



Issue Date: 14 April 2010

CASE NO. 2009-TSC-00002

In the Matter of:

RITA SMITH,

Complainant,

vs.

SEARLES VALLEY MINERALS,

Respondent.

**DECISION AND ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DECISION AND DISMISSING COMPLAINT**

This case arises under the employee protection, or “whistleblower,” provisions of the Toxic Substances Control Act of 1986 (“TSCA,” or “the Act”), 15 U.S.C. § 2622, *et. seq.* The Act protects employees who are discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking action to fulfill the safety and health requirements of the Act.

On April 15, 2009, Complainant Rita Smith filed a complaint with the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA), which OSHA interpreted as asserting a whistleblower claim under the TSCA. According to OSHA, Complainant alleged that Searles Valley Minerals (“Respondent”) violated the TSCA by denying her workers’ compensation claim after she filed complaints under the Act. OSHA dismissed the complaint as untimely on May 15, 2009 (OSHA Findings). By letter dated June 12, 2009, Complainant appealed the OSHA determination and requested a *de novo* hearing before an administrative law judge (Hrng. Req.). This case was assigned to me on June 17, 2009.

On June 18, 2009, I issued a Notice of Docketing and Assignment and Order Setting Forth Discovery and Briefing Schedule as to Threshold Issue. It established a discovery and motion schedule, which was subsequently amended, on two threshold issues. The first is whether Complainant filed a timely complaint with OSHA. *See* 15 U.S.C. § 2622(b)(1); 29 C.F.R. § 24.103(d)(1). The second is whether Complainant has alleged a violation of the Act’s employee protection provisions. *See* 15 U.S.C. § 2622(a); 29 C.F.R. §§ 24.102(a)-(b), 24.106(a).

On December 24, 2009, Respondent timely filed a Motion for Summary Judgment and Dismissal of Complaint (Resp. Motion), accompanied by a Memorandum of Points and Authorities (Resp. P&A). It was accompanied by the declaration of Respondent's counsel, René Tatro, and ten exhibits (Resp. Motion, Ex. A-J). Complainant filed a timely response on February 2, 2010 (Comp. Resp.). It was accompanied by a box of unindexed exhibits. Respondent filed a timely reply to Complainant's response on February 5, 2010 (Resp. Reply).

SUMMARY OF DECISION AND ORDER

Respondent is entitled to summary decision in its favor. There is no evidence in the record of Complainant having suffered, as the Act requires, an adverse employment action in the 30 days preceding the complaint filed in 2009 or one Complainant apparently filed in 2008. Additionally, I find that Complainant has not provided evidence showing that Respondent perpetrated an adverse employment action against her, a required element of Complainant's whistleblower claim. Therefore, Complainant's complaint is dismissed.

BACKGROUND

According to Respondent, it operates a mining facility in Trona, California, which removes brine from beneath the salt-encrusted surface of a dry lake in the Mojave Desert, recovering soda ash, sodium sulfate and boron products. Resp. Motion, p. 3. Complainant worked intermittently for Respondent beginning in 1990 until May 20, 1994. Resp. Motion, Ex. G at 41.

Respondent explains that Complainant first filed a state workers' compensation claim alleging an injury related to job-related chemical exposure on February 27, 2004. Resp. P&A p.4; Ex. A. She filed another in 2006. Resp. P&A, p. 4; Ex. B. In May 2004 and December 2006 respectively, Respondent's carrier denied the claims as untimely. Resp. P&A, Exs. A, B. Along with the 2006 claim, Complainant filed a claim alleging that Respondent had engaged in serious and willful misconduct in violation of the California Labor Code by not providing Complainant proper training and breathing equipment, and by requiring Complainant to work in extreme temperatures with over 400 undisclosed banned substances. Resp. P&A, Ex. C, pp. 1-2. In a deposition, Complainant stated that she understood that her "serious and willful misconduct petition" was denied by Respondent's carrier by the same letter that denied her 2006 workers' compensation claim. Resp. P&A, Ex G, pp. 53-54.

On July 15, 2008, Complainant sent a complaint to several California Division of Occupational Safety and Health ("Cal/OSHA") offices and the federal OSHA office in San Francisco. It alleges that Complainant was exposed to harmful chemicals at Respondent's facility. OSHA evidently requested additional information, and on April 13, 2009, Complainant's counsel forwarded to OSHA the 2008 complaint with attachments. Although such an assertion is nowhere to be found in the April 13, 2009 submission, OSHA construed it as alleging that Respondent had retaliated against Complainant by denying her workers' compensation claims. *See* OSHA Findings, p. 1. OSHA investigated this allegation, and then, on May 15, 2009, dismissed the complaint as untimely. *Id.*

Respondent's motion argues that it is entitled to summary decision in its favor for two reasons: First, Complainant's complaint is untimely because Respondent did not engage in an adverse employment action in the 30 days prior to the submission of Complainant's complaint to OSHA. Resp. Motion, p. 1. Second, Complainant does not state a cognizable whistleblower complaint under the Act, but rather asserts that Respondent has committed health and safety violations. Resp. Motion, p. 2.

Complainant's response does not address the arguments offered in Respondent's Motion and Memorandum of Points and Authorities. Rather, it appears to argue that Respondent should be held liable for health and safety violations. It concludes, "I deserve justice for these ROV's [records of violations] and the health effects of them." Comp. Resp., p. 2.

Respondent's reply argues that Claimant's response did not respond to, much less oppose or rebut [Respondent's] motion." Resp. Reply. p. 1.

ANALYSIS

The employee protection provisions of the Toxic Substances Control Act prohibit an employer from taking adverse employment action against an employee because the employee has engaged in protected activity. *See, e.g., Hand v. Clark Cty. School Dist.*, ALJ No. 2004-TSC-00003, Slip op. at 12 (ALJ Aug 12, 2004); *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146 at 15, 1988-SDW-00002 (ARB Feb. 28, 2003). Adverse employment actions are discharge or discrimination with respect to compensation, terms, conditions, or privileges of employment. 15 U.S.C. § 2622(a). Protected activities include initiating, preparing to initiate, or participating in the initiation of a proceeding to enforce the statute, or testifying or participating in such a proceeding. 15 U.S.C. § 2622(a)(1-3).

To prevail on a complaint of unlawful discrimination under these environmental retaliation statutes, a complainant first must establish a *prima facie* case, thus raising an inference of unlawful discrimination. *Jenkins*, Slip op. at 16. A complainant meets this burden by showing: (1) that the employer is subject to the applicable retaliation statutes, (2) that the complainant engaged in protected activity, as defined by the statutes, of which the employer was aware, (3) that he suffered an adverse employment action, and (4) that a nexus existed between the protected activity and the adverse action. *Id.* Once the complainant establishes a *prima facie* case, then the respondent has the burden of producing evidence that the adverse action was motivated by legitimate, non-discriminatory reasons. *Id.* If the respondent is successful, the complainant, as the party bearing the ultimate burden of persuasion, must then show that the proffered reason was but a pretext for retaliation. *Id.*

The Office of Administrative Law Judges (OALJ) has jurisdiction over complaints alleging that employees have suffered termination or retaliation for engaging in activities protected by the Act. *See* 29 C.F.R. § 24.106. OALJ does not have jurisdiction to adjudicate claims that an employer has engaged in practices that create an unsafe or unhealthy workplace. The issue before me is whether Complainant's complaint to OSHA was timely and whether it asserts a violation of the TSCA's whistleblower provision.

I. STANDARD FOR SUMMARY DECISION

Summary decision may be granted for any party if the pleadings, affidavits, materials obtained by discovery or otherwise, or matters officially noticed, show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. 29 C.F.R. § 18.40(d); Fed. R. Civ. P. 56(c). A judge "does not weigh the evidence or determine the truth of the matters asserted, but only determines whether there is a genuine issue for trial" by viewing the record "in the light most favorable to the non-moving party." *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, Dec. & Ord. of Remand, slip. op. at 6 (ARB Nov. 30, 1999) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1985)).

The moving party bears the initial burden of showing that there is no genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). By moving for summary decision, a party asserts that based on the present record and without the need for further exploration of the facts and conceding all unfavorable inferences in favor of the non-moving party, there is no genuine issue of material fact to be decided and the moving party is entitled to a decision as a matter of law. Fed. R. Civ. P. 56, 29 C.F.R. § 18.40(d). When a motion is properly supported, the nonmoving party must go beyond the pleadings to overcome the motion. He may not merely rest upon allegations, but must set out specific facts showing a genuine issue for trial. *Anderson*, 477 U.S. at 248.

Thus, Respondent, as the moving party, bears the burden of demonstrating (1) that there is no genuine issue of material fact regarding the timeliness and nature of Complainant's complaint and (2) that, as a matter of law, the complaint was not timely and does not allege a violation of the TSCA's whistleblower protection.

II. TIMELINESS OF THE COMPLAINT

A TSCA whistleblower complaint must be filed with OSHA "within 30 days" after the alleged violation. 15 U.S.C. § 2622(b)(1). The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. 29 C.F.R. § 24.103(d). The date of violation is the date that an employer communicates its decision to implement an adverse employment action, rather than the date the consequences are felt. See *Cante v. New York City Bd. Of Education*, ARB No. 08-012, ALJ No. 2007-CAA-004, Slip op. at 7-8, 10 (ARB July 31, 2009); *Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, Slip op. at 6 (ARB Jan. 30, 2004); *Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-002, Slip op. at 14 (ARB Feb. 28, 2003). Nothing in the record indicates that Respondent violated the TSCA whistleblower provision in the thirty days before Complainant's complaint was filed with OSHA. Thus, Complainant's complaint was not timely filed.

Complainant's complaint was dated April 13, 2009. Complaint, p. 1. Therefore, the violation complained of must have occurred within the 30 days prior to April 13, 2009, or no earlier than March 14, 2009. Complainant's complaint does not allege an adverse action, before or after March 14, 2009. In addition, the record is devoid of evidence that Respondent took any action regarding Complainant in the period between March 14, 2009 and April 13, 2009.

If one construes the July 15, 2008 filing with OSHA as the complaint at issue here, there is no evidence in the record indicating that Respondent violated the TSCA in the 30 days before July 15, 2008. Additionally, nowhere in the July 15, 2008 filing do I find an allegation that Respondent violated the TSCA's whistleblower protection in the previous thirty days.

If one construes the complaint as alleging retaliation in the form of denied workers' compensation claims as OSHA did, the complaint is still not timely. Respondent denied Complainant's workers' compensation claims in May 2004 and December 2006, well more than 30 days before both March 14, 2009 and July 15, 2008.

Accordingly, I find that Respondent has demonstrated that there is no genuine issue of material fact regarding the timeliness of Complainant's complaint and that, as a matter of law, Complainant's complaint was not timely.

III. ADVERSE EMPLOYMENT ACTION

Complainant cannot set forth a *prima facie* case of discrimination under the Act because she has not provided evidence that she suffered an adverse employment action perpetrated by Respondent.

Complainant's April 13, 2009 submission to OSHA, which OSHA construed as a whistleblower complaint, does not allege that Complainant suffered an adverse employment action. The April 13, 2009 letter is entitled "Re: Notice of Alleged Safety or Health Hazard." Complaint, p.1. Although OSHA investigated whether Respondent retaliated against Complainant by denying her workers' compensation claims, I find nothing in the April 13, 2009 submission or the documents that accompanied it which makes such an allegation.

Complainant's June 13, 2009 request for a hearing before an ALJ states "We are receiving retaliation for finding the Fraudulent & Concealment [sic] . . ." It does not, however, state what form that retaliation took, when it occurred, or who committed the alleged retaliatory act. Additionally, there is no evidence, beyond the assertion in the hearing request, that any such retaliation took place.

Complainant's February 2, 2010 reply to Respondent's motion for summary decision does not assert that she suffered an adverse employment action. Rather, it argues that Complainant has been poisoned by Respondent and seeks redress for Respondent's alleged health and safety violations. Comp. Resp., pp. 1-2. In addition, I find nothing in the box of documents that accompanied Complainant's response which contains an allegation of an adverse employment action, or evidence of such an action. The vast majority of the documents is related to Complainant's and her husband's medical conditions, and Respondent's environmental and workplace safety compliance.

Complainant herself seems to recognize that she has not alleged that she has suffered an adverse employment action. In her deposition, Complainant testified that "I wasn't covered under any provisions in the Whistleblower's Act [sic]." Resp. P&A, p. 79. She testified further that her intent in filing a complaint with OSHA was that OSHA should investigate Respondent's facility and conduct biomonitoring of its employees. *Id.* at 68-69, 72.

I find that Respondent has demonstrated that there is no genuine issue of material fact regarding the allegations and evidence in the record and that, as a matter of law, Complainant has not suffered an adverse employment action.

CONCLUSION

Complainant's complaint was not timely filed. Additionally, the record does not contain evidence that Complainant suffered an adverse employment action, a required element of discrimination under the TSCA's whistleblower protection. Accordingly, Respondent's motion for summary decision is **GRANTED** and Complainant's complaint is hereby **DISMISSED**.

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ANNE BEYTIN TORKINGTON
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.

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. Department 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).