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Issue Date: 10 September 2004

In the Matter of:
Henry W.M. Immanuel
Complainant

Case Number: 2003-CAA-00018

v.

C&D Concrete
Respondent

RECOMMENDED DECISION AND ORDER
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case comes pursuant to Section 322(a)(1-3) of the Clean Air Act (42 USC §7622), Section 110(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 USC §9610), Section 507(a) of the Federal Water Pollution Control Act (33 USC §1367), Section 1450(i)(1)(A-C) of the Safe Drinking Water Act (42 USC §300j-9(i)), Section 7001(a) of the Solid Waste Disposal Act (SWDA) (42 USC §6971) and/or Section 23(a)(1-3) of the Toxic Substances Control Act (15 USC §2622) and 29 CFR Part 1978, implementing regulations found at 29 CFR Part 24, and the Rules of Practice and Procedure for Administrative Hearings.

The Complainant is represented by Richard E. Condit, Esquire, Washington, D.C. The Respondent is represented by Harriet E. Cooperman, Esquire and Patrick E. Clark, Esquire, Saul Ewing LLP, Baltimore, Maryland.

This case was originally set for hearing on October 29, 2003. At that time, the Complainant was *pro se*. As an accommodation to the parties, I reset the case for January 27, 2004, in Baltimore, Maryland. On or about December 5, 2003, the Complainant retained counsel. On or about January 5, 2004, the Respondent filed a Motion for Summary Decision. Soon thereafter, on January 9, 2004, the Respondent filed a Motion to Dismiss. In the alternative, the Respondent sought sanctions. On or about January 7, 2004, the Complainant served a Motion to Re-Set the Pre-Trial Schedule. Then, on January 27, 2004, the Complainant filed a Response in Opposition to Respondent's Motion for Summary Decision and, in addition, filed a Cross Motion for Partial Summary Decision.

On January 26, 2004, I held a telephone status conference to discuss the pending motions and a request by the Complainant that the case be continued. As a result of the telephone hearing, I determined that it would be necessary to conduct a bifurcated proceeding wherein a proceeding on the issue of timeliness alone would take place prior to a proceeding on the case-in-chief. The proceeding on the issue of timeliness thereafter took place on May 18, 2004, in Baltimore, Maryland. Thus, the instant matter before me involves the issue of timeliness only and whether summary decision is appropriate on that ground. At hearing, forty (40) Complainant's Exhibits ("CX") were received into evidence as CX 1-40. Tr. at 8, 11, 38, 42, 49. In addition, nineteen (19) Respondent's Exhibits ("RX") were received into evidence as RX 1-

19. Tr. at 11. Finally, one (1) Administrative Law Judge Exhibit ("ALJ") was received into evidence as ALJ 1. Tr. at 110. Post hearing, the record remained open to receive briefs from the parties. Neither party chose to submit a post hearing brief.

Summary Decision

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, found at Title 29 C.F.R. Part 18, provide that an administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue of material fact. Title 29 C.F.R. Section 18.40; Federal Rule of Civil Procedure 56(c). Summary judgment is appropriate when the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp***., 475 U.S. 574, 587 (1986). The party moving for summary judgment has the burden of establishing the "absence of evidence to support the nonmoving party's case." ***Celotex Corp. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)***. In reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. ***Darrah v. City of Oak Park***, 255 F.3d 301, 305 (6th Cir. 2001). If the slightest doubt remains as to the facts, the ALJ must deny the motion for summary decision." ***Stauffer v. Wal-Mart Stores, Inc***., USDOL/OALJ Reporter (HTML), ARB No. 99-107, OALJ No. 1999-STA-21 at 6 (ARB November 30, 1999), citing ***Anderson v. Liberty Lobby, Inc***., 477 U.S. 242, 249 (1985).

Issues

(1) Whether the Complaint in this matter was timely filed but in an improper forum.

(2) If so, whether equitable principles should apply to mitigate the fact that the Complaint was filed in an improper forum.

Burden of Proof

"Burden of proof" under the Administrative Procedure Act is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Burden of proof means burden of persuasion, not merely burden of production. 5 U.S.C.A. § 556(d). The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of Labor v. Greenwich Collieries*** [Ondecko], 512 U.S. 267, 114 S.Ct. 2251 (1994).[1] A complainant's obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production, the obligation to come forward with evidence to support a claim.

Statement of the Case

Assessing whether the Complainant filed his environmental whistleblower complaint in a timely manner raises two issues. Since there is no dispute that he failed to file a timely claim in the proper forum, I must first assess whether he executed a timely filing in an improper forum.

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[1] Also known as the risk of nonpersuasion, *See* 9 J. Wigmore, ***Evidence*** § 2486 (J. Chadbourn rev.1981).

Should it be determined that the Complainant's filing was timely but executed in an improper forum, then it must be determined whether equitable concepts should apply to mitigate the fact that the complaint was filed in an improper forum.

The Complainant argues that his filing was indeed timely but that it was executed in the wrong forum. Tr. at 11. He asserts that he experienced difficulties in attempting to get his complaints addressed by the right agencies but demonstrated a good faith effort and worked as expediently as he could to sort out the "bureaucratic circumstances of the situation." Tr. at 11-12. He then argues that, according to the precedent set forth in ***Immanuel v. Wyoming Concrete***, 95-WPC-3 (ARB May 28, 1997), [2] the concepts of equitable tolling or constructive filing should apply. Application of these concepts would mean that his filing would either equitably toll the statute of limitations until the point at which his complaint actually reached the appropriate agency *or* would serve as a constructive filing of the complaint in the appropriate agency. Tr. at 11.

By contrast, the Respondent contends that the Complainant, as a preliminary matter, cannot even show that he executed a timely filing in the wrong forum. Specifically, the Respondent argues that the Complainant is unable to show the precise date when he filed his complaint with the state agency (i.e. the "wrong agency").[3] Tr. at 13-14. Moreover, according to ***Immanuel v. Wyoming Concrete***, equitable tolling is appropriate only if the Complainant files the *precise* whistleblower complaint with the wrong agency. To that end, the Respondent asserts that the complaint, whenever and wherever it was filed, failed to conform to this precise standard. Tr. at 13. The Respondent contends that the complaint filed with the state agency was unclear and ambiguous and did not clearly raise the issue of being terminated for environmental concerns. Tr. at 13-14. In addition, the Respondent asserts that as this is his third environmental whistleblower environmental action, the Complainant should have been more educated as to the filing requirements. Tr. at 13. In fact, one of his previous claims, ***Immanuel v. Railway Market***, 2002-CAA-00020, shows that the Complainant has done the same thing in all three cases: after inappropriately filing with the state agency, he has waited more than thirty (30) days from the determination by the state agency to file with the appropriate federal agency. Tr. at 14. Finally, the Respondent asserts that filing in the wrong agency does not toll the statute of limitations indefinitely; rather, the "clock starts running again" upon receipt of the decision from the state agency advising that the claim is being dismissed. Tr. at 14.

Summary of the Evidence

The Complainant, Henry Immanuel, testified at hearing on May 18, 2004. His occupation at the time of hearing was selling real estate. Tr. at 16. He graduated from high school in 1973, attended Catonsville Community College in Baltimore County, and graduated from Loyola College in Baltimore in 1985 with a degree in theology. Tr. at 17. He had also taken a basic class in law at Villa Julie College but never pursued any career options in that regard, never had occasion to study law beyond this course, but he testified that he does not consider himself "a student of the law." Tr. at 18. His only occasion to review statutes or

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[2] The Complainant in the instant case was also the Complainant in ***Immanuel v. Wyoming Concrete***.

[3] As will be examined further, the record reflects that the improper forum received the Complainant's environmental whistleblower complaint either on or sometime before August 1, 2002. This appears reasonably consistent with the Complainant's testimony that he drafted and sent this letter on June 25, 2002.

regulations was after he received information from the Department of Labor in connection with his complaints. Tr. at 18-19. He claimed, however, that he "did not really understand what he read." Tr. at 18-19. He testified as to previous instances in which he had alleged complaints similar to the one at issue here.[4] While working as a driver of concrete mixer at Annapolis Concrete, he alleged a complaint concerning polluting, and a complaint concerning unionizing.[5] Tr. at 20. While working at Wyoming Concrete, he again alleged a complaint concerning polluting.[6] Tr. at 21. Finally, while working at Railway Market, he alleged a complaint involving the disposal of hazardous waste.[7] Tr. at 21-22.

The Complainant was employed by Respondent, C&D Concrete ("C&D"), in January 2002. Prior to his employment with C&D, he had been working as a concrete mixer driver for Aggregate Industries. In January, 2002, Aggregate Industries was acquired by C&D. Tr. at 22-23. C&D retained all of Aggregate Industries' workers, but there was a lay-off at the time of acquisition, which affected the Complainant. Thus, he did not truly begin working at C&D Concrete until he was recalled for duty in April, 2002. Tr. at 23-24.

The Complainant testified that he began having concerns about C&D's environmental and safety practices as soon as he was recalled to the job. Tr. at 25. He stated that it was "pretty much common knowledge" that the company was polluting "in many different ways at the Salisbury Plant [the plant where the Complainant worked]." Tr. at 25. While at first he took no steps to address these environmental and safety concerns, by May 29, 2002, he undertook some action. Tr. at 25. Specifically, he wrote a letter (CX 1) and "placed it next to the time clock so that all the employees that punched in could see it."[8] Tr. at 25. He addressed it to the employees of C&D Concrete because he "felt pretty confident that the company wasn't going to do anything" about these issues. Tr. at 25-26. In addition to the letter regarding environmental and safety concerns, the Complainant also posted a letter to his co-workers attempting to organize them into a labor union (RX 3).[9] Tr. at 58-59.

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[4] He also testified as to instances in which he alleged complaints regarding general workplace concerns, not necessarily similar to the ones alleged here. He noted that during his final year of high school, he worked at UPS, where he was elected as a Teamster Shop Steward for Teamsters Local 355, and made many complaints regarding "working people's problems at the job site." Tr. at 19.

While at Loyola College, he served as a bus driver and made a safety complaint regarding the fact that the bus lacked a backup beeper and special equipment for handicapped individuals in wheelchairs Tr. at 19-20. He testified that ultimately the school responded to his safety complaint. Tr. at 19.

[5] According to the Complainant, the outcome of these complaints was that the Complainant got his job back with back pay plus interest. Tr. at 20-21.

[6] The Complainant recalled that this complaint ultimately went to the Fourth Circuit; however, a settlement was reached. Tr. at 21.

[7]According to the Complainant, at the time of hearing, the case had been appealed to the Administrative Review Board. Tr. at 22.

[8] He posted the letter at the Salisbury plant only, though he distributed it to people at other plants. Tr. at 27-28.

[9] In addition to the whistleblower complaint alleged here, the Complainant also filed a charge with the NLRB (RX 7), because he believed that engaging in protected activity under the NLRA was another reason for his termination. Tr. at 66.

C&D Management responded by removing the Complainant's letter regarding environmental and safety practices about an hour after it was posted.[10] Tr. at 27. The Complainant was not present when the letter was removed. Tr. at 28. He was subsequently told not to put any more documentation like that in the work areas and was questioned by Mr. Larry Hefner, whom the Complainant identified as a regional manager. Tr. at 27-28. Mr. Hefner also facilitated a meeting regarding the letter about one week after it was posted. Tr. at 28-29.

On June 5, 2002, the Complainant was involved in a work-related accident when he backed his cement truck into a building. Tr. at 57. At hearing, he admitted that he did cause some damage, stating: "I didn't – the chute was extended , and, yes, I did back and touch the building and do some damage." Tr. at 57. As a result of that incident, the Complainant was suspended. Tr. at 57.

On June 9, 2002, the Complainant drafted a letter (CX 2) to the Maryland Department of Labor, Licensing and Regulation ("DLLR"), complaining about alleged safety and pollution problems at C&D. Tr. at 59-60. At hearing, he admitted that this letter did not raise any kind of discriminatory action taken by C&D, but rather raised only environmental and safety concerns. Tr. at 60. He further stated his understanding was that Maryland Occupational Safety and Health ("MOSH") was within DLLR. Tr. at 60.

On June 20, 2002, there was another work-related accident involving the Complainant, although this time the facts were more in dispute. Tr. at 58. In essence, the Complainant backed his cement truck into the washout area. Tr. at 58. At hearing, the Complainant admitted that there was some damage to the truck as a result of this accident. Tr. at 58.

On June 21, 2002, the following day, the Complainant was terminated. Tr. at 29, 58. The Complainant first testified that the reason given for his termination was that he had done damage to his vehicle while backing up to unload the gray water mix. Tr. at 29. Later, on cross examination, it was clarified that C&D informed him that he had "two accidents within a 30-day period", and that was part of the reason for his termination. Tr. at 58.

Following his termination, the Complainant called MOSH to discuss what to do. Tr. at 29. He claimed to have called MOSH after first calling the federal Occupational Safety and Health Administration ("OSHA"). According to the Complainant, he was told by federal OSHA that since Maryland was a "special exempt state" he would have to file all of his complaints with the state of Maryland. Tr. at 29. He testified that these conversations, first with OSHA then with MOSH, took place within three (3) days of his termination date. Tr. at 30.

In a letter dated June 25, 2002, and addressed to Cheryl Kammerman of MOSH (CX 3), the Complainant wrote that he had been terminated from his job on June 6, 2002, for reasons that he believed "to be a pretext" due to complaints he posted on company property.[11] CX 3; Tr. at 30. He further requested that the matter be investigated as he believed himself to be "protected by the whistle blower [sic] statute." CX 3; Tr. at 30. At hearing, he claimed that along with his June 25, 2002 letter to Ms. Kammerman he enclosed the May 29, 2002 letter he had posted at C&D regarding environmental and safety concerns. He thereby believed it was clear that he was

[10] The testimony is unclear as to whether management removed both letters or simply the one regarding environmental and safety concerns.

[11] With this statement he was referring to the letter he posted next to the time clock regarding environmental and safety practices (CX 1). Tr. at 31.

alleging a whistleblower complaint based on environmental concerns. Tr. at 67. However, he also admitted that he did not indicate "see attachment" on the letter that he sent to Ms. Kammerman. Tr. at 67-68. He testified that he incorrectly noted his termination date as June 6, 2002, because that marked the day he was first suspended, and that "somehow [he] must have been mixed up with dates and times." Tr. at 31. He testified that he was prompted to write the June 25, 2002 letter upon learning from MOSH that he should put his concerns in writing. Tr. at 30. Specifically, he testified: "I recall that I was immediately on the telephone with DLLR discussing it, and that I sent it out immediately as soon as I knew I had to put it in writing." Tr. at 63-64. He testified that he sent the letter via U.S. mail. Tr. at 31. Although in his affidavit he states that he merely prepared the letter on June 25, 2002 (*See* RX 15 ¶ 17), at hearing he testified that he both prepared and sent the letter on that date. Tr. at 64.

The exhibits include another letter dated June 25, 2002. CX 4. This letter, however, is addressed *to* the Complainant from Linda Jaenigen, a Supervisor at DLLR. Tr. at 32-33. The Complainant testified that he received this letter after calling DLLR on June 25, 2002, and making a verbal complaint, which "basically set forth his problems with C&D Concrete." Tr. at 33-34. Tr. at 33. The letter advised that it was in response to the Complainant's "formal complaint concerning safety and/or health hazards" at C&D Concrete. CX 4. It further advised that MOSH would assign his complaint for investigation, which would be scheduled as promptly as possible. CX 4. Finally, it indicated that the MOSH Act did not provide relief for all types of safety and health complaints and that his concerns regarding air and water pollution would not be covered by this inspection. CX 4. It was recommended that the Complainant contact the Maryland Department of the Environment (MDE) regarding those concerns, and that he contact the Maryland State Police Commercial Vehicle Inspection Unit for his complaint item concerning overweight vehicles. CX 4.

With regard to whether it was "fair to say" that this letter was acknowledging receipt of his June 9, 2002 complaint, the Complainant testified: "I don't think believe so. I think that this was the letter that I believe was crossing in the mail at the same time that I was sending – or giving a call and then sending a letter dated the same day." Tr. at 60-61. However, he admitted that Ms. Jaenigen's June 25, 2002 letter did not acknowledge receipt of a whistleblower complaint. Tr. at 61. He further admitted that the letter stated that it was in response to his formal complaint and that MOSH had advised him that to make a formal complaint he had to do so in writing; it could not be done over the phone. Tr. at 62. Finally, he admitted that as of June 25, 2002, MOSH had not received a formal (i.e. written) complaint from him regarding a whistleblower issue. Tr. at 63.

The exhibits include yet another piece of correspondence dated June 25, 2002. Also on that date, the Complainant sent an e-mail message to someone called Keith Owens at "keith.owens@osha.gov". CX 5[12]; Tr. at 34. The Complainant identified Keith Owens as a contact person with whom he had dealt at MOSH.[13] Tr. at 34. His purpose in sending the email was that he presumed Mr. Owens was another person he was supposed to contact concerning his termination. Tr. at 36. Regarding the discrepancy between his belief that Keith Owens worked

[12] CX 5 was admitted into evidence over Respondent's objection. Tr. at 37-38.

[13] His recollection was that Keith Owens was actually an investigator in the matter at one point but then "dropped out". Tr. at 34. He later stated: "You know, I kind of get the names mixed up. I think Keith Owens was an investigator with MOSH, but I'm not 100 percent sure. It was a man and a woman that I met, but at this moment I don't recall their names." Tr. at 36.

at MOSH and the fact that the email address contained the acronym OSHA, the Complainant testified that his understanding was that there were "people that work for OSHA inside of MOSH." Tr. at 36. The email message contained a copy of the June 25, 2002 letter that the Complainant sent to Ms. Kammerman. CX 5.

The Complainant did not recall whether he ever received any information indicating that Owens received the email. Tr. at 36. In terms of whether he ever received any indication that Owens' email address was not as he submitted it, the Complainant testified that if he had received such an indication he would have called and obtained the correct email address or sent the correspondence by regular mail. Tr. at 37. However, he believed that it was sent only by email. Tr. at 37. He stated: "I guess that was his correct address at the time when I sent it out. I was under the presumption – I had spoken and then received an email address, and I sent copy, and I never received anything back that I recall that said this was going to the wrong location, so I presume that I was sending this to the right person with the right email address. Tr. at 35-36.

In any event, the Complainant's understanding was that MOSH conducted an investigation of his complaint at "a couple of different levels". Tr. at 32. In this regard, he recalled meeting with two investigators from MOSH[14] in Salsibury, Maryland. Tr. at 32. At the meeting, he conveyed the same information that he had written in his June 25, 2002 letter and provided the investigators with a copy of the May 29, 2002 letter that he had posted at work regarding environmental and safety concerns. Tr. at 32.

By letter dated August 1, 2002, DLLR contacted the Complainant once again. CX 6. This time, however, the letter was signed by Ms. Kammerman of MOSH. CX 6. The letter stated that its purpose was to acknowledge receipt of the Complainant's "complaint alleging discrimination" under "Section 5-604 of the Maryland Occupational Safety and Health Act" by C&D Concrete. CX 6; Tr. at 38. It further stated that the matter had been assigned to a MOSH investigator, Ellen Q. Yalley, and that Ms. Yalley would contact him periodically as she investigated his claim. CX 6. It further provided a telephone number where the Complainant could contact Ms. Yalley should he have questions. CX 6. Finally, it stated that once the investigation was complete, the Commissioner of MOSH would advise the Complainant in writing of the determination. CX 6.

On October 16, 2002, the Complainant sent an email to Mr. William Seguin, whom he identified as "someone who works for the Department of Labor in Philadelphia on discrimination cases." CX 7[15]; Tr. at 38-39. In essence, the email stated that the Complainant wished to appeal his MOSH complaint because "they did not find any evidence to substantiate his problems."[16]

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[14] He knew that he did not meet with Ms. Kammerman but could not recall the names of the people with whom he did meet. Tr. at 32.

[15] CX 7 was admitted into evidence over the Respondent's objection. Tr. at 42.

[16] The Complainant admitted that there were some errors in the email but was unable to provide any real explanation for the errors. For example, as to why he had incorrectly indicated the date June 2, 2002, he testified:

> I guess this is the original – I must have like either resent this copy to him, and originally, then which I can't – I don't believe that. I guess I must have just gotten mixed up with the dates. I'm not – I don't have any real good idea, but I – but no matter what, the date that I sent it was certainly October 16, 2002, 2:46 p.m., when I sent the email to Mr. Seguin, but I don't know why June 2, 2002 is on there.

Tr. at 40-41.

CX 7; Tr. at 39. The email also included a copy of the letter that he had hung by the time clock at work. Tr. at 41. On cross examination, the Complainant admitted that in the second paragraph of the email he mentioned safety concerns; however, he denied that the email was devoid of anything relating to his being terminated on account of environmental whistleblowing, testifying: "I did say that I was concerned about whistleblowing because it says subject: concerning my case, concerning the whistleblower action against C&D Concrete." Tr. at 72-73. He further stated that his email was not just concerning safety, but included the pollution and how that affected the workers and the neighborhood. Tr. at 73.

The Complainant testified that he believed he could appeal through Mr. Seguin because he had met him in the past when he had filed a complaint in another matter and thought he was a person that could be contacted in reference to this issue. Tr. at 39. He believed that Mr. Seguin's department would be able to take his whistleblower case and forward it or give him information on where to go for a whistleblower problem. Tr. at 40. The Complainant stated that if he had had any communication with Mr. Seguin on the C&D matter prior to this email, it would have been only to discuss the fact that the Complainant would be sending him a letter. Tr. at 40. He did not have Mr. Seguin's phone number and could not recall whether they had spoken prior in this regard. Tr. at 40. He testified that at the time he sent the email to Mr. Seguin, he believed he had had the correct email address for him.[17] Tr. at 43.

On March 25, 2003, the Complainant sent another email to Mr. Seguin because he still had not heard anything regarding his case and was therefore "confused about the progression of this investigation by Mr. Seguin's office." CX 18[18]; Tr. at 44. He testified that the email address he used for Mr. Seguin this time was again from referencing the one that he had used in the past. Tr. at 44. He could not recall whether he received a response from Mr. Seguin. Tr. at 44-45. Regarding whether he had had any communication by phone or otherwise (other than email) with Mr. Seguin, he stated: "You know I might have left a message. He's not an easy person to get up with, so I don't know if I might have left a message." Tr. at 45.

The March 25, 2003 email to Mr. Seguin was copied to John Spear, whom the Complainant identified as someone in Washington, D.C. that was "actually in charge of the

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Another error in the email concerned the date of his termination. While the email states that he was terminated on June 6, 2002, this was, as clarified by the Complainant at hearing, the date on which he was suspended, not terminated. Tr. at 72.

[17] The Complainant clarified that he had gotten the email address for Mr. Seguin from the records that he kept from his Railway Market claim. Tr. at 43. Railway Market was a claim that the Complainant was pursuing at about the same time that he pursued this claim. Tr. at 43. Eventually, however, the Complainant received a new email address for Mr. Seguin. Tr. at 43. He further stated:

> This was his original email address, but the United States Department of Labor changed his email to another email, and I do know that if I would have gotten that, I would have copied him the same letter. I do know there was a problem with email address for them, and I don't know if it got on his end that – it's my recollection that he changed his email address, but I do know that that was originally the email address that I had for him.

Tr. at 43.

[18] CX 18 was admitted into evidence over the Respondent's objection. Tr. at 49.

section that Bill Seguin works in which is – it's called the 11C section[19] for whistleblowers, and it was my understanding that John Spear would be able to have oversight and so I cc'd that to him." Tr. at 45. With regard to how he came to have Mr. Spear's email address, the Complainant stated: "I either pulled it from my records or I actually called up Washington, Department of Labor, to find out who was in charge. I do believe – I do recall would be that I already had John Spear's name and email address in my file from Railway Market." Tr. at 45.

The Complainant could not recall whether he received any email communications from Mr. Spear as a result of this email; however, he did have verbal communication with Mr. Spear. Tr. at 45-46. He testified: "Basically when I spoke [to Mr. Spear], I told him about my complaint. I verbally complained about the – what I believe was the failure and inadequacy of the department that Bill Seguin was working for." Tr. at 46. Mr. Spear responded by saying that he would "investigate or proceed to find out more details about what problems – what kind of problems I was having." Tr. at 46. The Complainant testified that this conversation would have taken place sometime around March 25, 2003. Tr. at 46.

Next, the Complainant testified as to the eventual outcome of his claim. He stated: "I was told that as I recall that I had not filed – I don't know. I was told that – I was confused. I was told that there was a situation here that I hadn't filed appropriately. So I don't know what that was all about." Tr. at 47-48. Once he was advised that he had not filed appropriately or timely, he "dashed out a bunch of letters to everybody that [he] thought should know and realize that the plight of the working person and how it should be just resolved at a better solution." Tr. at 48. He further testified: "[I]t shouldn't be this difficult to file a complaint, and get resolution, I was thinking." Tr. at 48.

In addition to seeking assistance from the Department of Labor, the Complainant also sent a letter to Senator Mikulski because he figured that "throughout the years [he had] dealt with her office, [he knew] that she was able to at least get things rolling." Tr. at 48. The Complainant specified that by contacting her Office, he was "trying to get this case heard where it was supposed to be heard." Tr. at 48. He explained that once Senator Mikulski's office became involved either Mr. Seguin or Mr. Spear sent him a letter to go through the formal steps of appeal. Tr. at 50. With regard to how Senator Mikulski's Office assisted him specifically, the Complainant stated: "Well, I – my personal opinion is that we're sitting here because of those – the responses that I was given then by the Department of Labor. Because they sent me a letter and told me how I had to go about doing the next steps to get the process moving again, supposedly. So I did what they told me to do." Tr. at 50-51.

Regarding whether at the time he was communicating with Senator Mikulski's Office, there were still some aspects of his complaint before MOSH, the Complainant stated: "I don't recall. I think that the investigation – this would – my recollection would that MOSH investigation at that time was completed, and that there was other investigations then going forward in other state agencies in Maryland." Tr. at 51. Specifically, he recalled the Maryland Department of the Environment as being one such agency. Tr. at 51. His understanding of what the Maryland Department of the Environment would be doing was that it was going to "investigate the parts about air pollution and water pollution and how they were affecting the Salisbury – the river, the Wicomico River and the air quality in Salisbury, and it was my understanding that they did do that, and that took them quite a long time." Tr. at 51.

[19] The Complainant testified that he did not know what 11C referred to specifically. Tr. at 47.

With regard to whether he had provided the Department of Labor with any information in writing to support his position, the Complainant stated:

> I believe I had sent them a letter and a request to an appeal to appeal the process that I was under – that I was a whistleblower and that I was having a – that I had my right to appeal, but I don't recall what documentation, if you're talking about that, that I would have sent. I probably would have sent my, certainly my letter, my May the 29th letter, because that was what I believed to be the whole crux of everything that I had as evidence."

Tr. at 52.

On cross examination, the Complainant was asked several questions regarding his previous whistleblower claims. With regard to his ***Wyoming Concrete*** claim, he stated: "The cement company that I was working for was located in Delaware, and it was my understanding at that time in history that I had to file with this agency called DNREC, which was the Department of Natural Resources in Delaware, which is a state agency." Tr. at 53. He learned that he was to file with DNREC by placing "a lot of phone calls to all over the place trying to find out where my, you know, what agency I was supposed to file my complaint with, and I found that – I was satisfied that I had found the correct agency within the State of Delaware as being the Department of Natural Resources for Delaware." Tr. at 53. His understanding was that DNREC investigated his claim but that it eventually went to Mr. Seguin's office. Tr. at 53.

The Complainant stated that he initiated his ***Railway Market*** claim by calling up MOSH. Tr. at 54. He further stated: "I went through their steps and did what I believed to be taking the right steps to go to file my complaint as a whistleblower there, and I also filed with MDE as they were what I believed to be doing illegally transporting a hazardous waste via dumpster into a county landfill." Tr. at 54. As he recalled, MOSH was ultimately in charge of investigating his Railway Market claim. Tr. at 54. He further stated: "MOSH did their investigation, then I appealed that, and the Department of Labor out of Philadelphia, Bill Seguin's office, did that investigation." Tr. at 54.

In terms of whether he knew how to appeal and to whom to appeal his ***Railway Market*** claim, the Complainant stated: "I don't recall if they sent me information or if I actually had to dig through files all the way back through Miami Concrete. I don't recall." Tr. at 54. When asked whether he received any information based on his experience in the ***Railway Market*** case that informed him as to how to handle the case at bar, he stated: "Not at the time I don't believe." Tr. at 55. When asked specifically whether he had been informed in any way about what happened with the ***Railway Market*** claim when he pursued the case at bar, he testified: "I wasn't any more informed – the only – what I believe my, my information would have been still what I had done as filed with MOSH. That was my understanding of where to – even to this day, I, I would still think I'd have to file with MOSH because there's no place anywhere else to find out where you file." Tr. at 55. He further stated that:

> If you call up anybody – I called up OSHA up in Pennsylvania, and I directly spoke to an information person. They told me that Maryland is a state that deals with the issues because – they've got some kind of a special designation because the EPA or Department of Labor has allocated certain power to the Department of MOSH. So it was – it's actually still at this very moment my understanding that I would have to file with MOSH." Tr. at 55.

Law as to Filing Requirements

The environmental whistleblower acts require that a complaint must be filed within thirty (30) days of the date of discrimination:

1. 42 U.S.C. § 7622(b)(1), the Clean Air Act;

2. 15 U.S.C. § 2622(b)(1), the Toxic Substances Control Act;

3. 33 USC §1367 et. seq., the Federal Water Pollution Control Act;

4. 42 USC §300j-9(i);Section 1450(i)(1)(A-C) of the Safe Drinking Water Act;

5. 42 U.S.C. § 6971(b), Solid Waste Disposal Act ("SWD");

6. 42 U.S.C. § 9610 (b),Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CECLA").

Deveraux v. Wyoming Association of Rural Water, 93-ERA-18 (Sec'y Oct. 1, 1993); ***Foley v. Boston Edison Co***., ARB No. 99-022, ALJ No. 1997-ERA-56 (ARB Jan. 31, 2001).

Evaluation of the Evidence

The Complainant, Henry Immanuel, posted his letter to the other employees at C&D regarding environmental and safety concerns on May 29, 2002. He was involved in an on-the-job accident on June 5, 2002, for which he was thereafter suspended. On June 9, 2002, the Complainant drafted a letter (CX 2) to the Maryland Department of Labor, Licensing and Regulation ("DLLR"), complaining about alleged safety and pollution problems at C&D. CX 2; Tr. at 59-60. At hearing, he admitted that this letter did not raise any kind of discriminatory action taken by C&D, but rather raised only environmental and safety concerns. Tr. at 60. I note, moreover, that the Complainant could not possibly have raised environmental whistleblowing concerns at this point because he had not yet been terminated.[20] On June 20, 2002, the Complainant was involved in another work-related incident, though this time the facts surrounding the incident were more in dispute. Tr. at 58. In any event, on June 21, 2002, the following day, the Complainant was terminated. Tr. at 29, 58. The stated reason for his termination was that he had had two preventable accidents within a 30-day period. Tr. at 58.

According to the Complainant, after he was terminated he called federal OSHA to discuss his environmental whistleblower concerns but was told that, since Maryland was a "special exempt state" he would have to file all of his complaints with the state of Maryland (i.e. MOSH). Tr. at 29. He then contacted MOSH and was told to put his complaints in writing.[21] The Complainant did so in a June 25, 2002 letter addressed to Cheryl Kammerman of MOSH. CX 3; Tr. at 30. Also on June 25, 2002, the Complainant sent an email message to Keith Owens at

[20] At this point, the only context in which he could have alleged retaliation on account of environmental whistleblowing is if he implicated his recent suspension. However, there is no evidence that the Complainant did so.

[21] He testified that these conversations, first with OSHA then with MOSH, took place within three (3) days of his termination date. Tr. at 30.

"keith.owens@osha.gov".[22] At hearing, he testified that Mr. Owens was someone with whom he had dealt at MOSH. He believed that Mr. Owens was another person he was supposed to contact concerning his termination. Tr. at 36. Regarding the discrepancy between his belief that Keith Owens worked at MOSH and the fact that the email address contained the acronym OSHA, the Complainant testified that his understanding was that there were "people that work for OSHA inside of MOSH." Tr. at 36. He did not recall whether he ever received any information indicating that Owens received the email. Tr. at 36. However, if he had sent the message to the wrong email address and had received information alerting him of this fact, the Complainant stated that he would have obtained the correct email address or sent the correspondence by regular mail. Tr. at 37. However, he believed that it was sent only by email. Tr. at 37.

On June 25, 2002, the very same day that he sent his letter to Ms. Kammerman and his email to Mr. Owens, the Complainant received a letter from Linda Jaenigen, a Supervisor at DLLR. CX 4; Tr. at 32-33. The letter advised that it was in response to the Complainant's "formal complaint concerning safety and/or health hazards" at C&D Concrete. CX 4. There is considerable dispute as to whether this letter was in response to the Complainant's June 9, 2002 letter to DLLR or in response to his June 25, 2005 telephone call (and related letter) to MOSH on June 25, 2002. The Complainant alleged at hearing that the June 25, 2002 letter from Ms. Jaenigen was in response to his June 25, 2005 telephone call (and related letter) to MOSH on June 25, 2002. However, I find that this is not a reasonable interpretation of the facts. The Complainant admitted, and the evidence shows, that Ms. Jaenigan's letter stated that it was in response to his formal complaint and that MOSH had advised him that to make a formal complaint he had to do so in writing; it could not be done over the phone. Tr. at 62. He further admitted that as of June 25, 2002, MOSH had not received a formal (i.e. written) complaint from him regarding a whistleblower issue. Tr. at 63. Therefore, it is clear that the June 25, 2002 letter from Ms. Jaenigan was in response to the Complainant's June 9, 2002 letter to DLLR and not in response to any communication that he had with MOSH on June 25, 2002.

By letter dated August 1, 2002, DLLR contacted the Complainant once again. CX 6. This time, however, the letter was signed by Ms. Kammerman of MOSH and acknowledged receipt of the Complainant's "complaint alleging discrimination" under "Section 5-604 of the Maryland Occupational Safety and Health Act" by C&D Concrete. CX 6; Tr. at 38. It further stated that the matter had been assigned to a MOSH investigator, Ellen Q. Yalley, and that Ms. Yalley would contact him periodically as she investigated his claim. CX 6. It further provided a telephone number where the Complainant could contact Ms. Yalley should he have questions. CX 6. Finally, it stated that once the investigation was complete, the Commissioner of MOSH would advise the Complainant in writing of his determination. CX 6.

On October 16, 2002, the Complainant sent an email to Mr. William Seguin, whom he identified as "someone who works for the Department of Labor in Philadelphia on discrimination cases. CX 7[23]; Tr. at 38-39. In essence, the email stated that the Complainant wished to appeal his MOSH complaint because "they did not find any evidence to substantiate his problems."[24] CX 7; Tr. at 39. He testified that he believed he could appeal through Mr. Seguin because he had

[22] The email message contained a copy of the June 25, 2002 letter that the Complainant sent to Ms. Kammerman. CX 5.

[23] CX 7 was admitted into evidence over the Respondent's objection. Tr. at 42.

[24] The email also included a copy of the letter that he had hung by the time clock at work. Tr. at 41.

met him in the past when he had filed a complaint in another matter and thought he was a person that could be contacted in reference to this issue. Tr. at 39. The Complainant stated that if he had had any communication with Mr. Seguin on the C&D matter prior to this email, then it would have been only to discuss the fact that the Complainant would be sending him a letter. Tr. at 40. He testified that at the time he sent the email to Mr. Seguin, he believed he had had the correct email address for him.[25] Tr. at 43. Eventually, however, the Complainant received a new email address for Mr. Seguin. Tr. at 43.

Timely filing

Taking the Complainant's testimony as true, he both drafted and sent a letter alleging his environmental whistleblower complaint to Ms. Kammerman of MOSH (i.e. the "wrong agency") on June 25, 2002.[26] The record does not reveal the precise date on which MOSH received the complaint. However, it is clear that the complaint was received sometime on or before August 1, 2002, since the record includes a letter dated August 1, 2002, from Ms. Kammerman to the Complainant, acknowledging receipt of his "complaint alleging discrimination" under "Section 5-604 of the Maryland Occupational Safety and Health Act" by C&D Concrete. CX 6; Tr. at 38.

I assume that Complainant relies upon the common-law presumption that a letter correctly addressed and mailed is presumed to have been received by the addressee ("the mailbox rule"). See, e.g., ***Hagner v. U.S***., 285 U.S. 427, 430 (1932). However, to invoke this presumption, there must be evidence to permit the inference that the letter was properly addressed and actually mailed. See, e.g., ***Davis v. U.S. Postal Service***, 142 F.3d 1334, 1340 (10th Cir. 1998).

In whistleblower cases, statutes of limitation run from the date an employee receives a "final, definitive and unequivocal" notice of an adverse employment decision. ***Overall v. Tennessee Valley Authority***, ARB No. 98-111, ALJ No. 1997-ERA-53 (ARB Apr. 30, 2001). The date that an employer communicates a decision to implement such a decision, rather than the date the consequences of the decision are felt, marks the occurrence of a violation. Claim accrual is the date a statute of limitations begins to run, i.e., the date a complainant discovers he or she has been injured. Accrual may differ from the date the respondent decides to inflict injury which may pre-date a complainant's discovery of the injury. The Department of Labor applies a discovery rule in whistleblower cases: limitations periods begin to run on the date when facts which would support a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his or her rights. *Id*.

In this case, the Complaint does not allege a continuing violation or allege any acts that may have occurred post termination of his employment. Therefore, the latest protected activity[27] was on June 21, 2002, when the Complainant's job was terminated. The tolling period ended on July 21, 2002. As noted above, based on the date of Ms. Kammerman's letter, the record demonstrates that MOSH received the environmental whistleblower complaint either on or

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[25] The Complainant clarified that he had gotten the email address for Mr. Seguin from the records that he kept from his Railway Market claim. Tr. at 43. Railway Market was a claim that the Complainant was pursuing at about the same time that he pursued this claim. Tr. at 43.

[26] It is unclear whether his email to Keith Owens, dated that same day, was ever received; however, I find that this issue is not dispositive.

[27] Or the date of "claim accrual". See ***Overall*** *supra*.

sometime before August 1, 2002. Although I specifically asked the parties to brief this issue and they failed to do so, I find that the alleged date of mailing appears reasonably consistent with the Complainant's testimony that he drafted and sent the letter on June 25, 2002, before the tolling period ended on July 21, 2002.

In addition, the substance of Ms. Kammerman's August 1, 2002 letter demonstrates that Respondent's argument concerning the imprecision of the complaint is not well-founded. In Ms. Kammerman's August 1, 2002 letter she states: "This will acknowledge receipt of your complaint alleging discrimination against you under Section 5-604 of the Maryland Occupational Safety and Health Act by C&D Concrete." CX 6. Thus, the Complainant's June 25, 2002 letter was certainly precise enough that MOSH interpreted it as an environmental whistleblower complaint. I therefore conclude that the Complainant filed an adequately precise and timely complaint but with the wrong agency.

Wrong Agency

The Complainant invokes doctrines of equitable tolling and constructive filing. Now that I have determined that the Complainant filed an adequately precise and timely complaint but with the wrong agency, I must assess whether he is entitled to any equitable doctrine that would mitigate his having filed in the wrong forum. Filing is not purely a jurisdictional issue and is subject to allegations of equitable relief. However, the Complainant must allege facts that show entitlement to equitable treatment. *See* ***United States v. All Funds Distributed To, or on Behalf of Weiss***, 345 F.3d 49, 55 (2d Cir. 2003) ("A party seeking to benefit from the doctrine [of equitable tolling] bears the burden of proving that tolling is appropriate . . . ."); ***United States v. Marolf***, 173 F.3d 1213, 1218 n.3 (9th Cir. 1999) (same); ***Justice v. United States***, 6 F.3d 1474, 1479 (11th Cir. 1993); *See also* ***Phillips v. Donnell***, 216 F.3d 508, 511 (5th Cir. 2000) (noting that "[i]n other areas of federal law, the party seeking to establish [equitable] tolling typically carries that burden").

Filing periods may, under certain specific circumstances, be tolled, such as where the complainant has in some extraordinary way been prevented from asserting his or her rights, or where the complainant raised the specific statutory claim but in the wrong forum.

In ***Shelton v. Oak Ridge National Laboratory***, 95-CAA-19 (ALJ Apr. 21, 1998), Complainant moved for reconsideration of an order denying Complainant's motion for default judgment based on Respondents' failure to file a timely request for hearing with the OALJ. Complainant argued that the time period for requesting a hearing stated at 29 C.F.R. § 24.4(3)(i) is jurisdictional, citing ***Crosier v. Westinghouse Hanford Co***., 92-CAA-3 (Sec'y Jan. 12, 1994) and ***Backen v. Entergy Operations***, 95-ERA-46 (ARB June 7, 1996). The ALJ denied the motion, finding that the unambiguous holding in both ***Crosier*** and ***Backen***, was not that the five day time period for filing a request for a hearing is jurisdictional, but that equitable grounds for modification of the time deadline had not been established. The ALJ also noted that in ***Ward v. Bechtel Const., Inc***., 85-ERA-9 (Sec'y July 11, 1986), the Secretary had indicated that an untimely request for a hearing may be excused on grounds of mistake, inadvertence, or excusable neglect.[28] The Supreme Court has set forth a somewhat rigorous standard for *pro se* litigants attempting to apply equitable principles by stating: "[W]e have never suggested that procedural

[28] It may be otherwise where a duly diligent employee is excusably ignorant of his or her rights. See ***Lastre v. Veterans Administration Lakeside Medical Center***, 87-ERA-42, slip op. at 2-4 (Sec'y March 31, 1988); ***School District of the City of Allentown v. Marshall***, 657 F.2d 16, 19-21 (3rd Cir. 1981). However, this must be proved.

rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel. As we have noted before, 'in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'" ***McNeil v. United States***, 113 S.Ct. 1980, 1984 (1993) *citing* ***Mohasco Corp. v. Silver***, 447 U.S. 807, 826, 100 S.Ct. 2486, 2497, 65 L.Ed.2d 532 (1980).

Insofar as establishing specific factors to be considered in determining whether equitable tolling should apply in a given situation, the Administrative Review Board ("ARB") has delineated five grounds: (1) whether the plaintiff lacked actual notice of filing requirements; (2) whether the plaintiff lacked constructive notice, i.e. his attorney should have known; (3) the diligence with which the plaintiff pursued his rights; (4) whether there would be prejudice to the defendant if the statute were tolled; and (5) the reasonableness of the plaintiff remaining ignorant of his rights.[29] ***In the Matter of Paul T. Prybys v. Seminole Tribe of Florida***, ARB Case No. 96-064 (November 27, 1996). In applying these factors to the instant case, I find that the Complainant has not met his burden of proving he is entitled to the application of equitable principles.

According to the Complainant, he lacked actual notice of the filing requirements in that he telephoned OSHA within three days of his termination by C&D, and was allegedly told to file his complaint with MOSH, since Maryland was a "special exempt state." Tr. at 29. I do not find this allegation credible. As reflected in several aspects of his testimony and in many exhibits of record, the Complainant frequently became "mixed up" in his version of the facts of this case. For example, in his June 25, 2002 letter to Ms. Kammerman, the Complainant incorrectly stated that he had been terminated by C&D on June 6, 2002. CX 3; Tr. at 31. When questioned as to why he made this error, he claimed that he "somehow must have been mixed up with dates and times." Tr. at 31. Similarly, in regards to his October 16, 2002 email to Mr. Seguin, the Complainant again included incorrect dates, and his only explanation for doing so was that he must have "just gotten mixed up." Tr. at CX 7; Tr. at 39. Given that the Complainant is admittedly prone to "mixing up" facts, and given that it is highly unlikely that OSHA would have supplied the Complainant with such misinformation, I do not find the Complainant's allegation that OSHA led him astray credible.[30]

Moreover, there is evidence of record demonstrating that the Complainant did have actual notice of the filing requirements. Specifically, the record shows that the Complainant committed the very same filing mistake in one of his previous whistleblower complaints, ***Immanuel v. Wyoming Concrete***. In that case, the Administrative Review Board held that equitable tolling *was* proper, since the Complainant had filed his claim within thirty (30) days of the alleged

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[29] In delineating these factors, the Administrative Review Board cites ***Wright v. State of Tenn.***, 628 F.2d 949 (6th Cir. 1980) (*en banc*).

[30] The Complainant's alleged telephone call to OSHA also raises the sub-issue of justifiable reliance. In ***Jarrell v. United States Postal Service***, 753 F.2d 1088 (D.C. Cir. 1985), the court held that failure to meet a statutory deadline "may be excused if it is the result of justifiable reliance on the advice of [a] government officer." *Id*. at 1092. However, this principle is inapplicable to the case at bar because the Complainant cannot show, assuming he did receive misinformation from OSHA, that he relied on it *justifiably*. As will be more fully explained below, the Complainant's educational background and prior experience filing environmental whistleblower claims demonstrates that, had he received misinformation from an OSHA employee, he would not have been justified in relying on it.

violation, even though it was filed in the wrong forum. The Final Decision and Order of Dismissal in this case, including explicit language articulating why the Complainant was entitled to equitable tolling, was issued on May 28, 1997. Although the Complainant was permitted to avail himself of equitable tolling in that case, issuance of the Final Decision and Order of Dismissal in ***Immanuel v. Wyoming Concrete*** served as unequivocal, actual notice to the Complainant of how he should have properly filed his environmental whistleblower complaint. Thus, to allege in the instant case that he still lacked the knowledge of where to file his environmental whistleblower claim is disingenuous.

Application of equitable tolling also fails under the second factor delineated by the ARB, lack of constructive notice. This complainant is a veteran, having been advised in written decisions how to file and where to file (and what to file) in both of his former cases. Thus, the Complainant in the instant case cannot claim that he lacked constructive notice.[31]

Application of equitable tolling also fails under the third factor delineated by the ARB, the diligence with which the plaintiff pursued his rights. At hearing, the Complainant testified that once he was advised that he had not filed appropriately or timely, he "dashed out a bunch of letters to everybody that [he] thought should know . . ." Tr. at 48. In so testifying, the Complainant presumably attempted to show that he pursued his rights with reasonable diligence. I do not find this to be the case, however, considering that he is a college educated individual, who has filed multiple environmental whistleblower complaints in the past, and who has been given wide latitude in the past on this very same filing issue.[32] These facts are also significant in the context of the fifth factor delineated by the ARB, the reasonableness of the plaintiff remaining ignorant of his rights. As stated earlier, I find that the Complainant is not credible as to the allegation that MOSHA is the "state agency" acting on behalf of OSHA. Evidence to substantiate this assertion was not further developed. I also reject the allegation that he was told by an employee of OSHA to file his claim in the wrong forum, MOSHA.

Not only would it have been unreasonable for the Complainant to claim ignorance of his rights given his relatively extensive experience with environmental whistleblowing, but he was also clearly aware of his rights, since he did file a claim promptly but did so in an improper forum. If the Complainant argues that OSHA and Department of Labor hide or obscure the filing requirements, there is no proof that this has been done.

As part of his burden, the Complainant must allege facts to demonstrate that he is entitled to equitable treatment; it is not automatic. Here, the facts in evidence, namely the Final Decision and Order of Dismissal in ***Immanuel v. Wyoming Concrete***, demonstrate quite the contrary: it shows that the Complainant had actual knowledge of where and when to his file his environmental whistleblower complaint. Accordingly, I find that the Complainant is not entitled to equitable treatment.

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[31] As noted above, in regard to this factor, complainants commonly claim that their attorneys should have known about the filing requirements, and that they therefore lacked constructive notice. Such was the claim, for example, of the Complainant in a case entitled ***In the Matter of Arthur J. Roberts, Jr. v. Tennessee Valley Authority***, Case No. 94-ERA-15 (August 15, 1995). In that case, the Secretary held that the Complainant could not claim he lacked constructive notice because his attorney should have known of the filing deadline, when he did not even hire an attorney until after the deadline had passed. *See id*. Similarly here, the Complainant was initially *pro se* and did not hire an attorney until December 5, 2003, well after the filing deadline had passed.

[32] Moreover, his use of the term of art "pretext" in his June 25, 2002 letter to Ms. Kammerman demonstrates that he is at least a somewhat seasoned environmental whistleblower.

FINDINGS OF FACT

Accordingly, after a review of the entire record before me and after considering this issue in best light of the facts presented by the Complainant, I render the following findings:

1. There is no issue of material fact in dispute regarding the fact that the Complainant failed to file a timely claim in the proper forum. 29 CFR 18.41.
2. The Complainant asserted that he was an aggrieved environmental whistleblower and filed a timely claim with MOSH, the state agency, on or about June 25, 2002.
3. The Complainant worked for Respondent until June 21, 2002.
4. The date of claim accrual or last protected activity in this case is July 21, 2002.
5. The Complainant failed to establish entitlement to equitable tolling of that date.
6. The Complainant failed to file his claim in a timely manner.

ORDER

Accordingly, **IT IS HEREBY ORDERED:**

The Respondent's Motion for Summary Decision is **GRANTED** and this matter is **DISMISSED** as untimely filed.

SO ORDERED

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DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.7(d) and 24.8.