

# U.S. Department of Labor

Office of Administrative Law Judges  
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**Issue Date: 19 April 2018**

CASE NO.: 2018-CER-00001

In the Matter of:

DUSTIN LANE,  
Complainant

v.

GEMMS OILFIELD SERVICES,  
Respondent

## **ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION**

### **I. Procedural Background**

Complainant, Dustin Lane ("Complainant"), filed a complaint with the Occupational Safety and Health Administration ("OSHA") on August 17, 2017 under the employee protection provisions of §11(c) OSHA 29 USC §660(c) ("OSH Act"), the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") (1980), the Federal Water Pollution Control Act, ("FWPCA") 33 USC §1367, the Solid Waste Disposal Act ("SWDA") 42 USC §6971, and the Safe Drinking Water Act (SDWA) 42 USC §300j-9(i). (OSHA Complaint; November 1, 2017 Letter from Celmouth A. Stewart, Jr., Assistant Regional Administrator to Dustin Lane ("OSHA Findings")). In the complaint, Complainant alleged that he was terminated from his position with Respondent, Gemms Oilfield Services ("Respondent"), on June 3, 2017, in retaliation for his report to Respondent on the same date, that (1) he believed there to be a spill of contaminated water, (2) he did not have proper personal protective equipment, (3) did not have proper training to clean up spills, and (4) the spill kit was inaccessible. (OSHA Complaint). All subject actions took place on June 3, 2017. (*Id.*; OSHA Findings; Motion for Summary Decision Pursuant to 29 C.F.R. § 18.72 (Mar. 22, 2018) ("Motion") 8; Complainant's Response to Respondent's Motion for Summary Decision Pursuant to 29 C.F.R. § [sic] 18.72 ("Response") 8)).

On November 1, 2017, OSHA dismissed Complainant's claim due to untimeliness, stating, "[t]here may be circumstances that would justify tolling the 30-day period upon recognized equitable principles or because of strongly extenuating circumstances. Upon review of the evidence presented, this office did not find these equitable principles or strongly extenuating circumstances applied in this case. Consequently, this complaint is dismissed." (OSHA Findings).

On November 21, 2017, Complainant, through counsel, objected to OSHA's findings and requested a hearing before an Administrative Law Judge ("ALJ"). (Complainant's Objections to Findings and Request for Hearing before an ALJ ("Hearing Request")). The matter was subsequently assigned to me and on December 12, 2017, I issued a Notice of Hearing and Pre-hearing Order, which included certain hearing related deadlines, some of which were extended in subsequent orders. On March 22, 2018, Respondent timely filed a "Motion for Summary Decision ("Motion") Pursuant to 29 C.F.R. § 18.72," in accordance with the deadline provided in my Pre-Hearing Order. On April 11, 2018, Complainant submitted "Complainant's Response to Respondent's Motion for Summary Decision Pursuant to 29 C.F.R. § [sic] 18.72" ("Response"), which was untimely.<sup>1</sup> On the same date, Complainant also submitted "Complainant's Final Pre-hearing Statement" and "Final Pre-hearing Disclosures and Exchanges," both of which were untimely too.

On April 13, 2018, Respondent filed a "Motion for Leave to File Response to Complainant's Recent Filings of a Final Pre-Hearing Statement, Final Pre-Hearing Disclosures and Exchanges, and Complainant's Response to Respondent's Motion for Summary Decision" and "Respondent's Reply to Complainant's Final Pre-Hearing Statement, Final Pre-Hearing Disclosures and Exchanges, and Complainant's Response to Respondent's Motion for Summary Decision," ("Respondent's Reply"). In sum, Respondent's reply seeks to strike Complainant's response to summary decision, as well as Complainant's other Pre-hearing submissions, due to their untimeliness. It is undisputed that the Response and other submissions were untimely, however as discussed below (*see*, footnote 1), it is considered herein. Accordingly, because Respondent's Reply is based on Complainant's untimely Response, which is addressed and considered herein, and for the reasons described below, as summary decision is granted in favor of Respondent, Respondent's request to strike Complainant's Response is denied.<sup>2</sup>

The following decision and Order is based on consideration of the record, pleadings, materials and arguments submitted by the parties, and relevant law.

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<sup>1</sup> On April 10, 2018, my law clerk contacted Complainant's counsel to request counsel fax a copy of his response to our office because, assuming he had sent it by mail, it was not yet received. Apparently Complainant had not yet prepared or submitted his response, since it was hand-delivered on April 11, 2018. Complainant's Response to Motion for Summary Decision, however, was due ten (10) days after the Motion was served on the parties. (*See* Notice of Hearing and Initial Pre-Hearing Order ¶ 6). Respondent's Motion was served on March 22, 2018. (Certificate of Service, Respondent's Motion for Summary Decision). Consequently, Complainant's response was due April 2, 2018, or, allowing three days for mailing, by April 5, 2018 at the latest. (*Id.*), *see also* 29 C.F.R. § 18.32. Complainant's response on April 11, 2018, was not only untimely, but provided no explanation or good cause as to why it was untimely. Despite its untimeliness, because this is a dispositive motion, it requires the facts be viewed in the light most favorable to the non-moving party and more importantly, Complainant's Response does not change the outcome here, I consider Complainant's Response herein.

<sup>2</sup> To the extent Respondent's Reply also objects to Complainant's untimely submitted Final Pre-hearing Statement and Final Prehearing Disclosures and Exchanges, because I grant summary judgment in favor of Employer and no hearing will be necessary, I need not address Complainant's objections as they are moot.

## **II. Respondent's Arguments**

Respondent moves for summary judgment, primarily on the basis of jurisdiction and timeliness, arguing the Office of Administrative Law Judges ("OALJ") lacks jurisdiction here and more importantly, that it is undisputed that Complainant's whistleblower complaint to OSHA was untimely. More specifically, Respondent argues that the OALJ lacks jurisdiction over any claim alleging an OSH Act violation. (Motion 3). Next, it argues Complainant's whistleblower complaint filed with OSHA in this matter is untimely and therefore barred because a complainant must file a complaint within 30 days of an alleged adverse employment action under all applicable statutes. (Motion 4-6). Respondent further argues that no circumstances here justify tolling of any of the applicable statutes. (Motion 5-6). Finally, Respondent argues that Complainant cannot demonstrate a causal connection between his protected activity and the adverse action<sup>3</sup>. (Motion 6-11). For these reasons, Respondent asserts it is entitled to summary judgment as a matter of law.

## **III. Complainant's Arguments**

In response, Complainant maintains that the OALJ has subject matter jurisdiction over whistleblower complaints arising under section 11(c) of the OSH Act and the other related statutes under which this complaint arose. (Response 5). Complainant argues that he filed a complaint with the Pennsylvania DEP on June 3, 2017 in which he "advised of his wrongful termination in retaliation for his reporting of health, safety and environmental concerns to management at Respondent" and asserted that the report to the DEP<sup>4</sup> should toll the 30 day time limitation for filing a whistleblower complaint with OSHA. (Response 2, 6). He also asserted that OSHA was aware of Complainant's report to the DEP and aware of "his intent to assert claims for retaliation under section 11(c) of the OSH Act." (Response 2, 7). Complainant further maintains that because OSHA was investigating Complainant's allegations in his DEP complaint filed June 3, 2017, his time to file his section 11(c) OSH Act retaliation complaint should be equitably tolled. (Response 2-3). Additionally, Complainant argues that he did not retain counsel until September 8, 2017, and was therefore unaware of the 30 day deadline to file his complaint, filed it promptly after receiving the letter from OSHA about his hazard complaint on August 10, 2017, and therefore the thirty day filing deadline should be equitably tolled. (Response 3). Finally, Complainant argues the merits of the case. (Response 8-9).

## **IV. Undisputed Material Facts**

- There was a fluid spill at the location where Complainant worked on June 3, 2017. (Motion 7; Response 8).

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<sup>3</sup> As discussed below, because summary decision is granted on the procedural matter of timeliness in favor of timeliness, I need not and do not address the argument on the merits herein.

<sup>4</sup> Complainant's Response to Summary Decision appears to be the first time he asserted the complaint he filed at the DEP was a retaliation complaint. To the extent Complainant may now seem to argue that the hazard complaint filed at DEP was also a retaliation complaint, as discussed herein, there is no evidence of a retaliation complaint filed with DEP, or that the hazard complaint filed with DEP was also one for retaliation.

- Complainant reported the spill to Respondent's management on June 3, 2017. (Motion 6, 8; Response 8).
- Complainant also filed a report with the Pennsylvania DEP on June 3, 2017. (Motion 8; Response 6).
- Complainant was terminated from his position on June 3, 2017. (Motion 8; Response 1).
- Complainant, Dustin Lane, filed a retaliation complaint under § 11(c) of the OSH Act and the related acts with the Occupational Safety and Health Administration ("OSHA") on August 17, 2017. (OSHA Complaint; Motion 4, 5; Response 2, 7).

## V. Applicable Law

### 1. Summary Decision Standard

The standard of review for summary decision is the same as the standard for summary judgment in the federal courts, Rule 56 of the Federal Rules of Civil Procedure. *Fredrickson v. The Home Depot U.S.A., Inc.*, ARB No. 07-100, ALJ No. 2007-SOX-013, slip op. at 5 (ARB May 27, 2010); *Hasan v. Burns Roe Enter., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001). The Rules of Practice and Procedure for Administrative Hearings before the OALJ provide that an ALJ "shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law." 29 C.F.R. § 18.72(a).

The party moving for summary decision must show that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Then, the burden shifts to the non-moving party, who must present affirmative evidence beyond the pleadings to show a genuine issue of material fact exists for hearing. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). If the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact and that the party is therefore entitled to summary decision as a matter of law, the ALJ may enter summary decision for either party. 29 C.F.R. § 18.72(a); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18, slip op. at 5 (ARB Jun. 28, 2011); see *Catrett*, 477 U.S. 317. The ALJ may consider both the materials cited in the Motion for Summary Decision and other materials in the record. 29 C.F.R. § 18.72(c)(3).

A material fact is a fact whose existence affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact is a fact that if resolved, "could establish an element of a claim or defense and, therefore, affect the outcome of the action." *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046 slip op. at 4 (quoting *Bobreski v. U.S. EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003)). A genuine issue exists when a reasonable fact-finder could rule for the non-moving party, based on the evidence presented. *Id.* at 252. Sufficient evidence is any significant probative evidence. *Id.* at 249 (citing *First Nat'l Bank of Ariz. V. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)). However, mere allegations are insufficient to defeat a motion for summary decision. *Anderson*, 477 U.S. at 257; *Cante v. New*

*York City Dept. of Ed.*, ARB No. 08-012, ALJ No. 2007-CAA-004, slip op. at 9 (ARB July 31, 2009) citing *Webb v. Carolina Power & Light Co.*, No. 1993-ERA-042, slip op. at 4-6 (Sec’y July 14, 1995); *Henderson v. Wheeling & Lake Erie Ry.*, ARB Case No. 11-013, ALJ Case No. 2010-FRS-012 (Oct. 26, 2012).

In considering a motion for summary decision, an ALJ must consider the facts in the light most favorable to the non-moving party, here, Complainant. *Anderson*, 477 U.S. at 255. The ALJ must draw all reasonable inferences in favor of the non-moving party and may not weigh evidence or make credibility determinations. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under Fed. R. Civ. P. 50 and 56). If the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial,” there is no genuine issue of material fact, and the moving party is entitled to summary decision. *Catrett*, 477 U.S. at 322-23.

## 2. *Subject Matter Jurisdiction*

Under 20 C.F.R. § 24.100 and the related statutes here, the OALJ has jurisdiction to hear whistleblower complaints. 29 C.F.R. § 24.100 (“These rules, together with those rules codified at 29 C.F.R. part 18, set forth the procedures for ... litigation before administrative law judges”).

Complaints under section 11(c) of the OSH Act have several options to pursue remedies, including arbitration, agencies, collective bargaining agreements and the U.S. district court. 29 C.F.R. § 1977.18. U.S. district court however, is not the sole remedy. *Id.* Also, requests for judicial review of OSHA findings under whistleblower statutes are filed with the Chief Administrative Law Judge; thus the OALJ has jurisdiction because a judicial review is enumerated as before an ALJ in the regulation. 29 C.F.R. § 24.106. Accordingly, jurisdiction is proper here, where Complainant indeed submitted his objections and request for review and hearing to the OALJ Chief Administrative Law Judge. As a result, to the extent Respondent maintains OALJ lacks jurisdiction over the instant whistleblower complaint, he is not entitled to summary decision on this issue.

As I find jurisdiction proper here, I proceed to Respondent’s remaining issues presented for summary decision.

## 3. *Timeliness*

This claim arose out of §11(c) of the OSH Act, and CERCLA, FWPCA, SWDA, and SDWA. Each of these statutes requires that a complainant who believes he or she has been retaliated against by an employer to file the complaint within 30 days of the adverse employment action. 29 C.F.R. § 24.103(d)(1); 29 C.F.R. § 1977.15(d).

In OSHA claims, certain circumstances may justify tolling of the 30 day filing limitation “on recognized equitable principles or because of strongly extenuating circumstances.” 29 C.F.R. § 1977.15(d)(3). The regulation enumerates several examples, including the employer misleading or concealing the grounds of discharge or adverse action or, in situations where the

discrimination is a continuing violation. *Id.* The regulation also explicitly states that “filing with another agency” and “the pendency of grievance-arbitration proceedings” are some of the circumstances “which do not justify tolling the 30-day period.” *Id.*

Under the remaining statutes, 29 C.F.R. § 24.103(d)(1) enumerates the time of filing. There, “the time for filing a complaint may be tolled for reasons warranted by applicable case law.” 29 C.F.R. § 24.103(d)(1). There are specific and limited circumstances in which tolling may be appropriate including when, (1) the defendant has actively misled the plaintiff respecting the cause of action; (2) the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *Prybys v. Seminole Tribe of Fla.* 1995-CAA-15 (ARB Nov. 27, 1996) (an action arising under SWDA, CERCLA and FWPCA) (citing *School Dist. of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981) (an action arising under the Toxic Substance Control Act, which also has a 30 day limit on filing under 29 C.F.R. § 24). Ignorance of the law is not enough to invoke equitable tolling. 657 F.2d at 20. Thus, the situations warranting equitable tolling under 29 C.F.R. § 24.103(d)(1), are substantially similar to those provided by 29 C.F.R. § 1977.15(d)(3).<sup>5</sup>

The undisputed facts here reveal Complainant’s subject retaliation complaint to OSHA was untimely and there is no basis upon which to toll the deadline for filing the complaint. Accordingly, for the reasons below, Respondent is entitled to summary judgement as a matter of law.

Here, Complainant reported a fluid spill to Respondent’s Management on June 3, 2017. (OSHA Complaint; Response 1, 8; Motion 7). He considered it to be a hazardous spill. (OSHA Complaint; Response 1, Motion 8). Complainant was also terminated from his position with Respondent on June 3, 2017. (*Id.*). Complainant filed his whistleblower complaint, under section 11(c) of the Act, with OSHA on August 17, 2017. (OSHA Complaint; Motion 4, 5; Response 2, 7). He therefore filed his complaint seventy-five (75) days after the alleged adverse action, that being, his termination from his employment. Accordingly, on its face, there is no material issue of fact that Complainant filed his retaliation complaint forty-five (45) days later than the requisite 30 day time limitation and it is thus untimely. 29 C.F.R. § 24.103(d)(1); 29 C.F.R. § 1977.15(d).

Moreover, equitable tolling is not applicable here because the facts do not present any “strongly extenuating circumstances,” such as those discussed above, that might toll the time limitation. 29 C.F.R. § 1977.15(d)(3). It is undisputed that Complainant was terminated on June 3, 2017. (Respondent’s Motion 8; Complainant’s Response 1). It is his termination for reporting the spill, which Complainant alleges is the adverse action which led to his filing of the instant whistleblower (or retaliation) complaint. (Motion 1; Response 2). Respondent has not prevented Complainant from asserting his rights because it has not had contact with Complainant since his

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<sup>5</sup> While some courts have addressed additional factors for equitable tolling, see, *Rose v. Dole*, 945 F.2d 1331 (6th Cir. 1991) (per curiam) (arising under the ERA), here, neither party asserted or otherwise addressed the applicability of any, nor, more importantly, has either party provided evidence of any additional factors. Rather the parties considered those provided for under 29 C.F.R. §§24.103(d)(1) and 1977.15(d) which I address herein.

termination on June 3, 2017. (Motion 6). Complainant does not dispute this, nor does he dispute his termination on June 3, 2017. (*See* Response). Thus, it is undisputed that Employer has not concealed or misled Complainant about the alleged adverse action or his right to file a complaint with OSHA. Accordingly, the time limitation cannot be tolled for this reason.

Likewise, neither filing with the DEP, nor an ongoing investigation by OSHA of a safety complaint, tolls the 30-day time limitation for filing of a whistleblower complaint with OSHA under section 11(c) of the Act. 29 C.F.R. § 1977.15(d)(3). The regulation specifically states that “filing with another agency... do[es] not justify tolling the 30-day period. 29 C.F.R. § 1977.15(d)(3). However, if a complainant mistakenly filed a claim in the wrong forum and raised the precise statutory claim in issue, equitable tolling could be appropriate. *Prybys v. Seminole Tribe of Fla.* 1995-CAA-15 (ARB Nov. 27, 1996) (citing *School Dist. of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981)).

Looking at the facts most favorably for Complainant, it is undisputed Complainant reported a spill of fluid on June 3, 2017 to Respondent’s management. (Motion 7; Response 6, 8). It is undisputed that he also reported the June 3, 2017 spill to the Pennsylvania Department of Environmental Protection (DEP). (Motion 8; Response 8). Complainant asserted that his reporting of alleged statutory violations by Respondent to the DEP within thirty (30) days would toll the 30 day time limitation for filing an OSHA complaint. (*See* Response 2; Complainant’s Initial Disclosures; Complainant’s Amended and Supplemental Disclosures). Now, for the first time here, in his Response, Complainant asserts that in his DEP complaint “he advised of his wrongful termination in retaliation for his reporting of health, safety, and environmental concerns to management.” (Response 2). However, no evidence or facts in the record support this allegation,<sup>6</sup> nor can a non-moving party, such as Complainant here, rely upon “mere allegations or denials” in his pleadings to defeat summary judgment. *Anderson*, 477 U.S. at 256.

Rather, the undisputed record supports that the complaint to the DEP was an *environmental* complaint and not a *retaliation* complaint. On December 29, 2017, Francis Yebesi, OSHA’s then Acting Director, Directorate of Whistleblower Protection Programs, issued a letter addressed to Mr. Davant, Complainant’s counsel, following Mr. Davant’s request for review of the OSHA dismissal. (Exhibit C.4 to Response; Exhibit C to Motion). The letter states, “While your client did file an *environmental complaint* with the Pennsylvania DEP within the Section 11(c) filing period, there is insufficient evidence that he attempted to file a retaliation complaint at that time.” (Exhibit C.4 to Response; Exhibit C to Motion (emphasis added)). Also, further support that the complaint to DEP was *environmental* in nature is found in a memo from Lisa Farabee, HR, which memorializes the June 3, 2017 events involving Complainant. (Exhibit C.1 to Response). An affidavit from Lisa Farabee clarifies that she is Human Resources Manager at Gemms Oilfield Services. (Exhibit E to Motion). The memo states in relevant part that, “Mr. Bruce Gearhart for the Pa. Dept. of Environmental Protection was at GEMMS and he advised us he had nothing to report because there was no spill and/or no incident.” (Exhibit C.1

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<sup>6</sup> Significantly, the Complaint purportedly filed with the DEP is not of record, nor has it been identified or otherwise disclosed as an exhibit at any time in this proceeding by either party. The sole evidence of the DEP Complaint, other than Complainant’s unsupported assertion, is by reference from OSHA in its dismissal letter dated November 1, 2017 and letter dated December 29, 2017. (OSHA Findings; Exhibit C.4 to Response; Exhibit C to Motion).

to Response). It simply does not support even an inference that the DEP complaint was for retaliation. To the contrary, the evidence of record undisputedly indicates that Complainant did not file a retaliation complaint with DEP, such that the thirty day period to file a retaliation complaint with OSHA could be equitably tolled under the law.

Next, Complainant contends that OSHA was aware that he intended to file a retaliation claim, however this assertion too is not supported by any evidence in the record, nor does Complainant provide any further support for the assertion. *See Anderson*, 477 U.S. at 256 (The non-moving party, cannot rely upon “mere allegations or denials” of the non-moving party’s pleadings). More importantly, even if I were to accept this as true, and considering it in the light most favorable to Complainant, the law does not support equitable tolling when someone *intends* to file a complaint.

Lastly, Complainant asserted that he did not retain Mr. Davant as counsel in this matter until the 30 day time limitation to file a retaliation complaint with OSHA had elapsed and, because he was unrepresented at that time, he was unaware of the time limitation to file a claim. However, ignorance of the law is insufficient to invoke equitable tolling. *School Dist. of Allentown v. Marshall*, 657 F.2d at 20. Thus, Complainant cannot succeed in defeating summary judgment with this assertion.

It is undisputed that the adverse action was complainant’s termination from his position at Gemms Oilfield Services, on June 3, 2017, after reporting a spill on the same date. (Motion 6-8; Response 8). Complainant filed his 11(c) OSHA whistleblower complaint on August 17, 2017. (Response 7; Motion 1). Considering the facts in the light most favorable to Complainant, there is nothing in the record, nor evidence provided, to toll the applicable 30-day time limitation for the filing of the instant whistleblower complaint with OSHA. More specifically, in this case, there is no indication Respondent actively misled the complainant, nor is there evidence of Complainant being prevented from asserting his rights in some extraordinary way. Additionally, merely asserting ignorance of the law is insufficient to toll the time limitation. Likewise there is no evidence of record that Complainant raised this precise statutory claim in the wrong forum, whether DEP or another, by mistake. Finally, Complainant’s DEP complaint does not toll the time limitation because the evidence supports that it was an environmental complaint and not a retaliation claim. Accordingly, Complainant’s claim was untimely filed and Respondent is entitled to summary decision as a matter of law.

Finally, I do not address Respondent’s last argument that Complainant cannot demonstrate a causal connection between his protected activity and the adverse action or Complainant’s Response thereto, because I grant summary judgment on the issue of Complainant’s untimely filing of the instant Complaint. (*See*, Motion 6-11). As a result, any further argument related to the merits is moot.

## **VI. Conclusion**

In sum, there are no issues of material fact. I have jurisdiction over Complainant’s instant Complaint filed under section 11(c) with OSHA and related statutes. The evidence clearly establishes that Complainant’s Complaint was untimely filed under the OSH Act, as

well as CERCLA, FWPCA, SWDA, and SDWA. Additionally, the undisputed evidence further establishes that the thirty day period of time to file his retaliation Complaint under the OSH Act section 11(c), and/or the other relevant statutes was not equitably tolled. As a result, Respondent is entitled to summary decision as a matter of law.

### **ORDER**

Based on the foregoing, it is **ORDERED** that Respondent's Motion for Summary Decision is GRANTED. The hearing scheduled to begin on April 30, 2018 and continuing through May 4, 2018, is cancelled and all outstanding motions are DENIED as moot. The Complaint of David Lane is hereby DISMISSED.

NATALIE A. APPETTA  
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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. E-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

The date of the postmark, facsimile transmittal, or e-filing 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 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.

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 filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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.