

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 September 2017

CASE No.: 2017-FDA-00005

In the Matter of:

DON PORTIS,
Complainant,

v.

RUAN TRANSPORTATION,
Respondent,

and

ATLAS LOGISTICS WAREHOUSE,
Respondent,

and

THE KROGER CORPORATION,
Respondent.

DECISION AND ORDER GRANTING ALL RESPONDENTS' MOTION TO DISMISS COMPLAINT FOR NOT BEING TIMELY FILED AND FOR NOT TIMELY FILING AGAINST RESPONDENTS ATLAS AND KROGER

This matter arises from a complaint filed on October 23, 2016, under the employee protection provisions of the Food Safety and Modernization Act ("FSMA"), Section 402 of P.L. 111-353 (FSMA), and 21 U.S.C. § 399d (2011), which amended the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 et seq. (1938), and is governed by the implementing regulations found in the Code of Federal Regulations, Title 29, Part 1987.

By Motion filed August 29, 2017, and August 30, 2017, Respondents Ruan, Atlas Logistics, and Kroger filed their Motions To Dismiss pursuant to 29 C.F.R. § 18.70(c), to dismiss Donald Portis' October 23, 2016 Complaint. Respondents argued that Complainant's complaint was not timely filed pursuant to the regulations and was denied by OSHA for the same reason. Respondents Atlas and Kroger also argued that Complainant failed to file a claim against Atlas or Kroger as required by Food Safety and Modernization Act ("FSMA"), or the Occupational Safety and Health Act ("OSH Act").

By letter dated September 11, 2017 and received on September 13, 2017, Complainant filed his response. Complainant argued that he was entitled to complete discovery “to support circumstances that led to his wrongful termination.” He also argued that his complaint was timely filed.

Based on the case law and regulations discussed below, this court finds the complaint was not timely filed. It was also not filed against Atlas Logistics or Kroger, but only filed against Ruan. Therefore, the court cannot hear the complaint. The court grants Respondents’ Motion to Dismiss since Complainant did not file his complaint within the time deadlines set by law and is untimely filed, and since the complaint was not against Atlas Logistics and Kroger.

Procedural History Provided By Respondent Ruan and Supported By Procedural Exhibits

Pursuant to Respondent Ruan’s motion, on June 8, 2012, Complainant received a 2 day suspension for failure to follow accident-reporting procedures. On September 12, 2012, Complainant received a three-day suspension since it was his 3rd safety violation in 6 months, for failing to wear a safety vest while on the Respondent Ruan Yard . On November 17, 2012, Complainant received a written warning for failing to perform a proper post-trip inspection. Respondent stated that Complainant wrote a comment on the corrective action form that it viewed as inappropriate and that Complainant behaved aggressively toward a supervisor. As a result, Complainant received a disciplinary corrective action for gross insubordination, all of which resulted in November 21, 2012 termination of employment. During Complainant’s employment with Respondent Ruan, Respondent Ruan was signatory to a collective bargaining agreement with the Teamsters Local Union No. 171; which agreement specifically reserved to Respondent Ruan the right to establish and enforce Uniform Rules and Regulations ("Rules") for the employees covered by that Agreement. Those Rules provide that an employee who incurs three offenses which are subject to possible suspension within a nine-month period may be subject to discharge.

On November 30, 2012, Complainant filed a Complaint against Respondent Ruan with the Virginia Department of Labor and Industry ("VDOLI") alleging a violation of § 40.1-51.2: 1 of the Code of Virginia based on his termination. On or about October 7, 2013, VDOLI informed Complainant that their office was closing his file and of his right to file an action in the Circuit Court against his former employer pursuant to § 40.1-5 1.2:2(B) of the Code of Virginia. (Exhibit 2.)

On February 10, 2014, Complainant filed a first Complaint in the Circuit Court for the City of Salem, Virginia, naming Respondent Ruan, Atlas, and Kroger. On March 12, 2014, Complainant’s first Complaint was removed to federal court. (Exhibit 3.) On March 19, 2014, Respondent Ruan filed an Answer to the first Complaint. (Exhibit 4.) On August 25, 2014, Respondent Ruan filed a Motion to Compel Arbitration. (Exhibit 5.)

On August 28, 2014, Respondent Ruan filed a Motion for Summary Judgment. (Exhibit 6.) Prior to filing his response to Respondent Ruan' s Motion to Compel Arbitration and Motion for

Summary Judgment, Complainant voluntarily dismissed his Complaint on September 17, 2014. (Exhibit 7.) On December 10, 2014, Complainant filed a Motion to Reopen the case. (Exhibit 8.)

On February 10, 2015, the court denied Complainant's Motion to Reopen the case. (Exhibit 9.) On March 16, 2015, Complainant filed a second Complaint against Respondent Ruan. (Exhibit 10.) On April 27, 2015, Respondent Ruan filed a Motion to Dismiss, or in the alternative, a Motion to Compel Arbitration. (Exhibit 11.) On March 1, 2015, Respondent Ruan filed an Amended Motion to Dismiss, or in the alternative, a Motion to Compel Arbitration. (Exhibit 12.) After a hearing, the U.S. District Court granted Respondent Ruan's Motion to Compel Arbitration. (Exhibit 13.) On October 6, 2015, Complainant filed a grievance with the Teamsters Local Union No. 171, protesting his discharge. (Exhibit 14.) On July 14, 2016 and July 15, 2016, Arbitrator Norman R. Harlan ("Arbitrator") conducted an evidentiary hearing regarding Complainant's grievance. Complainant and the Local Union were represented by Justin P. Keating, Esq. of Beins and Axelrod, P.C. (Exhibit 15; including all of the trial exhibits.) On September 9, 2016, Complainant, the Union, and Respondent Ruan submitted their post- hearing briefs to the Arbitrator. (Exhibit 16.) On October 19, 2016, Arbitrator Harlan issued an Award in which he held, in relevant part, that Complainant was not retaliated against for bringing health/safety complaints, and upheld Complainant's dismissal by Respondent Ruan. (Exhibit 17.) On November 14, 2016, Complainant requested that the District Court vacate the Arbitrator's Award. (Exhibit 18.) On December 19, 2016, the U.S. District Court denied Complainant's request to vacate the Arbitrator's Award and affirmed the Award. (Exhibit 19.)

A review of the attached exhibits reflects that the procedural history provided by Respondent Ruan is accurate.

Procedural History Provided By Respondent Atlas Logistics and Supported By Exhibits

Pursuant to Respondent Atlas' motion, Complainant was "employed by Ruan Transport as a truck driver delivering Kroger goods loaded onto trucks by Atlas employees and shipped to Kroger Limited Partnership ("Kroger) store locations. On February 10, 2014, Complainant filed a first Complaint in the Circuit Court for the City of Salem, Virginia, against Ruan, Atlas, and Kroger. On March 12, 2014, Complainant's first Complaint was removed to Federal Court. (Exhibit 1). On March 19, 2014, Atlas filed a Motion to Dismiss pursuant to rule 12 (b) (1) of the Federal Rules of Civil Procedure; Complainant failed to exhaust his administrative remedies because he did not file a complaint against Atlas with the Commissioner of the Virginia Department of Labor and Industry alleging that he was discharged or otherwise discriminated against by Atlas. (Exhibit 2). On August 28, 2014, Atlas filed a Motion For Summary Judgment for the same reasons set forth in its Motion To Dismiss. (Exhibit 3). On September 4, 2014, a hearing on Atlas' Motion To Dismiss and Motion For Summary Judgment was set for October 7, 2014. Prior to filing his response to Atlas' Motion For Summary Judgment, Complainant voluntarily dismissed his complaint on September 17, 2014. (Exhibit 4). On December 10, 2014, Complainant filed a Motion To Reopen the case. (Exhibit 5). On February 10, 2015, the court denied Complainant's Motion To Reopen the case. (Exhibit 6)."

Respondent Atlas also stated that, "According to the Occupational Safety And Health Administration's ("OSHA") February 28, 2017 Determination letter, Complainant submitted a

complaint on October 23, 2016, identified only Ruan as the party responsible for violating the employee protection provisions of the Food Safety Modernization Act. Also according to that Determination letter, Complainant also sent a complaint to the Department Of Transportation, copying OSHA and asking for a review of the Virginia Department of Labor and Industry's ("VDOLI") actions with regards to Complainant's complaint concerning only Ruan. Neither of the recent complaints nor the previous complaint sent to VDOLI were filed against Atlas."

A review of the attached exhibits reflect that the procedural history provided by Respondent Atlas Logistics is accurate.

Procedural History Provided By Respondent Kroger and Supported By Exhibits

Pursuant to Respondent Kroger's motion, Complainant "was employed by Ruan Transport Corporation as a truck driver who delivered Kroger goods located on trucks by Atlas Logistics employees which are delivered to Kroger to stores. On February 10, 2014, Complainant filed a first Complaint in the Circuit Court for the City of Salem, Virginia, naming Respondent Ruan, Atlas, and Kroger. On March 12, 2014, Complainant's first Complaint was removed to federal court. (Exhibit 1) On March 19, 2014, Kroger filed a Motion to Dismiss pursuant to rule 12 (b) (1) of the Federal Rules of Civil Procedure stating that Complainant failed to exhaust his administrative remedies because he failed to file any complaint against Kroger with the Commissioner of the Virginia Department of Labor and Industry alleging that he was discharged or otherwise discriminated against by Kroger. (Exhibit 2). On August 28, 2014, Respondent Kroger filed a Motion for Summary Judgment. (Exhibit 3). On September 4, 2014, a hearing on Kroger's Motion To Dismiss and Motion For Summary Judgment were set for October 7, 2014. Prior to filing his response to Kroger's Motion For Summary Judgment, Complainant voluntarily dismissed his complaint on September 17, 2014. (Exhibit 4). On December 10, 2014, Complainant filed a motion to reopen the case. (Exhibit 5). On February 10, 2015, the court denied Complainant's Motion To Reopen the case. (Exhibit 6)."

Respondent Kroger also stated that, "According to the Occupational Safety And Health Administration's ("OSHA") February 28, 2017 Determination letter, Complainant submitted a complaint on October 23, 2016, identified only Ruan as the party responsible for violating the employee protection provisions of the Food Safety Modernization Act. Also according to that Determination letter, Complainant also sent a complaint to the Department Of Transportation, copying OSHA and asking for a review of the Virginia Department of Labor and Industry's ("VDOLI") actions with regards to Complainant's complaint concerning only Ruan. Neither of the recent complaints nor the previous complaint sent to VDOLI were filed against Kroger."

A review of the attached exhibits reflect that the procedural history provided by Respondent Kroger is accurate.

Respondent Ruan's Argument

Respondent Ruan argued that pursuant to OSHA, Complainant "filed a complaint on October 23, 2016 with the White House alleging that Respondent Ruan discriminated against him in violation of the Food Safety Modernization Act by terminating his employment on November

20, 2012. Pursuant to the Food Safety Modernization Act, a person who believes that he or she has been discharged because they made a complaint concerning food safety may, ‘**not later than 180 days after the date on which such violation occurs, file a complaint with the Secretary of Labor...**’ (Emphasis added), 21 USCS § 399d(b)(1). Mr. Portis' purported complaint under the Food Safety Modernization Act was filed approximately **four (4) years** after his termination. As a result, his October 23, 2016 complaint was untimely and should be dismissed.” (Bold emphasis in original)

Respondent also argued that, “In addition to mailing a complaint to the White House, Mr. Portis also submitted a letter to the Department of Transportation on September 19, 2016, which was copied to OSHA. Pursuant to Section 11(c)(2), Mr. Portis had the right to file a complaint with the Secretary of Labor within thirty (30) days of his termination. 29 C.F.R. § 1977.15(d)(1). Mr. Portis' Complaint to the Federal OSHA Office was filed approximately **four (4) years** after his termination. As a result, his September 19, 2016 Complaint to OSHA is untimely and should be dismissed. See Id. § 1977.15(d)(2)(‘complaints not filed within 30 days of an alleged violation will ordinarily be presumed to be untimely.’).” (Bold emphasis in original)

Respondent argued that Complainant’s complaint with the Virginia Department of Labor and Industry does not allow him to extend the time mandatory deadlines for filing his federal complaint. Respondent argued, “While Mr. Portis previously filed a timely complaint with the Virginia Department of Labor and Industry against Respondent Ruan Transport only, such filing does not toll his obligation to file a complaint with the federal OSHA within thirty (30) days of his termination. As stipulated by the Code of Federal Regulations, "filing with another agency, among others, are circumstances which do not justify tolling the 30-day period." Id. § 1977.15(d)(3). Mr. Portis was notified on December 5, 2012 that he needed to file a complaint with OSHA in addition to filing a complaint with Virginia Department of Labor. (December 5, 2012 Letter, Exhibit 20.) Mr. Portis failed to heed that instruction and file a complaint with the Federal OSHA until **more than four years after** his termination, despite having notice that he must do so to preserve any cause of action under federal law.” (Bold emphasis in original)

Respondent further argued that, “Even if Mr. Portis had filed a timely action with OSHA, he nevertheless did not file a timely request for federal review of the Virginia agency's decision dismissing his claims before that Agency. According to OSHA's Whistleblower Investigations Manual, ‘[i]f a Complainant requests federal review of a dually-filed complaint under Section 11(c)... after receiving a state determination, it will be evaluated to determine whether it has been properly dually-filed.’ In order to be deemed properly dually-filed, it is necessary that: (1) ‘Complainant filed the complaint with federal OSHA in a timely manner (i.e., within 30 days...’; and (2) ‘Complainant makes a request for federal review of the complaint to the Regional Office, in writing, that is postmarked within 15 calendar days of receiving the state's determination letter.’ Whistleblower Investigations Manual, Exhibit 21: On October 7, 2013, VDOLI sent a letter to Mr. Portis closing the state case. (Exhibit 22). Mr. Portis sent his letter to federal OSHA on September 19, 2016, almost three (3) years later, and well after the 15 calendar days specified. Mr. Portis' letter to federal OSHA is untimely. Accordingly, his September 19, 2016 attempted filing should be dismissed.”

Respondent Ruan moved Complainant's claim was not timely filed as required by the regulations. Respondent Ruan moved that its Motion to Dismiss be granted and Complainant's complaint be dismissed.

Respondent Atlas' Argument

Respondent Atlas argued that inasmuch as Complainant never filed a complaint against Atlas, and only filed a complaint against Ruan, Complainant failed to submit a complaint against Atlas as required by the FSMA or OSH Act, and his complaints against Atlas should be dismissed. Respondent Atlas also argued that Complainant filed his complaint on October 23, 2016 with the White House. Respondent Atlas argued this was 4 years after his November 20, 2012 termination. Respondent Atlas stated that pursuant to the Act, an individual must file a complaint within 180 days of the alleged violation with the Secretary of Labor. Respondent Atlas argued the complaint was untimely and should be dismissed. Respondent Atlas also argued that pursuant to 29 C. F. R. § 1977.15 (d) (3), complainant's filing with the Virginia Department of Labor and Industry does not toll his obligation to timely file his complaint within 30 days of termination. Complainant was notified December 5, 2012 of the filing deadlines (Exhibit 7) but did not follow those instructions. Instead, he filed his OSHA complaint 4 years after his termination. Respondent Atlas argued that the September 19, 2016 Complaint was untimely filed and should be dismissed. Respondent Atlas argued that even had Complainant timely filed with OSHA, he did not timely file a request for federal review of the Virginia Department of Labor and Industry within 15 days of receiving the State's determination letter. (Exhibit 8). Respondent Atlas argued that the Virginia Department of Labor and Industry sent Complainant a letter on October 7, 2013 closing the state case. (Exhibit 9). Respondent Atlas argued Complainant sent his OSHA letter on September 19, 2016, not within the required 15 days but almost 3 years later. Respondent Atlas argued that the attempted September 19, 2016 OSHA filing should be dismissed as untimely.

Respondent Kroger's Argument

Respondent Kroger argued that inasmuch as Complainant never filed a complaint against Kroger, and only filed a complaint against Ruan, Complainant failed to submit a complaint against Kroger as required by the FSMA or OSH Act, and his complaints against Kroger should be dismissed. Respondent Kroger also argued that neither Complainant's recent complaint nor his previous complaint sent to VDOLI were filed against Kroger. The complaints were only filed against Ruan. Respondent Kroger also argued that Complainant filed his complaint on October 23, 2016 with the White House. Respondent Kroger argued this was 4 years after his November 20, 2012 termination. Respondent Kroger also stated that pursuant to the Act, 21 U.S.C.S. § 399 d (b) (1), an individual must file a complaint within 180 days of the alleged violation with the Secretary of Labor. Respondent Kroger argued the complaint was untimely and should be dismissed. Respondent Kroger also argued that Complainant filed his complaint on September 19, 2016 to the Department of Transportation and copy to OSHA. Respondent Kroger argued that pursuant to 29 C. F. R. § 1977.15 (d) (1) and (2), Complainant must file his complaint with the Secretary of Labor within 30 days of termination. Respondent Kroger argued that the September 19, 2016 complaint to OSHA was filed 4 years after his termination, was untimely, and should be dismissed. Respondent Kroger also argued that pursuant to 29 C. F. R. § 1977.15

(d) (3), Complainant's filing with the Virginia Department of Labor and Industry does not toll his obligation to timely file his complaint within 30 days of termination. Complainant was notified December 5, 2012 of the filing deadlines (Exhibit 7) but did not follow those instructions. Instead, he filed his OSHA complaint 4 years after his termination. Respondent Kroger argued that the September 19, 2016 complaint was untimely filed and should be dismissed. Respondent Kroger argued that even had Complainant timely filed with OSHA, he did not timely file a request for federal review of the Virginia Department of Labor and Industry within 15 days of receiving the State's determination letter. (Exhibit 8). Respondent Kroger argued that the Virginia Department of Labor and Industry sent Complainant a letter on October 7, 2013 closing the state case. (Exhibit 9). Respondent Kroger argued Complainant sent his OSHA letter on September 19, 2016, not within the required 15 days but almost 3 years later. Respondent Kroger argued that the attempted September 19, 2016 OSHA filing should be dismissed as untimely.

Complainant's Response And Argument

Complainant responded that he was entitled to subpoenas and to complete discovery to determine "events that led to his termination, as well as the facts of this case, and the opportunity to bring forth the circumstances." Complainant stated that his former attorney stated at the initial investigation, "we are 100% going to court." Complainant also stated that "I turned down a \$25,000 settlement offer a second time" and his case was "dismissed." Complainant referenced a safety meeting November 2, 2012 and comments made to Respondent Ruan's safety leader. Complainant argued the facts of his case, citing to accountability, safety, society, and that "integrity has been compromised everywhere in our society, especially in our government." Complainant addressed the timeliness issues stating that "his final complaint began when I called Greg Tait with OSHA and Philadelphia." Complainant submitted exhibits to support his complaint against Respondents Ruan, Atlas, and Kroger.

Complainant also submitted written questions in his Response to the Motions to Dismiss, stating he "requests the CEOs of Ruan, Atlas and Kroger to answer the plaintiff's questions 1 through 14."

Findings Of Fact And Conclusions Of Law

This court begins its analysis with the argument of Respondents Ruan, Atlas Logistics, and Kroger that Complainant did not timely file his complaint with the United States Department of Labor, and Respondent Atlas' and Kroger's argument that Complainant never filed a complaint against Atlas or Kroger, and that his complaints were untimely.

Complainant filed his complaint pursuant to the employee protection provisions of the FSMA, which allows a party who reported his reasonable belief of an act or omission which would constitute a violation of the FDCA and:

[W]ho believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 180 days after the date on which such violation occurs, file (or have any person file on his

or her behalf) a complaint with the Secretary of Labor (referred to in this section as the "Secretary") alleging such discharge or discrimination and identifying the person responsible for such act. Upon receipt of such a complaint, the Secretary shall notify, in writing, the person named in the complaint of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

21 U.S.C. § 399d(b).

For matters arising out of FDA Food Safety and Modernization Act , and pending before the United States Department of Labor, proceedings before the Office of Administrative Law Judges are guided by the Administrative Procedure Act, 5 U.S.C. 554, et. seq., and federal regulations at 29 C.F.R. Part 18A.

Complainant was terminated from employment with Respondent Ruan on November 20, 2012. Four years later, on September 19, 2016, Complainant filed his complaint with OSHA and on October 23, 2016 with the White House. These dates and filings are undisputed per the OSHA and court documents, and exhibits attached to Respondents' motion.

Pursuant to Section 11(c)(2), Complainant had the right to file a complaint with the Secretary of Labor within thirty (30) days of his termination. 29 C.F.R. § 1977.15(d)(1). Pursuant to 29 C.F.R § 1977.15(d)(2) complaints must be filed within 30 days of the alleged violation or such "alleged violation will ordinarily be presumed to be untimely." Pursuant to the Food Safety Modernization Act, 21 U.S.C.S § 399d (b) (1), a party must file his complaint with the Secretary of Labor not later than 180 days after the date on which such violation occurs.

The law is clear with its time deadlines. Complainant had 30 days to file his complaint under the FDA Food Safety Modernization Act but filed his complaint 4 years later. The facts are undisputed as to when the termination occurred and when Complainant filed his complaint. There is no genuine issue of material fact regarding the date of termination, the date the complaint was filed with OSHA, or that the complaint was filed against Respondent Ruan.

Pursuant Rules Of Practice And Procedure For Administrative Hearings Before The Office Of Administrative Law Judges, 29 C.F.R. § 18.70 (c), Motions for Dispositive Action, section (c) Motion to Dismiss, "a party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness. If the opposing party fails to respond, the judge may consider the motion unopposed."

On February 28, 2017, Occupational Safety and Health Administration, United States Department of Labor, Assistant Regional Administrator for the Whistleblower Protection Program, issued the Secretary's Findings. The February 28, 2017 decision was sent to Complainant. It stated that "we have reviewed the information provided by you in the above-referenced complaint filed against Ruan Transportation (Respondent) on October 23, 2016 through correspondence to the White House... In brief, you alleged you were not satisfied with the actions of several government agencies regarding your complaints and termination in 2012.

You also alleged in a letter dated September 19, 2016 to the Inspector General of the United States Department of Transportation, and copied to the Occupational Safety and Health Administration, that you were concerned about food safety in the trucks in 2012.”

The Assistant Regional Administrator stated that it was found that on October 23, 2016, he filed his complaint with the White House. The Assistant Regional Administrator found that the Virginia Department of Labor and Industry investigated, Complainant had 15 days from the receipt of the State’s determination, to file a federal review of a retaliation claim with OSHA. The Assistant Regional Administrator stated that, “As Complainant did not request a review as specified, a federal request for review will not be considered. Consequently, this complaint is dismissed.”

Based on a review of the OSHA and court records, the Regulations, Act, and the arguments, Complainant did not timely file his complaint. Complainant was terminated on November 20, 2012 and filed his complaint with OSHA 4 years later on September 19, 2016 and his complaint with the White House also 4 years later on October 23, 2016. Complainant’s complaint was not timely filed within the proper time deadlines after termination. Based on the time line and notifications to the Complainant, the time for filing is not tolled. Due to its “untimeliness,” this matter cannot be heard by the U. S. Department of Labor, Office of Administrative Law Judges.

Conclusion

Based on a review of the OSHA and court records, the Regulations, and the Act, Complainant did not timely file his complaint.

Based on a review of the OSHA and court records, the Regulations, and the Act, Complainant did not properly file his complaint against Atlas Logistics or Kroger. He only filed his complaint against Respondent Ruan. Therefore, there is no timely complaint pending before the United States Department of Labor against Atlas Logistics Warehouse or Kroger Corporation under the FSMA or OSH Act.

The court has no authority to address the merits or weigh the credibility of Complainant’s complaint. Accordingly, the court cannot hear the Complainant’s claim, grants Respondents’ Motion To Dismiss, and dismisses Complainant’s Complaint.

Since this matter is dismissed for not being timely filed, Complainant’s request to have the Respondents answer his written questions, is denied.

ORDER

It is hereby **ORDERED** that:

1. The Motions To Dismiss the Complainant’s complaint as not being timely filed, as submitted by Respondents Ruan, Atlas, and Kroger, are **GRANTED**.

2. The Motions To Dismiss the Complainant's complaint against Atlas Logistics Warehouse and Kroger Corporation as not being filed against those entities, are **GRANTED**.
3. Complainant's complaint is **DISMISSED**.

SO ORDERED.

DANA ROSEN
Administrative Law Judge

DR/CAN/ksw
Newport News, VA

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's 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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1987.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1987.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1987.110(a).

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 no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1987.109(e) and 1987.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1987.110(b).