U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 15 January 2015

CASE NOS.: 2014-SOX-00042
2014-SDW-00002
2014-ACA-00003

IN THE MATTER OF

GREGORY KELLY,
Complainant

v.

STATE OF ALABAMA –
PUBLIC SERVICE COMMISSION,
Respondent

ORDER OF DISMISSAL

On November 4, 2014, the undersigned issued an Order to Consolidate, Order of Dismissal in Part, and Order to Show Cause. In the Order (hereinafter Nov. 4, 2014 Order), Gregory Kelly (Complainant) and State of Alabama – Public Service Commission (Respondent) (hereinafter "the Commission" or "Alabama PSC") were ordered to file briefs addressing the question of whether Complainant's whistleblower complaints under the seven statutes where jurisdiction in this matter could conceivably exist in the three aforementioned consolidated cases, all filed with Occupational Safety and Health Administration (OSHA) between June 2014 and August 2014, should be dismissed.

I. UPDATED BACKGROUND AND PROCEDURAL HISTORY

As stated in the Nov. 4 2014 Order, Complainant has filed several cases spanning three OALJ offices covering all 19 whistleblower statutes under the OALJ's jurisdiction, all surrounding the same set of facts of his dismissal from employment with the Commission on April 9, 2009. The number of cases that have reached the OALJ, as of the date of this decision, stands at eight (8).[1] The undersigned and Administrative Law Judges Stephen Purcell (ret.) of Washington D.C. and John Sellers on Cincinnati, Ohio disposed complaints involving 11 whistleblower statutes in orders of dismissal issued July 7, 2014, (ALJ Kennington, *Kelly v. State of Ala. – Pub. Serv. Comm'n*, 2014-SOX-30 (July 7, 2014)); October 16, 2014 (ALJ Purcell,

[1] The eighth case, 2015-ACA-2, was assigned to the undersigned on November 19, 2014, after the consolidation and Order to Show Cause as part of the Nov. 4, 2014 Order.

Kelly v. Ala. Pub. Serv. Comm'n, 2014-AIR-18 (Oct. 16, 2014)) and October 23, 2014 (ALJ Sellers, *Kelly v. State of Ala., Pub. Serv. Comm'n*, 2014-CAA-4 (Oct. 23, 2014)). In the Nov. 4, 2014, Order, the undersigned disposed of complaints under seven of 14 statutes, many of which duplicated complaints before Judge Purcell as well as the SOX complaint as res judicata from my July 7, 2014 Order. The Order to Show Cause issued as part of the Nov. 4, 2014 Order provided Complainant with an additional opportunity to explain why his remaining environmental, PSIA, and NTSSA claims should not be dismissed as untimely.

The seven remaining statutes to be addressed by the parties in the instant cases are:

1. Solid Waste Disposal Act (SWDA);
2. Federal Water Pollution Control Act (FWCPA or "Clean Water Act");
3. National Transit Systems Security Act (NTSSA);
4. Safe Drinking Water Act (SDWA);
5. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA);
6. Clean Air Act (CAA); and
7. Pipeline Safety Improvement Act (PSIA).

(Nov. 4, 2014 Order, pp. 11).

On November 17, 2014, Complainant, who is *pro se*, filed Complainant's Response to Order to Consolidate Order of Dismissal in Part and Order to Show Cause. Complainant's 21-page response is at times incoherent and strays off the topic of the seven statutes that the Court specifically ordered the parties to address. Complainant alleges racketeering under RICO and refers to RICO whistleblower laws and refers to "AL-GOP" public employees as a RICO criminal enterprise that conspired against him. (Resp. to Ord., p. 3). He acknowledges his termination in April 2009 and asserts that in December 2009, he wrote state officials about RICO conduct. Complainant asserts that he has been subject to "a pattern of reprisal acts for refusing to participate in this RICO enterprise." *Id*. at p. 15.

Also in his response, Complainant discusses the "RICO 'racketeering' doctrine" and alleges violations of Fair Housing Act laws and equal access to water, gas and utility services. He accuses Respondent of pressuring law firms into not offering him legal assistance for his whistleblower claims. (Resp. to Ord., p. 6).

Regarding his arguments as to why the statute of limitations should be extended for his claims, Complainant presents three theories. (Resp. to Ord., pp. 7-15). First, Complainant asserts the "discovery rule" as being applicable in states such as Alabama under which the statute of limitations is tolled if the complaining party can show some fraud by the perpetrator prevented discovery of the cause of action. He also asserts the "fraudulent concealment theory" as being applicable if proven that the complainant was lulled into delaying the filing of a claim. Finally, Complainant asserts the doctrine of "equitable tolling" applies because he was kept in ignorance of vital information necessary to pursue his claims. As support for his assertion, the complainant cites *U.S. v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011) (tolling the statute of limitation for the recovery of assets seized during World War II); *Bodner v. Banque Paribas*, 114 F.Supp.2d 117 (E.D.N.Y. 2000) (tolling in class action for plaintiffs recovering assets seized in World War II);

Morgan v. National Railroad Passenger Corp., 232 F. 3d 1008 (9th Cir. 2000) (continuing violation in a Title VII claim); *Bazemore v. Friday*, 478 U.S. 385 (1986) ("[a] pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date…,").[2] (*Id*. at pp. 9-12). Complainant cited no case law regarding equitable tolling in employee whistleblower statutes within the jurisdiction of OSHA and/or OALJ.

Complainant attached four exhibits to the Response to the Order in support of his claims. Exhibits 1 and 2 consist of three unsigned EEOC Charge of Discrimination letters dated September 10, 2013, August 22, 2014, and November 10, 2014 and a fourth signed letter dated August 26, 2014. In the September 10, 2013 charge letter, Complainant described himself as a 56-year-old male who suffered continuous discrimination from October 1, 2004 to August 28, 2013 based on, among other reasons, "Pregnancy." (Resp. to Ord., EX-1). He alleges that he was wrongly discharged and "constantly denied" favorable references when applying for new jobs in state services and rehire rights, but he indicates neither specific jobs he applied for nor specific application dates. In the August 26, 2014 letter, Complainant alleges that "[s]ince about April 9, 2009 and continuing, the above named Employer has blacklisted employee Gregory Kelly in retaliation for his protected concerted activities…." (*Id*. at EX-2). Again, Complainant does not identify specific dates or specific acts of blacklisting by Respondent.

Exhibits 3 and 4 consist of letters from the State of Alabama's State Personnel Department dated October 8, 2014 and November 5, 2014. The October 8, 2014 letter states the following:

> It has come to our attention that on September 25, 2014, you submitted 29 applications to the State Personnel Department for various classifications and that these applications appear to contain false information. Specifically, you indicated that your reason for leaving the Alabama Power Company was due to downsizing. However, your personnel file indicates that you were terminated from the Alabama Power Company because you refused to follow your supervisor's instructions. You further indicated that your reason for separation from the Alabama Public Service Commission was that it was violating an array of Federal laws, and [you] refused to comply with wrongdoings. However, your personnel file indicates that you were separated from the Alabama Public Service Commission due to the falsification of your

[2] To the extent that Complainant may have also referred to *Bazemore* to refute dismissal for lack of jurisdiction in my Nov. 4, 2014 Order under statutes such as the FSMA and ACA, which did not exist during his term of employment with Respondent, Complainant's "continuing violations" and any theory do not apply since he was no longer an employee of Respondent when the statutes became effective, unlike the employees alleging employment discrimination under Title VII in *Bazemore*. See *Bazemore v. Friday*, 478 U.S. 385, 395 (1986). In complaints brought under the Department of Labor's employee whistleblower statutes, jurisdiction must exist on the date of the adverse action. *Gallagher v. Granada Entertainment USA*, slip op. at p. 1, 10, 2004-SOX-74 (Apr. 1, 2005); *Lerbs v. Buca de Beppo, Inc.*, 2004-SOX-8 (June 15, 2004). Also, while Title VII was not applicable to public employers until 1972, the Title VII statute itself existed for other employers since 1964, long before the start date of the period of alleged pay disparity in *Bazemore* (November 18, 1971). *Bazemore* at 405.

> application, disruptive and insubordinate conduct, and your use of abusive and threatening language.
>
> Furthermore, you also indicated on your applications that you have already graduated from Alabama State University; however, your transcript, which was attached, indicates that you have yet to graduate.

(Resp. to Ord., EX-3).

Because false information about Complainant's employment and education history was supplied on all 29 applications, Complainant was informed that he could be removed from any employment register for which he submitted State Personnel Department. (*Id.*).

The November 5, 2014 letter from the Alabama State Personnel Department states the following, in relevant part:

> You are aware of our expectation of truthful and correct information on applications submitted to SPD as you were removed from all State employment registers for a period of five years, which began on August 29, 2008, for falsifying information on your application. … Despite having certified that all statements in your application were truthful, including statements about your past employment history, it appears that false information was provided on the applications you recently submitted to SPD.
>
> Your continued wrongful actions are a serious offense to the Rules governing State employment. Thus, pursuant to the authority given the State Personnel Director, you are being removed from any and all employment registers with the State of Alabama for a period of five (5) years. (R.670-x-9-.013, State Personnel Board Rules). Further, you will not be placed on any employment register with the State of Alabama for a period of five years.

(Resp. to Ord., EX-4).

Claimant describes the procedural history of his employment and the content of the October 8, 2014 and November 5, 2014 letters, in relevant part, as follows:

> On or about April 14, 2009, by and thought [sic] his lawyer, the Complainant Kelly denied these 'wholesale' lies peppered and oiled on Complainant Kelly termination letter and on numerous occasions Complainant Kelly demanded that these RICO associates prove and show 'stick proof' thereof by (1) signed affidavit(s), (2) sworn statements or (3) other on legal declarations with the penalty of perjury to support these lies blacklisting listed

> [sic] their termination letter and a letter dated on or about October 8, 2014 tendered to Complainant Kelly. ("See Exhibit #3")
>
> ***
>
> Again on or about November 5 of 2014, Complainant Kelly was notified by mailings by one of the Respondent and in these mailings Complainant Kelly was notified by a RICO Associate and that this state agent [sic] were seeking additional penalties and sanctions against Complainant Kelly for disclosing information to federal and state officials such as EEOC, NLRB, OSHA/EPA concerning RICO ("racketeering") activities and other discrete, ongoing, and pervasive discrimination and reprisal acts under federal whistleblowers laws. ("See Exhibit 4").

(Resp. to Ord., pp. 3-4).

On November 18, 2014, Respondent filed Respondent's Brief and Motion to Dismiss under the summary disposition provisions of 29 C.F.R §§ 18.40 and 18.41. Alternatively, Respondent seeks to dismiss under Federal Rule of Civil Procedure 12(b)(6). Respondent, a state governmental unit, stated that it hired Complainant on July 13, 2001, and his employment was terminated on April 9, 2009. (Resp. Br. and Mtn., p. 4; EX-1 (Garner Aff., ¶¶ 5-6)). Respondent then listed each of the seven statutes remaining in this matter and the corresponding time allowed to file a whistleblower complaint under each statute. (*Id*. at pp. 2-4). Five of the relevant statutory provisions (CAA, CERCLA, FWCPA, SDWA, and SWDA) require a complainant to file a claim within 30 days of the adverse action. The PSIA and NTSSA statutes allow 180 days after the violation for a complainant to file a complaint. Since Complainant's complaints were filed with OSHA in the instant cases between June and August 2014, approximately five years after the applicable limitations periods, Complainants complaints are untimely.

In addition, Respondent included evidence of a phone call made to OSHA that appears to have occurred in 2011. In the written correspondence from OSHA to Complainant dated February 7, 2011, the OSHA representative acknowledges a phone conversation where Complainant was informed of the whistleblower statutes that are under OSHA's jurisdiction. (Resp. Br. and Mtn., EX-2). The correspondence notes that Complainant's alleged adverse action occurred more than 180 days prior to Complainant contacting OSHA. The letter informs Complainant that OSHA is "not opening any type of case as there are no whistleblower statutes in our jurisdiction that are applicable to your situation." (*Id*.). Thus, Respondent adds, even if Complainant is able to show that he "filed" a complaint on February 7, 2011, more than 180 days passed between the alleged violation and the filing of the Complaint, and it should be dismissed as untimely.

On November 24, 2014, Complainant filed his Response to Respondents' Motion to Dismiss (hereinafter Com. Resp. to Mtn.) In the Response, Claimant again alleges that he and other non-white citizens and individuals in mostly non-white communities have been subject to

widespread discrimination and reprisal acts by the Respondents and their "RICO Associates," including other state employees. (Com. Resp. to Mtn., pp. 4-7). Like the initial complaints and responses Complaint has filed throughout this matter, the Response to the Motion is conclusory, has insufficient arguments, is incoherent at times, makes general accusations under general theories, and discusses other laws not within the OALJ's jurisdiction. He includes as exhibits evidence of his sleep apnea, a letter from the State of Alabama Office of Attorney General from September 10, 2009 seeking arrangements for Complainant to pay $6,952.79 in court costs owed to the Commission, as ordered by the United States District Court, for *Kelly v. Free, et al.*, No. 2:07-cv-610-WHA; and, again, the November 5, 2014 letter from the State of Alabama Personnel Department. (Com. Resp. to Mtn., EX-2-5).

Regarding blacklisting, Complainant asserts that he was denied job references for employment searches on or about November 24, 2009 due to his alleged protected activities, and includes a series of exchanges with the Office of Federal Contract Compliance Programs (OFCCP) from on or about from December 28, 2010 to February 4, 2011 in support of this contention. However, the text of the letters state Complainant was informed that since his allegations were not timely filed, OFCCP had closed any further processing of his complaint. (Com. Resp. to Mtn., EX-1). In addition, it was determined that no jurisdiction existed because OFCCP has jurisdiction over federal contractors and not over federal grant programs, and OFCCP was unable to locate any federal contracts or subcontracts held by the Alabama Public Service Commission in Montgomery, Alabama. (*Id*. at EX-1 [Feb. 4, 2011 Ltr.]). Also, Complainant had filed a complaint with the Equal Employment Opportunity Commission (EEOC), making his complaint with OFCCP to be considered as "dual" and thus unable to be processed. (*Id*. at EX-1 [Jan. 18, 2011 Ltr.]).

On December 5, 2014, the Administrative Review Board issued an Order of Case Closing in *Kelly v. Ala. Pub. Serv. Comm'n.,* ARB No. 15-0006, ALJ No. 2014-AIR-18 (Dec. 5, 2014). In the Order of Case Closing, the ARB noted that it received multiple copies of Complainant's Response to Order to Dismiss, but that it was unclear why Complainant sent them to the to ARB. (Ord. of Closing, p. 2). The ARB issued an order on November 4, 2014, stating that if Complainant intended to file a Petition for Review with the ARB, he had 10 business days to file a petition that complied with 29 C.F.R. § 110(a) and 29 C.F.R. 1982.110(a). (*Id*.). Since he failed to file a proper Petition for Review with the Board as ordered, his case was closed. (*Id*.).

On January 14, 2015, the undersigned contacted the ARB regarding whether an appeal was filed in 2014-CAA-4 & 2014-PSI-2, the consolidated cases before ALJ Sellers. The ARB indicated that no appeal had been filed in either case.

II. DISCUSSION

A. Res Judicata

Once an administrative law judge renders a decision, the Complainant may request review by the ARB within the designated period under the whistleblower statute. If no appeal is filed, the decision of the ALJ becomes final. Again, Complainant has filed complaints under all

19 whistleblower statutes under the OALJ's jurisdiction, all involving his employment with Respondent and termination on April 9, 2009. There have been two final decisions dismissing the claims as untimely, one dismissing the claim for lack of jurisdiction, and two orders of dismissal prior to the final decision where the ALJ determined, *sua sponte*, that no jurisdiction existed.

Collateral estoppel/res judicata is not available where a prior ALJ decision is pending ARB review. *See Parker v. Stone & Webster*, 2000-ERA-2 (ALJ Dec. 22, 1999) (finding that collateral estoppel could not apply because the first ALJ's recommended decision was still pending on review by the ARB, and therefore there is, as yet, no final decision in that first matter) and *Coupar v. Federal Bureau of Prisons***,** 92-TSC-12 (ALJ May 13, 1994), (holding that the principles of res judicata and collateral estoppel do not apply to the prior decisions of ALJs when the Secretary had not yet issued a final order).

The mandatory period for filing a petition for review with the ARB under each whistleblower statute is as follows:

- **CAA, CERCLA, ERA, FWPCA, SDWA, SWDA,** and **TSCA** – within 10 business days of the date of the ALJ's decision (29 C.F.R. §§ 20.109(e), 20.110(a)
- **ACA** – within 14 days of the date of the ALJ's decision (29 C.F.R. §§ 1984.109(e), 1984.110(a)
- **AIR** – within 10 business days of the date of the ALJ's decision (29 C.F.R. §§ 1979.109(c), 1979.110(a)
- **CFPA** – within 14 days of the date of the ALJ's decision (29 C.F.R. §§ 1985.109(e), 1985.110(a)
- **CPSIA** and MAP-21[3] – within 14 days of the date of the ALJ's decision (29 C.F.R. §§ 1983.109(e), 1983.110(a)
- **FRSA** and **NTSAA** – within 10 business days of the date of the ALJ's decision (29 C.F.R. §§ 1982.109(e), 1982.110(a)
- **FSMA**– within 14 days of the date of the ALJ's decision (29 C.F.R. §§ 1987.109(e), 1987.110(a)
- **PSIA** – within 10 business days of the date of the ALJ's decision (29 C.F.R. §§ 1981.109(c), 1981.110(a)
- **SOX** – within 10 business days of the date of the ALJ's decision (29 C.F.R. §§ 1980.109(e), 1980.110(a)
- **SPA** – within 14 days of the date of the ALJ's decision (29 C.F.R. §§ 1986.109(e), 1986.110(a)
- **STAA** – within 14 days of the date of the ALJ's decision (29 C.F.R. §§ 1978.109(e), 1978.110(a)

[3] See *The Whistleblower Protection Programs - Regulations*, Occupation Safety and Health Administration, *available at:* http://www.whistleblowers.gov/regulations_page.html. (last visited Dec. 24, 2014). Until procedural regulations are published for the handling of retaliation complaints under MAP-21, OSHA will also follow the procedures in 29 CFR Part 1983 (Procedures for the Handling of Retaliation Complaints under Section 219 of the Consumer Product Safety Improvement Act of 2008). *Id*.

Complainant's SOX complaints have long since been dismissed by both the undersigned and ALJ Purcell. I previously dismissed Complainant's SOX claim involving the very same set of facts in *Kelly v. State of Ala. – Pub. Serv. Comm'n*, ALJ No. 2014-SOX-30 on July 7, 2014 for failure to state a claim upon which SOX relief can be granted, and in the Nov. 4, 2014 Order, I dismissed the SOX claim again under the doctrine of res judicata.[4] Complainant's complaints under SOX were also dismissed by ALJ Purcell in his July 15, 2014 Order of Dismissal and Order to Show Cause issued in *Kelly*, 2014-AIR-18.

The ARB's Order of Case Closing on December 5, 2014, which followed ALJ Purcell's Order of Dismissal in *Kelly*, 2014-AIR-18, closed Complainant's claims under six statutes where jurisdiction existed, including five environmental statutes and the NTSAA that have been raised here involving the same set of facts and circumstances of his employment with and termination from the Commission. On October 23, 2014, ALJ Sellers issued an Order of Dismissal in *Kelly*, 2014-CAA-4 for complaints under the CAA and PSIA, and, according to the ARB, no appeal was filed, making the ALJ's decision a final one. *See, e.g.*, 29 C.F.R. §1980.109 and DISCUSSION, *supra*, p. 7. Consequently, the doctrine of res judicata is available, and *Parker* and *Coupar* do not apply. Thus, Complainant's remaining claims for relief under CAA, CERCLA, FWCPA, SDWA, SWDA, PSIA, and NTSAA in the three consolidated cases before me are hereby **DISMISSED** under the doctrine of res judicata.

B. Summary Decision and Dismissal for Failure to State a Claim

Respondent has moved to dismiss the pending claims under the summary disposition provisions of the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, found at 29 C.F.R. §§ 18.40, 18.41. In the alternative, Respondent seeks dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The standards for summary decision/summary judgment, dismissal for failure to state a claim upon which relief can be granted, and dismissal of a complaint for untimeliness were previously identified by the undersigned and ALJ Purcell in *Kelly*, 2014-SOX-30 and *Kelly*, 2014-AIR-18, respectively. *See also* 29 C.F.R. §§ 18.40 and 18.41; Fed. R. Civ. P. 12 and 56. For the purpose of the consolidated cases involving the same Complainant, the same set of facts and circumstances and the same Respondent, I will identify the standards again in the event someone decides that the doctrine of res judicata does not apply.

1. Standard for Summary Decision

The standard for granting summary judgment or decision is set forth at 29 C.F.R. § 18.40(d) (2008), which is derived from Federal Rules of Civil Procedure (FRCP) 56. Section 18.40(d) permits an Administrative Law Judge to enter summary judgment for either party "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show there is no genuine issues as to any material fact and that a party is entitled to summary decision." If the moving party meets the initial burden of showing no genuine issue of material fact the burden shifts to the non-moving party to produce evidence or designate facts

[4] Complainant included 2014-SOX-30 in his Response to the Nov. 4, 2014 Order. This case, decided July 7, 2014, has long been considered a final decision. 29 C.F.R. §1980.109(e).

showing the existence of genuine issue(s) for trial with doubts and reasonable inferences resolved in favor of the non-moving party. *Reves v. Sanderson Plumbing Products Inc.*, 120 S. Ct. 2097, 2110 (2000); *Matsushita Elec. Indus. Co. Ltd., v. Zenith Radio Corp*., 475 U.S. 574 587 (1986). *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 278 (5th Cir. 2004). An issue is material if the allegations are such as to constitute a legal defense or are of such nature as to affect the result of the action. A fact is material and precludes a grant of a summary decision if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or a defense asserted by the parties. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Section 18.40(c) provides that when a motion for summary judgment or decision is made and supported by appropriate evidence, the non-movant or party opposing the motion may not rest upon mere allegations or denials of such pleading, but must set forth specific factors showing there is a genuine issue of material facts. As the Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) the non-movant must present affirmative evidence in order to defeat a properly supported motion for summary judgment, even where the evidence is within the possession of the moving party, as long as the non-movant had a full opportunity to conduct discovery. In reviewing a request for summary decision, all evidence and inferences must be viewed in the light most favorable to the nonmoving party. *Id.* at 262.

The movant has the burden of production to prove that the non-movant cannot make a showing sufficient to establish an essential element of the case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met its burden of production, the non-movant must show by evidence beyond the pleadings themselves that there is a genuine issue of material fact. *Id.* at 324. The non-movant's evidence, if accepted as true, must support a rational inference that the substantive evidentiary burden of proof could be met. Where the non-movant presents admissible direct evidence such as affidavits, answers to interrogatories or depositions, the judge must accept the truth of the evidence set forth without making credibility or plausibility determinations. *T.W. Electric Service v. Pacific Electric Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). If the non-movant fails to sufficiently show an essential element of his case, there can be "'no genuine issue as to any material fact,' entitling the movant is entitled to summary judgment, since a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial." *Id.* at 322-323; *Celotex Corp.*, 477 U.S. at 322-323.

The ALJ cannot summarily try the facts. Rather, the ALJ must apply the law to the facts that have been established by the parties. *See 10 A. Wright and Miller, Federal Practice and Procedure*, § 2725, at 104 (1983). A motion cannot be granted merely because the movant's position appears more plausible or because the opponent is not likely to prevail at trial. *Id*. at 104-5. In short, the trier of fact has no discretion to resolve factual disputes on a summary decision motion. *Id*. at § 2728, at 186. Accordingly, "if the evidence presented on the motion is subject to conflicting interpretations, or reasonable men might differ on its significance, summary judgment is improper." *Id*. § 2725, at 106, 109. Once it is determined that a triable issue exists, the inquiry is at an end, and summary decision must be denied. *Id*. at 187.

2. Standard for Motion to Dismiss under Rule 12(b)(6)

Although 29 C.F.R. Part 18, the Rules of Practice and Procedure for Administrative Hearings, does not contain a section pertaining to such a motion to dismiss, 29 C.F.R. § 18.1(a) indicates that in situations not addressed in Part 18, the Federal Rules of Civil Procedure are applicable. In the alternative, Respondent seeks to dismiss the case through Rule 12(b)(6) regarding the failure to state a claim upon which relief can be granted. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant can prove no set of essential facts in support of the complaint which would entitle the complainant to the relief sought. *Conley v Gibson*, 355 U.S. 41 (1957); *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1056–57 (11th Cir. 2007).

Unlike a motion for summary decision filed after discovery, a facial challenge of a complaint under a whistleblower claim through a Rule 12(b)(6) motion points to a missing essential element (no protected activity or adverse action) or a legal bar to the claim (e.g., sovereign immunity, lack of coverage over the respondent, the statute of limitations). *Evans v. U.S. Environmental Protection Agency*, ARB Case No. 08-059, ALJ Case No. 2008-CAA-3, slip op. at p. 10 (ARB July 31, 2012). A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the complaint, not the merits of the case. *Id*.

I will address the timeliness of the two types of adverse actions alleged by Complainant: his termination from on April 9, 2009 and the various, unspecified acts of blacklisting which he alleges occurred and continued for years after his termination.

Timeliness of Complainant's Claim based on his Employment Termination as an Adverse Action

As noted in my Nov. 4, 2014 Order, five of the remaining statutes at issue in this matter, CAA, CERCLA, FWCPA, SDWA and SWDA, require the filing of a complaint within thirty days after the alleged violation occurs. 29 C.F.R. §24.103(d); 42 U.S.C. § 7622(b)(1); 42 U.S.C. § 9610(b); 33 U.S.C. § 1367; 42 U.S.C. § 300j-9(i)(2)(A); 42 US.C. § 6971. The two remaining statutes at issue, PSIA and NTSSA, require that a whistleblower complaint be filed within 180 days of the occurrence of the alleged violation. 29 C.F.R. § 1981.103(d); 29 C.F.R. §1982.103(d); 42 U.S.C. § 60129(b); 6 U.S.C. § 1142. According to Complainant, these statutes were violated when he was fired by the Alabama PSC on April 9, 2009. Thus, at the latest, Complainant would have had to file his environmental complaints on or before May 9, 2009 and his PSIA and NTSSA complaints on or before October 6, 2009. However, Complainant's complaints in these cases were filed with OSHA on June 18, 2014; July 3 and July 7, 2014; August 4, August 6, and August 8, 2014. These complaints were filed approximately five years after the applicable statutes of limitations had run in each statute. Accordingly, Complainant's claims alleging that he was terminated from employment in retaliation for his alleged protected activities must be dismissed as untimely, unless Complainant establishes that he was entitled to equitable tolling.

Applicable Standards for Excusing Untimeliness and Finding a Statute of Limitations Tolled

Whistleblower statutes of limitations are not jurisdictional, but are subject to equitable modification, *i.e.*, equitable tolling and equitable estoppel. However, in order to justify the tolling of an applicable statute of limitations, a petitioner must act diligently, and it is his burden to show that the untimeliness of the filing is the result of circumstances beyond his control. *Reid v. Boeing Corp.*, ARB No. 10-110, ALJ No. 2009-SOX-27, at 2 (ARB Mar. 30, 2013); *Jose Romero v. Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-21, at 2 (ARB Sept. 30, 2010), *accord Wilson v. Secy. Dept. of Veteran Affairs*, 65 F.3d. 402, 404 (5th Cir. 1995) (ruling on a Title VII claim), quoting *Irwin v. Dept. of Veteran Affairs*, 498 U.S. 89, 96 (1990).

The Administrative Review Board (ARB) has specifically adopted equitable modification in environmental whistleblower cases, *see. e.g., Kelly v. U.S. Enrichment Co.*, ARB No. 13-063, ALJ No. 2012-ERA-15 (ARB Aug. 9, 2013), and relied on *School District of Allentown v. Marshall*, 657 F. 2d 16 (3rd Cir. 1981) for guidance. *Marshall* sets out three principal situations in which equitable tolling may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; and (3) when the plaintiff has raised the precise statutory claim at issue but done so in the wrong forum. *Id*. at 20. The ARB, like the Circuit Courts, has recognized that equitable tolling is an extraordinary remedy which is "'typically applied sparingly.'" *Romero*, ARB No. 10-095, at 4, citing *Drew v. Dept. of Correction*, 297 F. 3d 1298, 1286-87 (11th Cir. 2002). "Extraordinary circumstances" is a high standard. *Kelly*, ARB No. 13-063, at 2; *see, e.g., Stoll v. Runyon*, 165 F. 3d 1238, 1242 (9th Cir. 1999) (requiring "complete psychiatric disability" to cover the entirety of limitations period rendering the party "unable to read, open mail, [and] function in society"). Moreover, even where tolling may apply, a claimant must show that he exercised "due diligence in preserving his legal rights" and must still file within a reasonable time period. Equitable modification periods do not run indefinitely. *Daryanani v. Royal & Sun Alliance*, ARB No. 08-106, ALJ No. 2007-SOX-79, at 5 (ARB May 27, 2010), *citing Wilson*, 65 F.3d. at 404 and *Irwin v. Dept. of Veteran Affairs*, 498 U.S. at 96.

As noted previously by the undersigned, ALJ Sellers, and ALJ Purcell, Complainant is *pro se*. The ARB has stated that Administrative Law Judges must "construe complaints and papers filed by *pro se* complainants 'liberally in deference to their lack of training in the law' and with a degree of adjudicative latitude." *Wyatt v. Hunt Transport*, ARB No, 11-039, ALJ No. 2010-STA-69, slip op. at 2 (ARB Sept. 21, 2012), *quoting Trachman v. Orkin Exterminating Co. Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-3, slip op. at 6 (ARB Apr. 25, 2003); *Kelly*, 2014-AIR-18. Like he asserted in his cases before ALJ Purcell and ALJ Sellers, Complainant stated that each statute of limitation should be tolled because he was actively misled by Respondent as to his whistleblower rights, and because of his "array of disabilities." (Compl. in 2014-SDW-2, p. 8). He also reasoned that equitable tolling applies because he mistakenly filed his claims with the other government agencies. *Id*.

In my Nov. 4, 2014 Order, I directed Complainant Kelly to file briefs and/or evidence addressing the question of whether Complainants complaints under the SDWA, FWCPA,

SWDA, CAA, CERCLA, PSIA and NTSSA whistleblower statutes should be dismissed. Nothing in the record before me, including Complainant's submissions viewed liberally, suggests that the Commission actively misled Complainant as to his cause of action or that he timely raised these precise claims but did so in the wrong forum, or that he has "in some extraordinary way been prevented from filing his action" as defined in *Marshall*.

Claimant has noted the presence of disabilities in several filings, which he alleges are the result of Respondent's "ongoing acts of harassment, terrorism, and threats of serious injuries." (Resp. to Ord., p. 14). However, Complainant has not only failed to show specific instances of such acts, but he has not shown how the disabilities prevented him from asserting his legal rights. *See, e.g., Stoll v. Runyon, supra*, 165 F. 3d at 1242 (requiring "complete psychiatric disability" to cover the entirety of limitations period rendering the party "unable to read, open mail, [and] function in society"); *Kelly*, 2014-CAA-4, slip op. at pp. 2-3. Complainant has demonstrated an ability to contact federal agencies by telephone and submit written complaints since at least December 2010 (Com. Resp. to Mtn., EX-1); *Kelly*, 2014-AIR-18, slip op. at p. 6 ("Complainant's voluminous pleadings in this and other matters similarly support the conclusion that Kelly retains the ability to conduct his personal business, *i.e.* to file complaints and to articulate his position before this and other administrative bodies."). Furthermore, since at least February 2011, Complainant was in contact with OSHA regarding whistleblower protection for his alleged protected activities and alleged retaliation by Respondent; he was told by OSHA representatives that no whistleblower statutes applied to his situation and, even if they did, his claims were untimely. (Resp. Mtn. to Dis., EX-2); *Kelly*, 2014-AIR-18). More recently, the ARB clearly held that, absent extraordinary events preventing a claimant from asserting his rights, tolling the statute of limitations is improper. *Woods v. Boeing-South Carolina*, ARB No. 11-067, 2011-AIR-9, at 2-3 (ARB Dec. 10, 2012) (hereinafter *Woods I*); *Kelly*, 2014-AIR-18. Accordingly, I do not find that Complainant was so disabled that he was unable to manage his affairs or to understand and act upon his legal rights.

Based on the foregoing, I find that Complainant has failed to present probative evidence of the extraordinary circumstances required for tolling the applicable statutes of limitations in this case. I find that Respondent's termination of Complainant's employment on April 9, 2009 was a discrete actionable act that extinguished the employer-employee relationship, and Complainant was thus required to file his environmental whistleblower complaints on or before May 9, 2009 and his NTSSA complaint on or before October 6, 2009. Having failed to do so, I hereby **DISMISS** his complaint in this matter as untimely.

Timeliness of Complainant's Claim based on Blacklisting as an Adverse Action

Complainant has asserted that Respondent retaliated against him by blacklisting him from future employment.

The regulation at 29 C.F.R. § 24.2(b) specifically mentions blacklisting as a violation of the employee protection provisions of the six environmental statutes (CAA, CERCLA, FWCPA, TSCA, SDWA, SWDA) and the Energy Reorganization Act (ERA). Blacklisting is also a named violation in the PSIA (29 C.F.R. § 1981.102(b)) and NTSAA (29 C.F.R. § 1982.102(a)(1)).

In *Pickett v. Tennessee Valley Authority*, ARB Nos. 02-056 and 02-059, ALJ No. 2001-CAA-18, slip op. at 8-9, (ARB Nov. 28, 2003), the ARB described the definition of blacklisting:

> A blacklist is defined as a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate. *Leveille v. New York Air National Guar*d, Case No. 94-TSC-3, slip op. at 18-19 (Sec'y Dec. 11, 1995); *see Black's Law Dictionary* 154 (5th ed. 1979). …
>
> A blacklisting may also arise "out of any understanding by which the name or identity of a person is communicated between two or more employers in order to prevent the worker from engaging in employment." 48 Am. Jur. 2d, *Labor and Labor Relations* § 669 (2002). Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. *Barlow v. U.S.*, 51 Fed.Cl. 380, 395 (2002) (citation omitted).
>
> Blacklisting assumes that an employer covertly follows a practice of discrimination. *Black's Law Dictionary* 163 (7th ed. 1999) ("to put the name of (a person) on a list of those who are to be boycotted or punished"). …
>
> However, in *Odom v. Anchor Lithkemko*, Case No. 96-WPC-1, slip op. at 13 (ARB Oct. 10, 1997), the ARB emphasized that an employer is not prohibited from providing a negative reference simply because an employee has filed a whistleblower complaint. To be discriminatory, the communication must be motivated at least in part by the protected activity. …
>
> In addition, blacklisting requires an objective action; there must be evidence that a specific act of blacklisting occurred. *See Howard v. Tennessee Valley Authority*, Case No. 90-ERA-24 (Sec'y July 3, 1991), *aff'd sub nom., Howard v. U.S. Dept. of Labor*, 959 F.2d 234 (6th Cir. 1992) (table). Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place. *See Bausemer v. Texas Utilities Electric*, Case No. 91-ERA-20, slip op. at 8 (Sec'y Oct. 31, 1995) (an employer's letters to contractors requesting notice of any discrimination cases filed against them did not constitute blacklisting of complainant).
>
> Under *Smith v. Tennessee Valley Authority*, Case No. 90-ERA-12, slip op. at 4 (Sec'y Apr. 30, 1992), an allegation of blacklisting

> must include some form of detriment to the complainant. Thus, there must be some objectively manifest personnel or other injurious employment related action by the employer against the employee, proved directly or circumstantially, to support a claim of illegal action under the statute. *McDaniel v. Mead Corp.*, 622 F. Supp. 351, 358 (W.D. Va. 1985), *aff'd*, 818 F.2d 861 (4th Cir. 1987) (table).

See also Woods v. Boeing-South Carolina, ARB No. 13-035, ALJ No. 2011-AIR-9, slip op. at p. 3; fn. 7 (Mar. 20, 2014) (hereinafter *Woods II*).

In *Bryant v. Ebasco Services, Inc.*, 88-ERA-31 (Sec'y Apr. 21, 1994), the respondent, while conducting discovery regarding the complainant's second ERA complaint, determined that the complainant had misrepresented his educational qualifications when obtaining his job originally.[5] The Secretary found that the respondent proffered legitimate reasons for not rehiring the complainant, which had not been shown to be pretext, and that under the dual motive analysis, the respondent showed that it would not have rehired Complainant, even in the absence of the protected activity.[6] Although the complainant made out a prima facie case of blacklisting, the Secretary found that the blacklisting did not violate the ERA because Respondent presented credible testimony that the "bad paper" rumors referred to Complainant's lack of educational qualifications, and no blacklisting occurred prior to its discovery of the misrepresentation.[7]

Complainant has alleged blacklisting but provides few specific instances. The first indication of blacklisting presented by Complainant is by way of a letter alleging that he was denied job references for employment searches on or about November 24, 2009 due to his protected activities, and includes a series of exchanges with the OFCCP from on or about December 28, 2010 to February 4, 2011 in support of this contention. Again, the text of the letters state Complainant was informed that since his allegations were not timely filed, OFCCP had closed any further processing of his complaint. Complainant would have had until December 24, 2009 to file a complaint for blacklisting under the environmental statutes and ERA and until May 24, 2010 to file under the PSIA and NTSSA statutes.

Complainant has also presented a letter from the SPD dated November 5, 2014 as evidence that his claims in the current three cases before the undersigned are timely and actionable. The letter references how the SPD removed Complainant from all state employment registers for a period of five years, which began August 29, 2008, for "falsifying information" on his application. (Comp. Resp. to Ord., EX-4). To date, Complainant has not presented this specific act and specific date as evidence of blacklisting. This date was located only after this Court's review of all documents spanning three cases. Thus, it is insufficiently pled as an instance of blacklisting for the purposes of these cases.

---

[5] *See* Nuclear & Environmental Whistleblower Digest XIII.B.1, *available at* http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/REFERENCE_WORKS/EDIG13.HTM#13B 1 (last visited Jan. 15, 2015).
[6] *Id*.
[7] *Id*.

Still, even viewing the evidence in the most favorable light and considering the SPD's admission that it removed Complainant from its employment registers for five years, the five-year period of the SPD's blacklisting would have ended on August 29, 2013. The latest date for Complainant to file a complaint under the environmental statutes at issue was September 30, 2013.[8] The latest date for Complainant to file a complaint under the PSIA and NTSSA was February 25, 2014. Complainant filed the three complaints in this matter on June 18, 2014; July 3 and July 7, 2014; and August 4, August 6, and August 8, 2014. Thus, the complaints are untimely.

The November 5, 2014 letter from the Alabama SPD also states that because of Complainant's "continued wrongful actions," he is "***being removed*** from any and all employment registers in the State of Alabama" (emphasis added) and he "will not be placed on any employment register with the State of Alabama for five years. *Id*. However, this letter is dated November 5, 2014. The time for filing a complaint alleging retaliation, including blacklisting, under the five environmental statutes at issue (CAA, CERCLA, FWPCA, SDWA, and SWDA) is "within 30 days *after* an alleged violation of any of the statutes listed in §24.100(a)." 29 C.F.R. § 24.103(d). (emphasis added). The time for filing a complaint alleging retaliation under the PSIA and NTSAA is "[w]ithin 180 days *after* an alleged violation" occurs (*i.e.*, when the discriminatory decision has been both made and communicated to the complainant (emphasis added)." 29 C.F.R. § 1981.103(d); 29 C.F.R. § 1982.103(d). Complainant's complaints in these three cases were filed June 18, 2014; July 3 and July 7, 2014; and August 4, August 6, and August 8, 2014. Complainant has the burden of proving discriminatory acts occurred in the 30 days and 180 days, respectively, *prior* to filing the complaint. Since the letter from the SPD is dated November 5, 2014, and the SPD indicates that it is removing Complainant from the employment registers for five years *forward* from November 5, 2014, Complainant's use of this letter as evidence of blacklisting for the complaints in the instant three cases before the undersigned is improper.

Furthermore, Complainant has represented to the undersigned (and ALJ Purcell) that being declared disabled by the Social Security Administration is a reason why the statute of limitations for filing his complaint should be tolled. An application for Social Security benefits inherently represents the understanding that one cannot perform any work due to disability.[9] Thus, Complainant has not demonstrated how Respondent's alleged blacklisting prevented him from obtaining employment, when informed the Social Security Administration that he could not work at all due to his disabilities.

Applicability of the "Continuing Violation Doctrine" as Extending the Time Period for Filing a Complaint

[8] The 30th day was September 28, 2013. However, since that day was a Saturday, Complainant had until the next business day, Monday, September 30, 2013, to file a complaint. 29 C.F.R. § 18.4(a).
[9] 42 U.S.C. §§ 416(i), 423(d).

Although his complaints and responses are at times incoherent and difficult to follow, Complainant has consistently asserted a theory of a "continuing violation" as reason to toll the statute of limitations on his claims. In essence, each time Respondent allegedly failed to rehire him or failed to provide a job reference, it represented a separate actionable unlawful employment practice; at the same time, however, complainant asserts that the continuing violations doctrine tolls the statute of limitations for these alleged acts. Also, Complainant cited the Supreme Court in *Morgan* in support of his theory.

The ARB's recent decision in *Woods v. Boeing-South Carolina*, ARB Case No. 13-035, ALJ No. 2011-AIR-009 (Mar. 20, 2014) (*Woods II*) is instructive in this regard. According to the ARB,

> [a] continuing violation is not strictly speaking a ground for tolling. Instead, a continuing violation forestalls the commencement of the limitations period for as long as the continuing violation is ongoing. *Garn v. Benchmark Techs.*, No. 1988-ERA-021, slip op. at 7 (Sec'y Sept. 25, 1990). Further, the retaliatory acts of discharge and blacklisting in this case are separate and discrete acts, which cannot be considered together as constituting one continuing violation. The relevant cases have generally held that the doctrine of continuing violation does not apply to acts such as discharge, which is a completed, immediate violation.

Id. at p. 4.

Also in *Woods II*, the ARB discussed *Morgan* as being relevant to the question of whether a blacklisting complaint could extend the filing period for a termination complaint. *Woods II*, ARB No. 13-035, pp. 3-4. But the ARB held that such activity could not extend the limitations for discrete acts because the limitations period for discrete acts, like termination, begins when the act occurs and is communicated to the employee. However, the complainant, Woods, "appear[ed] fixated on the question of whether allegations of blacklisting can toll the limitations period for his termination complaint. In any event, …Woods failed to point to any admissible evidence that he filed a complaint for blacklisting." *Id*.

The ARB's analysis of *Morgan* and its decision in *Woods II* is analogous to this case. Complainant has asserted a "continuing violation" theory as reason for extending the period for filing his whistleblower complaint regarding his termination. Yet even construing the 2011 letter which referenced a phone conversation with OSHA as evidence a whistleblower complaint was "filed," there was no mention of blacklisting in that discussion. The OSHA representative determined that the unnamed alleged adverse action, whether it was Complainant's termination or an allegation of blacklisting, occurred more than 180 days prior to Complainant contacting OSHA. The acts are separate, and are not one "continuing" discriminatory act. Similar to *Woods II*, Complainant has failed to point to any admissible evidence that he filed a whistleblower complaint for blacklisting or any other discriminatory act within the 30-day or 180-day period in which the alleged act or acts occurred under the respective statutes.

Likewise, Complainant has not described specific details, such as an objective action or form of detriment in his employment prospects that specifically resulted from alleged blacklisting. *See generally Pickett*, ARB Nos. 02-056 and 02-059 (citations omitted). Complainant has, in the context of the three current cases before the undersigned, made only general assertions about what he believes is blacklisting. He states that he was "constantly denied favorable references when applying for new jobs and re-hire rights" for over a decade, but has not indicated specific instances of blacklisting during the period at issue in the three instant cases, let alone filed a timely complaint for those instances. As stated in *Pickett*, "[s]ubjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place." (citing *Bausemer v. Texas Utilities Electric*, Case No. 91-ERA-20, slip op. at 8 (Sec'y Oct. 31, 1995)); *see also* DISCUSSION, *supra*, pp. 11-12.

C. Conclusion

After a careful review of the entire record, including Complainant's Response to Order to Consolidate Order of Dismissal in Part and Order to Show Cause received November 17, 2014, Response to Respondents' Motion to Dismiss received November 24, 2014, and the remaining facts alleged in his numerous filings, I conclude that his complaints are untimely, and the evidence does not support Complainant's argument that his theories which of "equitable tolling," "discovery rule," "fraudulent concealment," or "continuing violations" apply to this case to extend the time for filing. I also conclude that while Complainant has broadly alleged blacklisting and identified just two instances (one in November 2009 and one in November 2014), he has still not met the burden of proving that a timely whistleblower complaint was filed in the instant cases.

III. ORDER

Based on the foregoing:

IT IS HEREBY ORDERED that Complainant's claims under SDWA, FWCPA, SWDA, CAA, CERCLA, PSIA, and NTSSA against Respondent as contained in 2014-SOX-42, 2014-SDW-2, and 2014-ACA-3 are **DISMISSED** because the ARB issued an Order of Closing on the same set of facts and circumstances in *Kelly*, 2014-AIR-18 on December 5, 2014, and the time for appeal in 2014-CAA-4, which was consolidated with a claim under the PSIA (2014-PSI-2) has expired, and thus res judicata applies to the instant complaints.

IT IS HEREBY ORDERED that Respondent's Motion to Dismiss is **GRANTED**, and Complainant's claims under SDWA, FWCPA, SWDA, CAA, CERCLA, PSIA, and NTSSA against Respondent as contained in 2014-SOX-42, 2014-SDW-2, and 2014-ACA-3 for his termination and alleged blacklisting are **DISMISSED** as being untimely.

With this Order, my Nov. 4, 2014 Order, my Order in 2014-SOX-30, previous orders issued by ALJ Purcell in 2014-AIR-18 and ALJ Sellers in 2014-CAA-4 (consol. 2014-PSI-2), Complainant's complaints brought under all 19 statutes within the OALJ's jurisdiction (ACA,

AIR 21, CAA, CERCLA, CFPA, CPSIA, ERA, FRSA, FSMA, FWCPA, MAP-21, NTSSA, PSIA, SDWA, SOX, SPA, STAA, SWDA, and TSCA) have been dismissed for lack of jurisdiction, failure to state a claim upon which relief can be granted, and/or untimeliness.

SO ORDERED this 15th day of January, 2015, in Covington, Louisiana.

Digitally signed by Clement Kennington
DN: CN=Clement Kennington,
OU=Administrative Law Judge, O=Office
of Administrative Law Judges,
L=Covington, S=LA, C=US
Location: Covington LA

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1980.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1980.109(e) and 1980.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 1980.110(b).