

**U.S. Department of Labor**

Office of Administrative Law Judges  
36 E. 7th St., Suite 2525  
Cincinnati, Ohio 45202

(513) 684-3252  
(513) 684-6108 (FAX)



**Issue Date: 05 September 2006**

Case Nos. 2006-STA-31  
2006-STA-32

In the Matter of

HARRY SMITH,

Complainant,

v.

and

CRST INTERNATIONAL, INC.,

AND

LAKE CITY ENTERPRISES, INC.,

Respondents.

**RECOMMENDED ORDER OF DISMISSAL**

This proceeding arises under the employee protection provisions of the Surface Transportation & Assistance Act ("the Act") 49 U.S.C. § 31105. The Act prohibits covered employers from discharging or otherwise discriminating against an employee in retaliation for the employee's engagement in certain protected activities. The implementing regulations are set forth at 29 C.F.R. Part 1978.

**BACKGROUND**

On or about November 16, 2005, Complainant, by Counsel, filed with the Secretary of Labor alleging he was an employee of Lake City Enterprises, Inc., from September, 2005 to November 9, 2005 and "his work for . . . Lake City Enterprises, Inc., was through an assignment or other arrangement with . . . CRST International, Inc." Complainant states he was terminated from his employment for "reporting information and objecting to unsafe equipment and driving conditions, refusing to drive

unsafe equipment, and reporting to management that he intended to report unsafe equipment to the Department of Transportation."

Occupational Safety and Health Administration ("OSHA") initiated an investigation against Lake City Enterprises, Inc., and CRST International, Inc., case number 5-8120-06-003 and case number 4-0350-06-008, respectively. By letter dated March 21, 2006, an OSHA Deputy Regional Administrator concluded that it was not reasonable to believe that CRST International, Inc., violated 49 U.S.C. Section 31105; and by letter dated May 12, 2006, an OSHA Deputy Regional Administrator concluded that it was not reasonable to believe that Lake City Enterprises, Inc., violated 49 U.S.C. Section 31105. The file contains a return receipt from the post office reflecting that on March 25, 2006 the Complainant received the decision of the Deputy Regional Administrator regarding CRST International, Inc. Although counsel for Complainant states that he had communication with both offices that were investigating the cases involving Lake City Enterprises, Inc., and CRST International, Inc., he was not aware of the decision regarding CRST International, Inc., until May 22, 2006. On May 24, 2006, Complainant, by counsel, filed his objections and request for a hearing in the cases discussed.

On June 13, 2006, Counsel by motion for CRST International Inc., moved that Complainant's request for a hearing be dismissed because his request was untimely.

By order issued on August 2, 2006 Complainant was ordered to show cause why the case regarding CRST International, Inc., Case No. 2006-STA-31 (4-0350-06-008), should not be dismissed as untimely.

By brief filed by Complainant's attorney received on August 9, 2006, he objects to any dismissal. The brief included two declarations by Complainant and his attorney, respectively, dated August 7, 2006.

#### FACTS

Although Complainant does not recall signing for the March 21, 2006 OSHA letter, he admits that the signature looks like his signature. Complainant's attorney in his statement of facts in his brief relates that Complainant recognizes the signature on the certified mail card dated March 25, 2006 as his signature. Complainant states that he does not remember seeing the OSHA letter until he received a copy of the letter which his attorney sent him after May 22, 2006. Complainant's attorney in

his declaration affirms the substance of the information contained in the Order to Show Cause issued on August 2, 2006 and discussed above.

In his brief, Complainant's attorney requests the following relief:

1. Determination that the 30 days to file objections and a request for a hearing under 29 C.F.R. § 1978.105(a) runs from the date of service on a party's representative of record.
2. Waiver of the time and an order extending the time to file objections and a request for hearing to June 21, 2006 (sic), pursuant to 29 C.F.R. § 1918.115.
3. Cancellation of the Order to Show Cause dated August 2, 2006.

#### DISCUSSION

As explained to Complainant in the Regional Administrator's March 21, 2006 letter, the Act provides for thirty days in which to file objections to the findings of the Regional Administrator. 49 U.S.C. § 31105(b)(2)(B). The Act's implementing regulations further provide:

Within thirty days of receipt of the findings or preliminary order the named person or the complainant, or both, may file objections . . . and request a hearing on the record.

. . . .

If no timely objection is filed with respect to either the findings or the preliminary order, such findings or the preliminary order, as the case may be, shall become final and not subject to review.

29 C.F.R § 1978.105.

Therefore, timely service was made upon Complainant in accordance with the Regulation and he failed to respond within the statutory time period.

The remaining issue is whether the thirty day time limitation to file objections by Complainant and to request a hearing should be equitably tolled. Complainant argues that the time limitation should be excused because his attorney of record was not notified until May 22, 2006.

While not exclusive, the thirty day time period governing Complainant's responses from the Secretary's findings issued by a Regional Administrator may be tolled where: (1) a complainant has received inadequate notice; (2) a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted on; (3) the court has led the complainant to believe that he has done everything required; (4) affirmative misconduct on the part of a respondent lulled the complainant into inaction; or (5) a complainant actively has pursued his judicial remedies by filing a defective pleading during the statutory period. See *Spearman v. Roadway Express, Inc.*, 92-STA-1 (Sec'y Aug. 5, 1992), citing *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (per curiam); *Irwin v. Veterans Administration*, 498 U.S. 89, 112 L.Ed.2d 435, at 444 and n.3 (1990).

In this case, Complainant was properly notified and served. There are no credible facts to support a finding that Complainant was prevented from filing his written objections or requesting a formal hearing within thirty days of receiving notice of the Regional Administrator's findings. Accordingly, Complainant has not provided an adequate basis for finding either his filing was timely or that the statutory limitations should be tolled.

#### ORDER

Therefore, it is ordered that the aforementioned claim, 2006-STA-31, is hereby recommended to be dismissed as untimely and the hearing in this particular matter is cancelled.

IT IS FURTHER ORDERED that the hearing scheduled for Case No. 2006-STA-32, In the Matter of Harry Smith v. Lake City Enterprises, will commence at 9:00 a.m. on October 24, 2006 at the Canton Municipal Court, Courtroom 4, 218 Cleveland Avenue, S.W., Canton, Ohio.

**A**

LARRY S. MERCK  
Administrative Law Judge

**NOTICE OF REVIEW:** The administrative law judge's Recommended Order of Dismissal, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Order of Dismissal, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 20 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.