

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 September 2007

Case No. 2007-WPC-1

In the Matter of:
JEFFREY A. CLYNE,
Complainant,

v.

TRIPLE P. SEPTIC/
WALTER L. PEECHER, et al.,
Respondents,

BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

RECOMMENDED ORDER OF DISMISSAL

This proceeding arises under the Section 507 of the Federal Water Pollution Control Act, (WPC), 33 U.S.C. § 1367; 29 C.F.R. Part 24.

On September 13, 2006, Complainant filed a request for a hearing with this Office in the above-captioned matter. Complainant contended that Respondent terminated him in reprisal after making complaints to management regarding inappropriate disposal of waste and safety of the vehicles used.

A conference call was scheduled for April 2, 2007 at 10:30 a.m. As a result of this conference call, a hearing in this matter was scheduled in Columbus, Ohio at 9:00 a.m. on October 23, 2007. On August 22, 2007, Respondent submitted a motion before this court to dismiss, or in the alternative, compel Complainant's appearance at deposition. Respondent alleged that Complainant failed to attend a deposition scheduled for Thursday, August 9, 2007. Specifically, the attached affidavit to Respondent's motion showed that it received a phone call from Mr. Clyne on August 3, 2007 in which he pointed out the notice of deposition stated "Tuesday, August 9" when in fact August 9 fell on a Thursday. Counsel for Respondent informed him it should have stated "Thursday, August 9" instead of "Tuesday." At that time, Mr. Clyne informed counsel that he would not be attending a deposition, regardless of whether it was Tuesday or Thursday. The day before the scheduled deposition, Mr. Clyne again called Mr. Dawicke, Employer's associate attorney, and stated he could not alter his schedule to attend. However, Mr. Dawicke's affidavit stated that when presented with the option of rescheduling the deposition – Mr. Clyne "declined" to entertain such an option. Respondent went forward with the scheduled deposition, which Complainant did not attend.

Employer has requested that I dismiss this case for failure to prosecute under Fed. R. Civ. P. 41(B)(1) and 37(B)(2)(c), or in the alternative, issue an order for Complainant to appear at a

deposition 10:00 a.m. Monday, August 27, 2007. On June 6, 2007, this Office issued an Order requiring the Complainant to show cause as to why he should not have to attend such a deposition, and stating should Complainant fail to timely respond in writing to this order by August 28, 2007, a judgment on Respondent's motion to dismiss would be forthcoming. To date, Complainant has failed to either respond to or to comply with this Order.

Title 29 C.F.R. § 18.6(d)(2)(v) provides where a party fails to comply with any order of the administrative law judge, the judge may:

[r]ule that a pleading, or a part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

Accordingly, after reviewing the record and considering Complainant's failure to participate further in this matter, I hereby **ORDER** that the Complainant's request for a hearing in this matter is **DISMISSED** and **JUDGEMENT BY DEFAULT** is entered against him.

SO ORDERED.

A

THOMAS F. PHALEN, JR.
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, Room S-4309, 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).