that caused him believe he was a victim of whistleblowing retaliation. Prior to June 12, 2009, the Complainant had already filed claims with the EEOC, MSPB and OSC alleging that his termination was due to whistleblowing about employee exposure to toxic chemicals in the air. Thus, the report was not the basis for his belief that these disclosures caused him to be terminated. Based on these facts, the Complainant has not been prevented from asserting his rights in some extraordinary way.

Contrary to the Complainant's arguments, there is no evidence that NASA actively misled him about the cause of action, whether or not he received a copy of the November 17, 2008 report at the time of its issuance (as indicated by the "cc" recipients). Mr. Bien, the contractor who wrote the report, emailed

a copy of it to the Complainant's email address on December 1, 2008. In the report, Mr. Bien thanked Mr. Udofot and others for their assistance related to the investigative survey. These circumstances do not suggest any intent to actively mislead the Complainant. Further, the Complainant has not identified any information in the report about which NASA misled him, nor has he described specific information in the report which was unknown to him as a potential cause of action before DOL.

Finally, although the Complainant alleged whistleblowing concerning air quality issues in other venues, he did not raise the precise statutory claim that is before DOL. Further, he has not argued in his brief that he did. Moreover, the whistleblowing claim that he filed before the OSC's Disclosure Unit was not filed in the wrong forum, as evident by the fact that OSC has required NASA to investigate his allegations in detail.

The undersigned would note that in recent correspondence the Complainant has stated

On November 24, 2008, I was notified that I was being removed from my civil service position. I was told that the reason I was being let go was that I did not have basic knowledge of electroplating processes, that I was demeaning to my group members, and that I conducted work outside my job description. On December 5, 2008, I was officially removed.

The Respondent argues that there was no intent to mislead the Complainant and points out that Mr. Bien sent an e-mail copy of the air monitoring report in early December.

The record reflects that the Complainant had previously filed complaints in other forums and, therefore, was aware of the procedures.

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 two and a half months after the Complainant's dismissal by the Respondent. The Complainant did not raise the precise statutory federal claim until mid-February 2009.

ORDER

It is recommended that the complaint of Bassey J. Udofot be dismissed as being untimely under the Clean Air Act.

SO ORDERED.

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).