

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 27 April 2012**

CASE NO: 2012-CAA-00002

***In the Matter of:***

MICHAEL YARMER,  
Complainant,

v.

TOTAL LOGISTIC CONTROL LLC,  
Respondent.

**ORDER DISMISSING CLAIM**

This proceeding arises under the employee protection provisions of the Clean Air Act, 42 U.S.C. § 7622, and the implementing regulations found at 29 C.F.R. Part 24.

**Procedural History**

On December 20, 2011, Michael Yarmer (Complainant) filed a complaint under the Clean Air Act with the Occupational Safety and Health Administration (OSHA), alleging that he was forced to resign from his employment with Respondent because of the behavior of certain supervisory employees after he voiced concerns about Respondent's handling of ammonia at its facility.

On February 22, 2012, the OSHA Assistant Regional Administrator found that Complainant's complaint was untimely, and therefore dismissed it. Complainant timely filed an objection to those findings together with a request for hearing, which was received at the Office of Administrative Law Judges on March 19, 2012.

On March 26, 2012, I issued a Notice of Docketing and Order to Show Cause, directing the parties to show cause no later than 30 days thereafter – or by April 25, 2012 – why Mr. Yarmer's complaint should not be dismissed as untimely. Respondent timely answered that Order. Mr. Yarmer has not responded.

**Timeliness of Objections**

Under the Clean Air Act and its implementing regulations, an employee who believes that he has been discharged or otherwise discriminated against by any person in violation of the

Act must file a complaint with the Secretary of Labor within 30 days after the violation occurs. 42 U.S.C. § 7622(b)(1); 29 C.F.R. § 24.103(d)(1).

The complaint and Respondent's submission show that Complainant resigned from employment with Respondent on or about September 8, 2009. He filed his complaint with OSHA on December 20, 2011, more than two years after his resignation. On its face, then the complaint was untimely filed.

The time limits for filing complaints and requesting appeals in whistleblower cases are not jurisdictional, and may be subject to application of the doctrine of equitable tolling. *See, e.g., Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114 and 115, ALJ Nos. 2004- SOX-20 and 36, slip op. at 16 (ARB June 2, 2006). When deciding whether to relax the limitations period in a particular case, ALJs and the Administrative Review Board have been guided by the discussion of equitable tolling of statutory time limits set forth in *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981). In that case, the Third Circuit recognized three situations in which tolling is proper:

- (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
- (2) [when] the plaintiff has in some extraordinary way been prevented from asserting his rights, or
- (3) [when] the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. 657 F.2d 16, 18-20 (1981) (citation omitted).

Respondent argues that there are no reasons to apply equitable tolling to this matter, and Complainant has provided none. There is no evidence that Mr. Yarmer was misled or prevented from asserting his rights, or that he has filed a claim in any other forum. Accordingly, I find that there is no basis for tolling the 30-day requirement, and the complaint was untimely.

### **ORDER**

Based on the foregoing, IT IS ORDERED that the complaint filed by Complainant Michael Yarmer is DISMISSED.

**SO ORDERED.**

**A**

PAUL C. JOHNSON, JR.  
Associate Chief 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

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.