

**MR. ANTHONY LA PLACA**

**Docket No. PES 08-006**



The Petitioner timely filed an appeal of Respondent's dismissal of the discrimination complaint with the Industrial Board of Appeals (Board), and upon direction by the Board, filed an amended petition that he signed before a notary public. The amended petition asserts in part that Petitioner's complaint was not untimely filed with DOL because there were no postings of his rights and obligations under Labor Law § 27-a at any of his job sites so that he did not have notice of the thirty-day filing period:

"I work in the field and report directly to each jobsite and had no way of knowing about the 30 day requirement . . . I have since learned that the employer must post these regulation [sic] at the place of business. I have never been to a job site that this was posted on."

On September 3, 2008, the Board acknowledged receipt of the amended petition and served a copy of it on Counsel to the Respondent, together with notice that a response should be served within 35 days. The Board did not receive any response to the amended petition or the September 3<sup>rd</sup> notice. By letter dated November 24, 2008, the Board extended to December 15, 2008, Respondent's time to file a response and, further, put Respondent on notice that under Board Rules of Procedure and Practice (Rules) § 65.14, failure to file a response by December 15 may "constitute a waiver of the right to further participation in the proceeding." Rule 65.14 provides that "[f]ailure to file any pleading pursuant to these rules when due may, in the discretion of the Board, constitute a waiver of the right to further participate in the proceeding."

Respondent did not respond to the Board's November 24<sup>th</sup> mailing, and on December 28, 2009, the Board informed Counsel to Respondent that

"[t]he failure to file an answer in this matter constitutes a waiver of the Commissioner's right to further participate unless a motion brought within 30 days of your receipt of this letter establishes good cause of the failure to file an answer."

The Board has not received any response to the December 28 letter, and accordingly, we affirm the finding that the Respondent has waived her right to further participate in Petitioner's appeal proceeding.

As Respondent has failed to deny any of the allegations in Petitioner's amended petition, we find the Petitioner's factual allegations are admitted for purposes of the instant review and now determine whether they state a basis for finding Respondent's determination unreasonable and/or invalid (Labor Law § 101).

Labor Law § 27-a governs safety and health standards for public employees, and Labor Law § 27-a (10) prohibits discrimination against an employee because the employee has filed "any complaint" related to the protections that Labor Law § 27-a affords. Labor Law § 27-a (10) (b) requires that a complaint of discrimination be filed with the Respondent within thirty days after the alleged discriminatory conduct that violates Labor Law § 27-a (10) (a):

“Any employee who believes that he has been discharged, disciplined, or otherwise discriminated against by any person in violation of this subdivision may, within *thirty days* after such violation occurs, file a complaint with the commissioner alleging such discrimination” (emphasis added).

Petitioner concedes that his complaint was filed with the Respondent more than thirty days after the alleged discrimination occurred, but he argues that there were no postings of his rights and obligations under Labor Law § 27-a, and therefore, he was unaware of the filing period. In a notarized but unsworn statement that is part of the amended petition, the Petitioner states that he has

“[n]ever been to a job site that this was posted on. In fact I never would have reported this to PESH if I had not been advised to do so by my Union delegate but he did not mention it until the week of April 26<sup>th</sup>. As soon as I was advised to report to PESH I did.”

Section 801.47 (a) Title 12 of the New York Codes, Rules and Regulations (12 NYCRR § 801.47) implements, in part, Labor Law § 27-a and states as relevant:

“Each employer shall post and keep posted in each establishment a poster providing information relating to the job safety and health protection afforded to public employees by the provisions of Labor Law, section 27-a. These posters may be obtained from the New York State Department of Labor, Division of Safety and Health. A poster for each establishment shall be posted in a conspicuous place or places where notices to employees of that establishment are customarily posted.”

The regulation makes it an employer’s duty to provide notice of the safety and health provisions of Labor Law § 27-a that are intended to protect public employees. The absence of posting at Petitioner’s job sites should not adversely impact the Petitioner in the exercise of his right to file a discrimination complaint when he is an intended beneficiary of the notice posting. Moreover, the thirty-day filing period under Labor law § 27-a (10) (b) is not a statute of limitations and may be waived (*Hartnett v New York City Tr. Auth.*, 86 NY2d 438 [1995]).

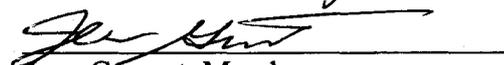
For all of the above reasons, we find that Petitioner’s filing of a discrimination complaint with Respondent on April 26, 2008 was not untimely and that Respondent’s determination dismissing Petitioner’s complaint of discrimination as untimely under Labor Law § 27-a (10) (b) is unreasonable.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

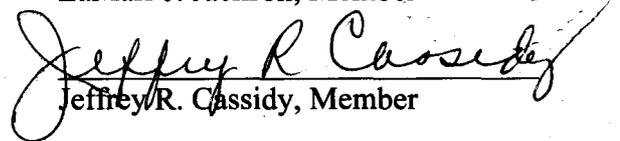
This matter be remanded to the Commissioner of Labor to investigate Petitioner's complaint of discrimination under Labor Law § 27-a (10).

  
\_\_\_\_\_  
Anne P. Stevason, Chairman

  
\_\_\_\_\_  
J. Christopher Meagher, Member

  
\_\_\_\_\_  
Jean Grumet, Member

\_\_\_\_\_  
LaMarr J. Jackson, Member

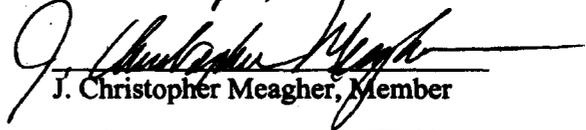
  
\_\_\_\_\_  
Jeffrey R. Cassidy, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at New York, New York, on  
June 23, 2010.

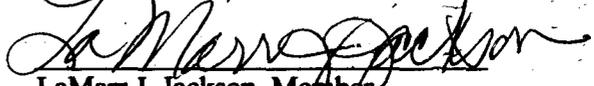
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

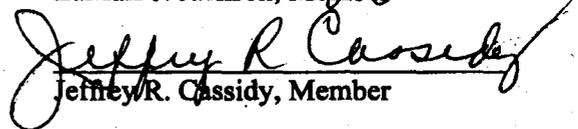
This matter be remanded to the Commissioner of Labor to investigate Petitioner's complaint of discrimination under Labor Law § 27-a (10).

  
\_\_\_\_\_  
Anne P. Stevason, Chairman

  
\_\_\_\_\_  
J. Christopher Meagher, Member

  
\_\_\_\_\_  
Jean Grumet, Member

  
\_\_\_\_\_  
LaMarr J. Jackson, Member

  
\_\_\_\_\_  
Jeffrey R. Cassidy, Member

Dated and signed in the Office  
of the Industrial Board of Appeals  
at New York, New York, on  
June 23, 2010.