

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MORTON F. DOROTHY,)	
)	
Complainant,)	
)	
v.)	PCB No. 05-49
)	
FLEX-N-GATE CORPORATION,)	
an Illinois corporation,)	
)	
Respondent.)	

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn	Carol Webb, Esq.
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	1021 North Grand Avenue East
Suite 11-500	Post Office Box 19274
Chicago, Illinois 60601	Springfield, Illinois 62794-9274
(VIA ELECTRONIC MAIL)	(VIA ELECTRONIC MAIL)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board Flex-N-Gate Corporation's **MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION TO STRIKE AFFIDAVITS FILED AND UNSUPPORTED STATEMENTS MADE IN SUPPORT OF COMPLAINANT'S SUMMARY JUDGMENT FILINGS AND MOTION FOR ADMONISHMENT OF COMPLAINANT and RESPONSE TO COMPLAINANT'S SECOND MOTION TO SUBSTITUTE AFFIDAVITS, AND MOTION TO STRIKE "SUBSTITUTED AFFIDAVIT"** copies of which are herewith served upon you.

Respectfully submitted,

FLEX-N-GATE CORPORATION,
Respondent,

Dated: August 11, 2005

By: /s/ Thomas G. Safley
One of Its Attorneys

Thomas G. Safley
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

THIS FILING SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, Thomas G. Safley, the undersigned, certify that I have served the attached
MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION TO STRIKE
AFFIDAVITS FILED AND UNSUPPORTED STATEMENTS MADE IN SUPPORT
OF COMPLAINANT'S SUMMARY JUDGMENT FILINGS AND MOTION FOR
ADMONISHMENT OF COMPLAINANT and RESPONSE TO COMPLAINANT'S
SECOND MOTION TO SUBSTITUTE AFFIDAVITS, AND MOTION TO STRIKE
"SUBSTITUTED AFFIDAVIT" upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Carol Webb, Esq.
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Post Office Box 19274
Springfield, Illinois 62794-9274

via electronic mail on August 11, 2005; and upon:

Mr. Morton F. Dorothy
104 West University, SW Suite
Urbana, Illinois 61801

by depositing said documents in the United States Mail in Springfield, Illinois, postage
prepaid, on August 11, 2005.

/s/ Thomas G. Safley
Thomas G. Safley

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**MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION
TO STRIKE AFFIDAVITS FILED AND UNSUPPORTED STATEMENTS
MADE IN SUPPORT OF COMPLAINANT'S SUMMARY JUDGMENT
FILINGS AND MOTION FOR ADMONISHMENT OF COMPLAINANT**

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by and through its attorneys, HODGE DWYER ZEMAN, and for its Motion for Leave to file Reply in Support of Motion to Strike Affidavits Filed and Unsupported Statements Made in Support of Complainant's Summary Judgment Filings and Motion for Admonishment of Complainant ("Motion to Strike and Admonish"), states as follows:

1. On or about July 18, 2005, Flex-N-Gate filed its Motion to Strike and Admonish.
2. On July 27, 2005, Complainant mailed his Response to Flex-N-Gate's Motion to Strike and Admonish ("Complainant's Response") to the undersigned.
3. For the reasons stated below, Complainant moves the Illinois Pollution Control Board ("Board") for leave to file a Reply in support of its Motion to Strike and Admonish to address two issues raised by Complainant in his Response.
4. First, in paragraph 8.b. – d. of his Response, Complainant argues that "[m]any of Respondent's objections [to Complainant's filings] center on the absence of qualified expert witnesses," and that while Flex-N-Gate "is free to question the degree of

Complainant's expertise in various areas at hearing, this goes to the weight of the evidence." Complainant's Response at ¶8.b.-d.

5. Complainant misunderstands Flex-N-Gate's argument. What Flex-N-Gate argued was that Complainant's affidavits did not establish that Complainant has personal knowledge or the qualifications to make the statements included in the affidavits. Illinois Supreme Court Rule 191(a) requires that affidavits include this. Flex-N-Gate never argued that Complainant's affidavits established that Complainant did have personal knowledge or was qualified (as an expert or otherwise) to make a statement, but that the Board should find that Complainant did not have personal knowledge or was not qualified.

6. Thus, Flex-N-Gate's argument does not go to Complainant's status as an "expert" or to the weight that the Board should give Plaintiff's affidavits. (In fact, the word "expert" does not even appear in Flex-N-Gate's Motion to Strike and Admonish.) Rather, Flex-N-Gate's argument goes to the question of whether Plaintiff's affidavits are in compliance with the requirement of Rule 191(a) that an affiant establish personal knowledge of, and qualifications to make, the statements included in his or her affidavit as a threshold issue.

7. Flex-N-Gate did not anticipate, and could not have anticipated, that Complainant would misinterpret its argument on this issue.

8. This argument is central to Flex-N-Gate's Motion to Strike.

9. Accordingly, Flex-N-Gate would be prejudiced if the Board does not grant it leave to file a Reply in support of its Motion to Strike and Admonish in order to address Complainant's misinterpretation of Flex-N-Gate's argument.

10. Second, Complainant argues that Flex-N-Gate "is somehow arguing that the fact that Denny Corbett's [alleged] lies were made in his reports to Occupational Safety and Health Administration ("OSHA"), and were therefore criminal in nature, somehow makes them off limits to discussion in this case." Complainant's Response at ¶11.

11. This also misinterprets Flex-N-Gate's argument. Flex-N-Gate did not argue that Complainant's allegations were improper because they involved OSHA and alleged criminal conduct, but because "Complainant's allegations . . . are conclusory and are not supported by any facts." Motion to Strike and Admonish at ¶61. (Emphasis added.)

12. Flex-N-Gate also did not anticipate, and could not have anticipated, that Complainant would misinterpret this argument.

13. This argument is central to Flex-N-Gate's Motion to Admonish.

14. Accordingly, Flex-N-Gate also would be prejudiced if the Board does not grant it leave to file a Reply in support of its Motion to Strike and Admonish in order to address Complainant's misinterpretation of Flex-N-Gate's argument on this issue.

WHEREFORE, for the reasons stated above, Respondent, FLEX-N-GATE CORPORATION, respectfully moves the Illinois Pollution Control Board to grant it leave to file a Reply in support of its Motion to Strike and Admonish to address the issues

outlined above, and to award FLEX-N-GATE CORPORATION such other relief as the Illinois Pollution Control Board deems just.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

By: /s/ Thomas G. Safley
One of Its Attorneys

Dated: August 11, 2005

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GWST:003/Fil/Motion for Leave – Reply – Motion to Strike and Admonish

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**RESPONSE TO COMPLAINANT'S
SECOND MOTION TO SUBSTITUTE AFFIDAVITS,
AND MOTION TO STRIKE "SUBSTITUTED AFFIDAVIT"**

NOW COMES Respondent, FLEX-N-GATE CORPORATION ("Flex-N-Gate"), by and through its attorneys, HODGE DWYER ZEMAN, and for its Response to Complainant's Second Motion to Substitute Affidavits, and Motion to Strike "Substituted Affidavit," states as follows:

I. PROCEDURAL BACKGROUND

1. On May 27, 2005, Flex-N-Gate filed its Motion for Summary Judgment as to All Counts of Complainant's Complaint ("Flex-N-Gate's Motion for Complete Summary Judgment") and its Motion for Partial Summary Judgment as to Counts II through VI of Complainant's Complaint ("Flex-N-Gate's Motion for Partial Summary Judgment"; collectively "Flex-N-Gate's Motions for Summary Judgment").

2. On or about June 24, 2005, Complainant filed his Responses to Flex-N-Gate's Motions for Summary Judgment.

3. With those Responses, Complainant also filed his "Affidavit in Support of Responses to Motions for Summary Judgment." See Complainant's Responses to Flex-N-Gate's Motion for Summary Judgment.

4. On July 8, 2005, Flex-N-Gate moved the Illinois Pollution Control Board (“Board”) to, among other things, strike this Affidavit. See Flex-N-Gate’s Motion to Strike Affidavits Filed and Unsupported Statements Made in Support of Complainant’s Summary Judgment Filings and Motion for Admonishment of Complainant (“Motion to Strike and Admonish”) at 8-16.

5. On July 28, 2005, Complainant filed his Second Motion to Substitute Affidavits.

II. RESPONSE TO COMPLAINANT’S SECOND MOTION TO STRIKE AFFIDAVITS, AND MOTION TO STRIKE “SUBSTITUTED AFFIDAVIT”

6. In his Second Motion to Substitute Affidavits, Complainant “moves that the Board allow him to substitute affidavits [sic] in support of his Responses to Respondent’s Motions for Summary Judgment,” and in support of this Motion, states in part:

On July 8, 2005, respondent Flex-N-Gate Corporation, filed a Motion to Strike Affidavits Filed and Unsupported Statements Made in Support of Complainant’s Summary Judgment Filings and Motion for Admonishment of Complainant.

* * *

Rather than argue the sufficiency of the affidavit made in support of [Complainant’s Responses to Flex-N-Gate’s Motions for Summary Judgment], complainant wishes to provide a more detailed affidavit meeting some of the objections raised by respondent.

Complainant’s Second Motion to Substitute Affidavits at ¶¶3, 6.

7. The Board has not ruled on Complainant’s Second Motion to Substitute Affidavits, and has not otherwise granted Complainant leave to file a substitute Affidavit in support of his Responses to Flex-N-Gate’s Motions for Summary Judgment.

8. Nevertheless, with his Second Motion to Substitute Affidavits, Complainant also filed the “Substituted Affidavit” that he is asking the Board for permission to file. See Complainant’s Second Motion to Substitute Affidavits at 2-19.

9. This “Substituted Affidavit” is fifteen pages long, and includes three “exhibits” in support of Complainant’s Responses to Flex-N-Gate’s Motions for Summary Judgment. Id.

10. For the reasons stated in Flex-N-Gate’s Motions for Summary Judgment, Flex-N-Gate submits that the majority of Complainant’s “Substituted Affidavit” is irrelevant, as it attempts to address the alleged emission of hydrogen sulfide gas at the Facility at issue in this litigation, which is not a material fact for purposes of Flex-N-Gate’s Motions for Summary Judgment.

11. Thus, allowing Complainant leave to file his “Substituted Affidavit” would be meaningless, as it would only inject more irrelevant information into this proceeding.

12. Flex-N-Gate also has numerous objections to Complainant’s “Substituted Affidavit” for the reasons stated in Flex-N-Gate’s Motion to Strike and Admonish.

13. Thus, if the Board grants Complainant’s Second Motion to Substitute Affidavits, Flex-N-Gate will need to revise its Motion to Strike and Admonish in order to raise these objections.

14. Given the length of Complainant’s proposed “Substituted Affidavit,” these revisions would be voluminous.

15. Further, if the Board grants Complainant’s Second Motion to Substitute Affidavits, Flex-N-Gate may have grounds to move the Board for leave to file Replies in

support of its Motions for Summary Judgment to address issues raised in Complainant's "Substituted Affidavit."

16. However, as noted above, the Board has not even granted Complainant leave to file his "Substituted Affidavit."

17. The Board, for whatever reason, may not grant Complainant leave to file his "Substituted Affidavit."

18. It does not make sense for Flex-N-Gate to incur the expense at this time to address deficiencies in, or to seek leave to file a Reply in support of its Motions for Summary Judgment based on, an affidavit which the Board may not even grant Complainant leave to file.

19. Further, it does not make sense for Flex-N-Gate to clutter the Board's file in this matter with filings addressing Complainant's "Substituted Affidavit," which filings would be rendered moot if the Board denies Complainant's Second Motion to Substitute Affidavits.

20. Accordingly, Flex-N-Gate moves the Board to strike Complainant's "Substituted Affidavit" pending the Board's decision on Complainant's Second Motion to Substitute Affidavits.

21. If the Board denies Complainant's Second Motion to Substitute Affidavits, Flex-N-Gate will have no need to amend its Motion to Strike and Admonish or to move the Board for leave to file Replies in support of its Motions for Summary Judgment based on Complainant's "Substituted Affidavit."

22. If the Board grants Complainant's Second Motion to Substitute Affidavits, Flex-N-Gate will file at that time an amended Motion to Strike and Admonish, and, if

appropriate, will move the Board for leave to file Replies in support of its Motions for Summary Judgment, in order to address Complainant's "Substituted Affidavit."

23. Flex-N-Gate responded previously to the arguments made by Complainant in paragraphs 5, 7, and 7.a. of Complainant's Second Motion to Substitute Affidavits. See Flex-N-Gate's Response to Complainant's [First] Motion to Substitute Affidavits.

24. Flex-N-Gate hereby incorporates its previous responses to these arguments in response to Complainant's Second Motion to Substitute Affidavits.

III. RESPONSES TO SPECIFIC ALLEGATIONS OF MISCONDUCT

25. Despite the above, Flex-N-Gate must at this time respond to two spurious allegations made by Complainant in his "Substituted Affidavit."

A. Response to Allegations of Delay

26. In paragraphs 3.g., 3.h., and 3.i. of Complainant's Second Motion for Leave to Substitute Affidavits, Complainant states:

[Flex-N-Gate's] motions for summary judgment repeat legal arguments already made to the Board in [Flex-N-Gate's] Motion to Dismiss, and do not depend on any new facts adduced in discovery.

Because the Board denied [Flex-N-Gate's] motion to dismiss, Respondent had no reasonable basis to believe that [its] motions for summary judgment would be granted.

The only possible purpose of filing the motions for summary judgment was to delay the case.

Second Motion for Leave to Substitute Affidavits, "Substituted Affidavit," ¶¶3.g., h., i.

27. This argument misrepresents Flex-N-Gate's filings, and Flex-N-Gate vehemently denies and objects to Complainant's improper allegation that Flex-N-Gate filed its Motions for Summary Judgment "to delay the case."

28. First, despite Complainant's assertion to the contrary, Flex-N-Gate's Motions for Summary Judgment do "depend on . . . new facts." Flex-N-Gate's Motion for Complete Summary Judgment contains a factual section which is more than seven pages long, and relies on 16 exhibits, including affidavits. See Flex-N-Gate's Motion for Complete Summary Judgment at 2-9 (factual allegations), in general (Exhibits A through P). Flex-N-Gate's Motion for Partial Summary Judgment contains a factual section which is approximately one page long, and relies on six exhibits. See Flex-N-Gate's Motion for Partial Summary Judgment at 2-3 (factual allegations), in general (Exhibits A through F).

29. These factual allegations and exhibits obviously were not before the Board when it ruled on Flex-N-Gate's Motion to Dismiss.

30. When ruling on a Motion to Dismiss, the Board applies "the same principles applied to Illinois Code of Civil Procedure 2-615 and 2-619 motions to strike or dismiss." County of DuPage v. Waste Management of Ill., AC No. 94-92, 1994 Ill. ENV LEXIS 1488, at *4 (Ill.Pol.Control.Bd. Dec. 1, 1994). As Flex-N-Gate's Motion argued that Complainant's Complaint failed to state a claim upon which relief can be granted, it was, in effect, a Rule 2-615 Motion. See T & S Signs, Inc. v. Village of Wadsworth, 634 N.E.2d 306 (2d Dist. 1994), which states:

The legal theories for proceeding on a motion to dismiss under sections 2-615 and 2-619 differ. A section 2-615 motion attacks the legal sufficiency of the complaint by asserting that it fails to state a cause of action upon which relief can be granted. Under section 2-619, a party admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter which avoids or defeats the claim.

Id. at 308. (Citations omitted.)

31. It is axiomatic that motions to dismiss for failure to state a claim may not “be supported by reference to any facts or exhibits that are not alleged in or attached to the complaint under attack.” Scott Wetzel Serv. v. Regard, 648 N.E.2d 1020, 1022 (1st Dist. 1995). Thus:

It is error . . . for a trial court to consider affidavits, depositions, or exhibits when considering a section 45 [now Section 2-615] motion to [strike or] dismiss a complaint for failure to state a cause of action.

Maas v. Cohen Assoc., Inc., 445 N.E.2d 517, 521 (1st Dist. 1983). (Quotations omitted; emphasis added.)

32. Second, the Board’s Order denying Flex-N-Gate’s Motion to Dismiss cannot be read as deciding the issues raised by Flex-N-Gate’s Motions for Summary Judgment.

33. The Board’s Order denying Flex-N-Gate’s Motion to Dismiss does not rule on any specific legal arguments made by Flex-N-Gate in its Motion to Dismiss, or, for that matter, by Complainant in responding to that Motion. Rather, the Board’s Order concludes: “Taking all well-pled facts as true and viewing them in a light most favorable to the non-movant, the Board finds there is a set of facts that could entitle Mr. Dorothy to relief.” Board Order, Feb. 3, 2005, at 8. The Order does not, however, identify what that “set of facts” might be.

34. Without more explanation, the reason that the Board denied Flex-N-Gate’s Motion to Dismiss cannot be determined. That does not mean, however, that in denying Flex-N-Gate’s Motion to Dismiss the Board took any particular position on legal arguments raised in that Motion or in Complainant’s response to that Motion. Rather,

a. As to Count I, and in part as to Counts II through VI, Flex-N-Gate argued that it was entitled to dismissal because the allegations of Complainant's Complaint "establish[] that the Treatment System at the Facility at issue is a 'wastewater treatment unit' exempt from RCRA permitting requirements." Motion to Dismiss at ¶17. Perhaps the Board disagreed that this question was settled by the pleadings alone, and felt that more facts were necessary on the question of whether or not the plant's treatment system constituted a "wastewater treatment unit" under RCRA. Flex-N-Gate submits that such additional facts have been provided by Flex-N-Gate's Motions for Summary Judgment.

b. As to Counts II through VI, Flex-N-Gate also argued that it was entitled to dismissal because Complainant alleged that a release of "gas" occurred, and "gases" are not regulated by RCRA. See, e.g., Motion to Dismiss, at ¶43. Perhaps the Board disagreed that Complainant had clearly alleged that the material released was a "gas." Flex-N-Gate submits that if this was not clear before, it now is clear that Complainant is alleging that a "gas" was released.

c. Or, perhaps the Board found that Flex-N-Gate had not made its legal argument clearly enough, and that the Board needed more argument to decide the legal issues raised by Flex-N-Gate's Motion to Dismiss. If this was the case, Flex-N-Gate submits that it has fully explained and supported its legal argument by its Motions for Summary Judgment.

35. Regardless, again, because the Board's Order denying Flex-N-Gate's Motion to Dismiss did not state the Board's position on the legal arguments made by Flex-N-Gate and Complainant, that Order cannot be read as taking any position as to those legal arguments, and thus cannot be read as preordaining the result of the Board's consideration of Flex-N-Gate's Motions for Summary Judgment.

36. In light of the above, Complainant is wrong to argue that Flex-N-Gate's Motions for Summary Judgment "do not depend on any new facts," that Flex-N-Gate "had no reasonable basis to believe that [its] motions for summary judgment would be granted," and that "[t]he only possible purpose of filing the motions for summary judgment was to delay the case." Second Motion for Leave to Substitute Affidavits, "Substituted Affidavit," ¶¶3.g., h., i.

37. Third, this conclusion is further supported by the fact that the Board applies different standards when deciding motions to dismiss and motions for summary judgment. On a motion to dismiss for failure to state a claim, the question that the Board must decide is whether the complainant has alleged “sufficient facts to bring the [complainant’s] claim within the scope of a legally recognized cause of action.” Oravek by Brann v. Community Sch. Dist. 146, 264 Ill. App. 3d 895, 898 (1st Dist. 1994). On a motion for summary judgment, the Complainant has alleged a valid cause of action, and the question for the Board is whether there is “no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Cassens and Sons, Inc. v. Illinois EPA, PCB No. 01-102, 2004 Ill. ENV LEXIS 635, at **11-12 (Ill.Pol.Control.Bd. Nov. 18, 2004) (citing Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998)); accord, 35 Ill. Admin. Code § 101.516(b).

38. Flex-N-Gate did not act improperly in filing its Motions for Summary Judgment, and Complainant’s allegation that Flex-N-Gate did act improperly is another example of Complainant filing “scandalous and impertinent material,” for which filing the Board should admonish Complainant. See Flex-N-Gate’s Motion to Strike and Admonish at 27-30.

B. Response to Allegation of Failure to Disclose Witnesses

39. In paragraph 12 of his “Substituted Affidavit,” as in previous filings, Complainant argues that Flex-N-Gate has “refused” to “name any witnesses or other evidence that it intends to produce at hearing to show that the hydrogen sulfide emission did not occur.”

40. Complainant further notes, however, that in response to Complainant's Interrogatory No. 1, Flex-N-Gate states that it "has not yet determined what witnesses, if any, it intends to call at hearing."

41. Complainant's argument that, by this response, Flex-N-Gate has "refused" to "name . . . witnesses or other evidence" implies that Flex-N-Gate's response to Complainant's Interrogatory No. 1 is somehow inappropriate.

42. Flex-N-Gate vehemently disagrees with such an implication.

43. Obviously, Flex-N-Gate does not think that any hearing will be held in this matter; that is why Flex-N-Gate filed its Motions for Summary Judgment. Flex-N-Gate has no way to identify what witnesses it would need to call at a hearing it does not think will need to take place.

44. Even if Flex-N-Gate were to assume that a hearing would take place, however, Flex-N-Gate's position is that the question of whether or not a release of hydrogen sulfide occurred is irrelevant. See Flex-N-Gate's Motions for Summary Judgment. Accordingly, Flex-N-Gate has no reason to "name any witnesses or other evidence that it intends to produce at hearing to show that the hydrogen sulfide emission did not occur." Irrelevant witnesses and evidence would not be admissible at hearing.

45. Finally, the only way that a hearing will take place in this matter is if the Board denies, in whole or in part, the Parties' Motions for Summary Judgment. Only if that happens would Flex-N-Gate know what the issues at hearing will be, and thus, what witnesses it would need to produce at hearing. If the Board denies Flex-N-Gate's Motions for Summary Judgment, it could do so because of a narrow issue of fact, and

then, the only witnesses that the Parties would need to present at hearing would be on that narrow issue.

46. Thus, Flex-N-Gate's response to Complainant's request for a list of witnesses is entirely appropriate. Obviously Flex-N-Gate will have an obligation under the Board's procedural rules to supplement its response to Complainant's Interrogatory No. 1 if a hearing is going to be held in this matter. For now, however, Flex-N-Gate objects to Complainant's implication in this and other filings that Flex-N-Gate has somehow acted improperly by failing to identify witnesses for a hearing that may never happen, or, if it happens, the scope of which is at this point undefined.

IV. CONCLUSION

WHEREFORE, for the reasons stated above, Respondent, FLEX-N-GATE CORPORATION, respectfully moves the Illinois Pollution Control Board to strike Complainant's "Substituted Affidavit," and to award FLEX-N-GATE CORPORATION such other relief as the Illinois Pollution Control Board deems just.

Respectfully submitted,

FLEX-N-GATE CORPORATION
Respondent,

By: /s/ Thomas G. Safley
One of Its Attorneys

Dated: August 11, 2005

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