



Issue Date: 12 January 2017

Case No.: 2016-NTS-00005

In the Matter

WILLIE IRVING WASHINGTON, SR.
Complainant

v.

MTA NEW YORK CITY TRANSIT
Respondent

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

This matter arises out of a complaint filed pursuant to the employee protection provisions of the National Transit Systems Security Act of 2007 (NTSSA or the "Act"), 6 U.S.C. § 1142. Applicable regulations are set forth at 29 C.F.R. Part 1982. The Complainant is not represented by counsel.

Background and Procedural History

On April 16, 2016, Complainant, a train operator at Respondent's Pitkin Yard and TWU Local 100 member, submitted an electronic complaint to OSHA. In summary, Complainant alleged that on October 16, 2003, Respondent management knowingly sent two employees, including Complainant, into a work-area that had been sprayed with a toxic weed killer without appropriate protective equipment. Complainant alleged that Respondent management was aware that Local 100 train operators at the Pitkin Yard had refused to work in the toxic work-area just prior to October 16, 2003, but that Respondent management, rather than clean up the hazardous work condition, ordered "the crew" to put on protective gear and work in the toxic area. He asserted that his injuries occurred on a "weed killer train called the Gel train . . . [that] was in white powdered toxic condition," which was used to control the weeds and leaves on the railroad tracks. He also alleged that his medical condition and disease forced him into early retirement, and that MTA "is controlling and hiding my medical info and my medical diagnosis is being purposely delayed." Complainant asserted that he reported these facts to OSHA who subsequently investigated these allegations, but "intentionally" did nothing to resolve the issue.

On May 3, 2016, the Department of Labor ("DOL") sent a letter to Complainant in which Terri M. Wigger, Assistant Regional Administrator ("ARA"), advised Complainant that the DOL received his complaint and completed the investigation under the employee protection provisions of the NTSSA. The ARA explained that Complainant's complaint was not timely filed, and

summarized Complainant's allegations: Complainant was exposed to a toxic weed killer on October 16, 2003;¹ he immediately raised concerns to Respondent and his union; he also reported the exposure to OSHA on October 17, 2003, but OSHA failed to investigate; Complainant's union arranged for him to receive medical attention, but the care was allegedly inadequate; he requested OSHA pick up the investigation of his 2003 chemical exposure that was not initiated. The ARA stated that "Complainant failed to file his complaint within 180 day statutory filing period [and] is dismissed." The ARA also sent the letter to the Chief Administrative Law Judge ("ALJ") of the DOL, Office of Administrative Law Judges ("OALJ").

On an unknown date, Complainant faxed the ARA's May 3, 2016 letter to the OALJ Chief ALJ on which he directly handwrote, "I did not make this complaint. The facts are distorted. I request a hearing."

On June 6, 2016, this matter was referred to the OALJ's Cherry Hill District Office, and I was assigned the case on June 15, 2016. On June 20, 2016, I issued a Notice of Hearing and Pre-hearing Order wherein I scheduled a hearing for this matter on October 6, 2016 in New York, NY, advised the parties of their Initial Submission requirements, and set out additional deadlines and requirements. I also informed the parties that the current record consisted of: (1) Complainant's undated objections to the May 3, 2016 OSHA Determination Letter; and (2) the May 3, 2016 OSHA Transmittal Letter to the OALJ Chief ALJ, which included the OSHA Determination Letter.² I directed Complainant to send Respondent and me a complete copy of the administrative complaint he filed with OSHA.³

On June 23, 2016 Respondent's counsel submitted a letter via facsimile in which counsel stated that he had not yet received a copy of Complainant's objection to the OSHA Determination Letter and request for hearing. As such, Respondent requested a continuance of the "initial conference" and "initial disclosure" requirements set out in my June 20, 2016 Notice of Hearing and Pre-hearing Order until after it received a copy of Complainant's objection and request for a hearing. On June 27, 2016, I directed my assistant to fax Respondent a copy of Complainant's objection and request for hearing. On the same day, Respondent submitted another letter via facsimile in which Respondent's counsel requested that the deadline for parties' Initial Submissions set on in my June 27, 2016 Order be extended because Respondent had no record of Complainant's underlying OSHA complaint, and could not provide an Initial Submission or "submit a well thought out position without knowing the facts that make up the complaint."

On June 29, 2016, I issued an Order Granting Respondent's Request for Extension of Deadlines wherein I directed Complainant to send Respondent and me a complete copy of his OSHA administrative complaint as soon as possible, but not later than July 8, 2016. I also

¹ The letter mistakenly stated that Complainant was exposed to the toxic weed killer on October 16, 2013. I will presume this is a typographical error and the ARA intended to write "2003" because she also wrote that Complainant alleged he reported his exposure on October 17, 2003, and Complainant's complaint alleged that the events took place on October 16, 2003.

² The record also contained a UPS envelope addressed to the Chief ALJ.

³ I note that at this point in time, neither I nor the Respondent had seen Complainant's October 17, 2003 OSHA administrative complaint or his April 16, 2016 electronic OSHA complaint.

advised Respondent that it had to file its Initial Submissions within 14 days of receiving Complainant's OSHA complaint, extended the deadline for the parties to hold a conference within 7 days of all parties filing their Initial Submissions, and extended the deadline for initial disclosures within 14 days of the same. Additionally, I noted that it may be necessary to extend the hearing date and associated deadlines. I also directed the parties to discuss possible hearing dates during their conference and inform me of their positions as to whether the hearing could proceed as scheduled or should be rescheduled for a future date.

On June 30, 2016, at 9:13 p.m., I received an email from a Staples Copy Center in Brooklyn, New York that included a 49-page PDF attachment of documents pertaining to Complainant and this matter. I presumed that the Staples Copy Center sent the email on behalf of Complainant, and that the submission was intended to comply with the requirements set out in my June 29, 2016 Order in which I directed Complainant to submit a copy of his OSHA administrative complainant. See Order of July 8, 2016. At my direction, on July 5, 2016, my law clerk contacted Respondent's counsel to inquire whether Complainant also sent him the same submission. Respondent's counsel reported to my law clerk that he had not received anything from Complainant, and on July 7, 2016, I directed my legal assistant to send Respondent's counsel a copy of Complainant's submission. On July 8, 2016, I issued an Order directing Complainant to send submissions by means other than email, and reminded Complainant that he was required to send Respondent's counsel a complete copy of all documents he submitted to me with a "certificate of service" reflecting that he has complied with this requirement. I also directed Complainant to provide my office with a telephone number he could be reached at as soon as possible, but not later than July 15, 2016.

On July 19, 2016, Respondent's counsel reported that the 49-page submission did not contain a copy of Complainant's OSHA administrative complaint. On July 27, 2016, I issued an Order reminding Complainant that I had directed him to provide me with his OSHA administrative complaint multiple times, and that his failure to comply with my Orders may subject him to sanctions such as dismissal of this matter. I also noted that I had previously informed Complainant in Orders dated June 20, 2016, June 29, 2016, and July 8, 2016 that failure to comply with my Orders may subject him to sanctions. Accordingly, I again ordered Complainant to provide Respondent and me with a complete copy of his OSHA administrative complaint by August 9, 2016. If Complainant believed he could not comply with this Order, I ordered him to provide me with a full explanation, in writing, telling me the circumstances which prevented him from complying with my Orders to provide his OSHA administrative complaint. I also informed Complainant that if he did not submit his OSHA administrative complainant or an explanation, I would consider taking action in the form of sanctions that could include dismissal of his complaint.

On August 8, 2016, Complainant submitted, via facsimile, an explanation as to why he could not produce his original OSHA administrative complaint. He explained that he no longer possessed his original written complaint that he submitted to TWU Local 100, and wrote that he initiated his complaint with OSHA orally via telephone on October 17, 2003. Accordingly, in an August 15, 2016 Order, I found that no written complaint to OSHA existed. I also noted that Respondent requested an adjournment on July 19, 2016 so it could obtain Complainant's case file from the U.S. Department of Labor pursuant to a Freedom of Information Act ("FOIA")

request. I found that it was not necessary to adjourn the matter until Respondent received a response to its FOIA request, and I presumed that Complainant's explanation accurately stated that he made an oral complaint to OSHA in 2003. I also extended deadlines regarding submissions, initial conference, and initial disclosures.

On August 26, 2016, I held a telephonic conference call with the parties. Among other items discussed was Respondent's intent to file a motion to dismiss. (Tr. at 11, 17).⁴ On September 7, 2016, I received Respondent's Initial Submission, as required by my Order dated June 20, 2016, as modified by subsequent Orders dated June 29, 2016, August 15, 2016, and August 26, 2016. Respondent titled the Initial Submission a "Preliminary Statement." In the Initial Submission, the Respondent asserted that Complainant's claim was not timely filed because it related to actions from 2003 and also that it concerned matters pre-dating the 2007 enactment of the NTSSA into law. Respondent's Initial Submission at 1-2, 4.

In an Order dated October 13, 2016, I informed Respondent that ALJs are bound by the "Rules of Practice and Procedure for Administrative Hearings Before the Office of the Administrative Law Judges" (the "Rules"), and that the Rules require that a party requesting that an ALJ take action must do so by written motion. See Order of October 13, 2016. I requested that if Respondent intended to file a motion to dismiss that it file the motion by October 31, 2016. Id. In the same Order, I advised the parties that upon receipt of Respondent's motion, I would issue an Order giving additional guidance to the parties, including Complainant's deadline to file a response to the Respondent's motion. Id. On November 1, 2016, I issued an Order granting Respondent's request for extension of time to submit its Motion to Dismiss to November 7, 2016. See Order of November 1, 2016. On November 7, 2016, I received Respondent's Motion to Dismiss (Motion).

On November 10, 2016, I issued an Order providing notice to Complainant of his right to respond to Respondent's Motion and ordering Complainant to show cause as to why I should not grant Respondent's Motion because Complainant's April 16, 2016 complaint to OSHA was untimely. On November 20, 2016, Complainant responded to my Order and requested a thirty (30) day extension to respond to Respondent's Motion. The Complainant also requested to be provided with every form Respondent received from OSHA regarding Complainant's complaint to that agency.

On November 23, 2016, I issued an Order granting Complainant's request for extension of time to provide a response to the Respondent's Motion to Dismiss, and I granted Complainant's request to order Respondent to provide Complainant with Complainant's entire OSHA file. See Order of November 23, 2016.

On December 20, 2016, Complainant submitted his Response to Respondent's Motion ("Response").

⁴ "Tr." refers to the page number of the transcript of the August 26, 2016 telephonic conference.

Motion to Dismiss

In its Motion, Respondent asserted that Complainant's complaint should be dismissed because: (1) Complainant's complaint to OSHA was untimely; (2) Complainant failed to state a claim because he failed to state a prima facie case under the NTSSA; and (3) Complainant failed to comply with my Order dated July 27, 2016. See Motion at 6-7, 11.

With regard to timeliness, Respondent stated that it received Complainant's DOL investigation file on July 19, 2016. Id. at 5. Respondent averred that, contrary to Complainant's assertion that he filed an oral complaint with OSHA in 2003, the only complaint from Complainant in the DOL file was an electronic complaint that Complainant submitted on April 16, 2016. Id. at 6. The Respondent asserted that because Complainant's complaint to OSHA referred to events that occurred in 2003, the April 16, 2016 complaint fell well outside of the NTSSA's 180-day statutory filing deadline. Id. at 6-7.

With regard to Complainant's prima facie case, Respondent contended that Complainant did not engage in protected activity or suffer an adverse employment action. The Respondent further contended that any alleged adverse employment action was not caused by Complainant's alleged protected activity. Specifically, with regard to protected activity, Respondent insisted that Complainant could not have engaged in protected activity under the NTSSA in 2003 because that statute was not enacted until 2007. See id. at 10. Additionally, Respondent argued that Complainant's complaint did not allege protected activity because the NTSSA's primary goal of enhancing the Nation's transit systems to prevent terrorist attacks is not "implicated by an allegation that a non-toxic liquid/spray applied by the Transit Authority for the purpose of controlling leaves and weeds on railroad tracks, allegedly dried into an allegedly toxic chemical" Id. at 11. With regard to an adverse employment action, Respondent maintained that Complainant's allegation that Respondent hid his medical information or delayed his medical diagnosis was unfounded and did not constitute adverse employment actions. Id. Respondent asserted that it did not discharge, demote, suspend, or reprimand the Complainant, or adversely affect Complainant's employment in any way. Id. Rather, Complainant voluntarily retired from his employment with Respondent on December 20, 2013. Id. at 2. With regard to causation, Respondent maintained that Complainant failed to provide any evidence to raise the inference that the alleged protected activity was a contributing factor in the alleged adverse action. Id. at 11.

Regarding Complainant's failure to comply with my July 27, 2016 Order, Respondent asserted that Complainant failed to submit a copy of his OSHA administrative complaint. Id. Respondent also asserted that Complainant waited over a month to respond to my Order to provide a copy of his OSHA complaint. Id. at 12. In summary, Respondent argued that Complainant failed to comply with my Order because Complainant told me that he made an oral complaint to OSHA in 2003, but that complaint was not in the DOL's investigatory file, and therefore, did not exist. Id.

Complainant's Response

In his response, Complainant asserted that he searched his home for documentation regarding his 2003 OSHA administrative complaint, and although he could not locate a record of the phone call he made, he did locate the envelope that OSHA sent him, which Complainant asserted, proved he made a phone call to OSHA. Response at 2.

Complainant alleged that Respondent intentionally violated federal law by sending two employees into a toxic environment, and intentionally failed to warn after a dispute that took place on October 16, 2003. Id. Complainant contended that TWU Local 100 was representing him on October 17, 2003; Local 100 representative Stanton kept Complainant at the west-end of the union hall for 5 hours. Complainant argued that phone calls to Pitkin Yard and a statement from "senior man Newton" prove that "Yard Master Plum" was shown the toxic white powder in a toxic state. Complainant alleged that Master Plum ordered the Pitkin Yard regular train operators to work in the toxin wearing protective gear, and that he "got higher supervision involved. (sic) T.S.S. Read was the first and probably (sic) only higher level to actually visit the toxic site." Complainant alleged that Mr. Read died from breathing complication years later, and that Complainant's coworker, Tyrone Dixon, almost died in 2015, but survived and was still working. Id.

Complainant insisted he reported Mr. Newton's statement to OSHA, state authorities, and TWU Local 100. Complainant maintained that Mr. Newton "saw something and said something to Tyron Dixon and I (sic) standing in the white toxic weed dust stuff." It is at times difficult to discern Complainant's intent from his written statements, but I will presume Complainant was quoting Mr. Newton when he wrote, "What are you guys doing standing in this stuff, I did not work in this stuff when I was ordered to wear protection, you guys don't have any protection, this stuff can kill you."

Complainant expressed bewilderment as to why OSHA and TWU Local 100 ignored these circumstances when "this broke all kind (sic) of FELA and Federal laws . . . broke the contract agreement between MTA and TWU of America as well as Local 100 . . . is a criminal act that can cause death that these fiduciaries of federal laws chose (sic) to ignore" Id.

Complainant also asserted that doctors are lying to him about his health condition. Id. at 3. He stated that he attempted to sue Dr. Feely, but that similar to this case, he "could not get any legal help." Complainant explained that Dr. Feely told Complainant that he had lung disease in 2015, but the test from which that diagnosis was drawn was conducted 2 years earlier. Complainant also alleged that Respondent's insurance, Blue Cross Blue Shield, told him that he has bone cancer, but that the doctors cannot be found; Dr. Kauffman, his primary doctor, gave him a nuclear bone scan in 2014, but Complainant alleged he never received the results.

Complainant asserted that OSHA auditor Joseph Graham quickly attempted to dismiss this "embarrassing" case based on the statute of limitations. Complainant contended that if OSHA is shown to have tampered with evidence, it would prove his point, and automatically award him some torts. Complainant stated that he does not want Respondent killing him this way, and that there is no statute of limitations on murder.

Discussion

I note that although Respondent submitted its Motion pursuant to 29 C.F.R. § 18.70(c), Motion to Dismiss, I elected to treat the Motion similar to a motion for summary decision because Complainant is pro se. See Order of Nov. 10, 2016. Accordingly, I provided Complainant notice of the requirements for opposing a motion to dismiss. See id. (citing Wallum v. Bell Helicopter Textron, Inc., ARB No. 09-081, slip op. at 7-8 (ARB Sept. 2, 2011)). I also granted Complainant's request for 30 days extension of time to respond to the Respondent's Motion. See Order of Nov. 23, 2016.

The regulation regarding motions to dismiss states, “[a] party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness.” § 18.70(c). Here, as discussed above, Respondent argued that Complainant's complaint should be dismissed because the complaint was untimely, it failed to state a claim, and he did not comply with my Order dated July 27, 2016. I will first address whether Complainant's complaint should be dismissed on timeliness grounds.

a. Timeliness

The NTSSA requires a complainant to file his complaint with the Secretary of Labor within 180 days of an employer's adverse employment action. 6 U.S.C. § 1142(c)(1); 29 C.F.R. § 1982.103(d). Dismissal is appropriate if a complainant's complaint falls outside of the 180-day window. See, e.g., Williams v. Nat'l R.R. Passenger Corp., ARB Case No. 12-068 (ARB Dec. 19, 2013) (affirming ALJ's decision to grant dismissal where the complaint's complaint was untimely).

This matter arose from Complainant's April 16, 2016 electronic complaint to OSHA, which the ARA dismissed for untimeliness. Complainant's April 16, 2016 complaint centered on his allegation that he was exposed to a toxic weed killer on October 16, 2003. See RX J.⁵ Complainant alleged that he complained about his exposure to Respondent management, his local union, and OSHA, but that the issue was never resolved. He asserted that he now suffers from serious health problems because of the 2003 exposure. In his Response to Respondent's Motion, Complainant insisted that he verbally complained to OSHA about the hazardous work-environment on October 17, 2003 via telephone. He also asserted that there is no statute of limitations for murder.

Respondent argued in its Motion that Complainant did not make an oral complaint in 2003 to OSHA because it submitted a FOIA request to OSHA for this matter's investigation file, and the file Respondent received did not contain record of Complainant's alleged 2003 complaint. See Motion at 5, 6. I find this argument unavailing because Respondent's FOIA request only requested the investigation file with reference to this matter's case number, 2016-NTS-00005, which arose from Complainant's April 16, 2016 complaint. See RX C. When making FOIA requests, a requester generally only receives what he requests, and nothing more. See 29 C.F.R. § 70.21(d). Therefore, it is not revealing that there is no record of Complainant's

⁵ “RX” refers to the exhibits attached to Respondent's Motion.

2003 complaint in the investigation file related to his April 16, 2016 complaint. Accordingly, I will presume that, consistent with Complainant's complaint and Response, Complainant made an oral complaint to OSHA on October 17, 2003 regarding the hazardous working conditions to which he was exposed.⁶

Even assuming that Complainant made a complaint to OSHA on October 17, 2003, Complainant's April 16, 2016 complaint at issue in this matter still must be dismissed for untimeliness. As discussed, Complainant has proceeded in this matter pro se, and as a consequence, it has been difficult to discern a theory of retaliation from his complaint and Response. However, it is clear that Complainant's complaint centered on events that occurred in October of 2003. When read in a light most favorable to Complainant, he seems to allege that the adverse employment action he suffered was being forced to work in the toxic work-area on October 16, 2003⁷ just after TWU Local 100 members complained to management and refused to work in the area. To the extent that Complainant alleged retaliation in or around October of 2003, his April 16, 2016 complaint is about 12 years outside of the statute of limitations for NTSSA whistleblower retaliation claims.⁸ Even if I were to assume that the adverse employment action occurred in December of 2013 in relation to his retirement, which Complainant did not explicitly assert, Complainant's April 16, 2016 complaint would still be about 2 years outside of the statute of limitations.

Complainant also alleged in his complaint and Response that Respondent, its insurance company Blue Cross Blue Shield, multiple medical doctors, TWU Local 100, and OSHA are hiding his medical diagnoses, results of diagnostic medical tests he underwent, and other medical information. See complaint at 2-3; Response at 3. Complainant complained in his Response that he had a nuclear bone scan test in 2014 that he had yet to receive the results from, and that Dr. Feely delayed giving him the results of a 2013 test for two years. He also suggested that he attempted to sue a Dr. Feely, but that he could not attain legal counsel. See Response at 3. Overall, Complainant seems very displeased with the medical care he has received, but it is unclear how any of these allegations are related to his employer-employee relationship with Respondent. Indeed, Complainant continued to work for Respondent from October 17, 2003, the date of his initial OSHA complaint, until his retirement 10 years later in December of 2013. Complainant did not allege that Respondent ever demoted, suspended, reprimanded, or in any other way took an adverse action against Complainant's employment that would be a part of the employer-employee relationship.

⁶ Therefore, I find that Complainant's Response provided an adequate explanation in compliance with my July 27, 2016 Order as to why he could not provide a written copy of his 2003 OSHA complaint. Accordingly, I will not dispose of Complainant's complaint on the grounds that he did not comply with my Order.

⁷ I note that this is not an adverse employment action because the NTSSA is not retroactive. See § (b)(ii)(1) infra.

⁸ Moreover, the NTSSA was not enacted until August 3, 2007. See 110 P.L. 53, 121 Stat. 266. Therefore, any alleged retaliation from 2003 is not actionable because statutory retroactivity "is not favored 'unless such construction is required by explicit language or by necessary implication.'" Brune v. Horizon Air Indus., Inc., ARB No. 04-037 (ARB Jan. 31, 2006), slip op. at 7 (quoting Landgraf v. USI Film Products, 511 U.S. 244, 270 (1994)). This will be further discussed below.

To bring a whistleblower retaliation claim, the complainant must be able to establish the employer-employee relationship. See Fullington v. AVSEC Servs., LLC, ARB No. 04-019, slip op. at 6-7 (ARB Oct. 26, 2005). The ARB has held that the “crucial factor in finding an employer-employee relationship is whether the respondent acted in the capacity of an employer, that is, exercise control over, or interfered with, the terms, conditions, or privileges of complainant’s employment.” Muzyk v. Carlsward Transp., ARB Case No. 06-149, slip op. at 5 (ARB Sept. 28, 2007). This includes the ability to hire, transfer, promote, reprimand, or discharge complainant, or to influence another employer to take such actions against a complainant. Id. “If a complainant is unable to establish the requisite control and thus an employer-employee relationship, the entire claim must fail.” Seetharaman v. General Elec. Co., ARB Case No. 03-029 (ARB May 28, 2004).

Consequently, Complainant’s allegations against TWU Local 100, OSHA, or any of his medical doctors for allegedly concealing his medical records are not appropriate NTSSA complaints because he was not an employee of any of these potential entities.

Complainant may not bring a complaint against Respondent for this allegation because, as will be discussed later, Complainant failed make even a general assertion that Respondent hid his medical information because Complainant engaged in protected activity. Although Complainant’s complaint against Respondent for allegedly hiding hid medical information fails to state a claim for which relief may be granted, I will not dismiss it at the motion to dismiss stage for untimeliness because there is no allegation in the complaint, Motion, or Response of when Respondent began hiding his medical information or when Complainant became aware that Respondent was hiding his medical information.

Regarding Complainant’s toxic weed killer exposure, the April 16, 2016 complaint was filed about 12 years outside of the NTSSA’s 180-day statutory filing period. Accordingly, I find that Complainant’s complaint with regard to his exposure to the toxic weed killer is untimely and must be dismissed. Regarding Respondent hiding Complainant’s medical information, I find that there is insufficient evidence on the face of the Complaint, Motion, or Response to determine when this adverse employment action took place. Accordingly, I will not dismiss Complainant’s complaint with regard to the latter adverse employment action based on timeliness.

b. Failure to State a Claim

Under the NTSSA, a public transportation agency may not take an adverse employment action (e.g. fire, demote, suspend) against an employee because the employee provided information that the employee reasonably believed to constitute a violation of any federal law, rule, or regulation relating to public transportation safety or security. 6 U.S.C. § 1142(a). Additionally, a public transportation agency may not take an adverse employment action against an employee for reporting a hazardous safety or security condition, refusing to work when confronted with such a condition, or refusing to authorize the use of any safety or security-related equipment, tracks, or structures if the employee believes that such equipment is in a hazardous safety or security condition. 6 U.S.C. § 1142(b).

Dismissal is appropriate where the complainant does not make a prima facie showing that the employee's protected activity was a contributing factor to the public transit agency's adverse employment action. 6 U.S.C. § 1142(c)(2)(B)(i); 29 C.F.R. § 1982.104(e)(1). To make out a prima facie case, the Complainant must allege the existence of facts and evidence as follows:

- i. The employee engaged in a protected activity or was perceived to have engaged in protected activity;
- ii. The employer knew, suspected, or perceived that the employee engaged in the protected activity;
- iii. The employee suffered an adverse action; and
- iv. The circumstances were sufficient to raise the inference that the protected activity (or perception thereof) was a contributing factor in the adverse action.

§ 1982.104(e)(2).

The Administrative Review Board ("Board") has observed that because "federal litigation materially differs from administrative whistleblower litigation within the Department of Labor, . . . [t]hese differences require a different legal standard for stating a claim." Evans v. EPA, ARB No. 08-059, slip op. at 6 (Jul. 31, 2012). Therefore, the Board held that, "in deciding a . . . facial challenge, fair notice is the proper legal standard for any complaint filed by the complainant or required by the ALJ in administrative whistleblower proceedings before the DOL." Id. at 9 (emphasis added). Specifically, in order to survive a motion to dismiss, the complainant must show the following: "(1) some facts about the protected activity, showing some 'relatedness' to the laws and regulations of one of the statutes in [the DOL's] jurisdiction, (2) some facts about the adverse action, (3) a general assertion of causation and (4) a description of the relief that is sought." Id.; see also Johnson v. Wellpoint Companies, Inc., ARB No. 11-035, slip op. at 6 (Feb. 25, 2013).

Complainant's complaint must be dismissed for failure to state a claim because he did not allege facts regarding retaliation under the NTSSA. As discussed, Complainant is pro se, which made it difficult to determine Complainant's theory of his case. However, interpreting the Complainant's complaint together with his Response, it is clear that Complainant did not intend to allege a NTSSA retaliation claim;⁹ he alleged that Respondent should be held responsible and pay damages for his currently poor health, which Complainant alleged occurred as a result of Respondent forcing him to work in an area that was covered by a toxic weed killer on October 16, 2003.¹⁰

⁹ This is especially clear because Complainant alleged that he complained to his union and OSHA regarding his exposure to the toxic weed killer in October of 2003, which was almost four years before the employee protection provisions of the NTSSA were even enacted.

¹⁰ Complainant also seems to have alleged that Respondent, Blue Cross Blue Shield, a number of medical doctors, TWU Local 100, and OSHA are all involved in a conspiracy to conceal Respondent's actions in 2003 and Complainant's current medical diagnoses.

Rather, it appears that Complainant may have intended to assert a worker's compensation claim or negligence torts claim that the ARA below treated as an NTSSA retaliation claim.¹¹ Complainant began his complaint, "On 16 October 2003. (sic) Strict FELA¹² regulations were violated by NYC transit management. These violations created crimes and injuries. Their crime is that mta management sent two human local 100 members in a known toxic weed killer local 100 members . . . exercised their right to refusal under the federal employees liability act that osha police (sic). By committing this abnormal strict behavior negligence act violation mta cause (sic) a FELA injury" RX J at 2. He also asserted, "this is negligence. (sic) That cause my toxic agent Orange disease." RX J at 3.

In his Response, Complainant referred to Respondent forcing him to work in the toxic weed killer as a "criminal act," and argued that the slightest involvement by Respondent "proves strict liability," which is a torts reference. Based on the foregoing, I find that it is likely Complainant did not intend to assert an NTSSA retaliation claim. He asserted that: (1) on October 16, 2003, Respondent forced him to work in a toxic work-area; (2) these actions caused Complainant's current poor health conditions, which also forced him into early retirement; and (3) Respondent should pay damages for his physical injuries and current health condition. Other than the fact that Complainant alleged his health condition forced him into early retirement, nowhere in Complainant's complaint or Response did he assert that he suffered an adverse employment action because he engaged in protected activity. He did not mention the NTSSA, whistleblower, or retaliation; rather, he asserted that Respondent violated FELA, a workers' compensation statute. Accordingly, I find that Complainant's complaint should be dismissed because he failed to allege a prima facie case of retaliation under the NTSSA.

I note that although Complainant is pro se and should be given some latitude in the requirements to articulate his claim, it is not appropriate for me to advocate for Complainant by creating a theory of retaliation and drafting his complaint. In Peck v. Safe Air Int'l, Inc., ARB No. 02-028 (ARB Jan. 30, 2004), the Board described its obligations toward a pro se complainant in whistleblower cases, and noted that this standard also applies to administrative law judges:

We 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. Young v. Schlumberger Oil Field Serv., ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 8-10 (ARB Feb. 28, 2003), citing Hughes v. Rowe, 449 U.S. 5 (1980). At the same time we are charged with a duty to remain impartial; we must "refrain from becoming an advocate for the pro se litigant." Id. We recognize that while adjudicators must accord a pro se complainant "fair and equal treatment, [such a complainant] cannot generally be permitted to shift the burden of litigating his case to the [adjudicator], nor to avoid the risks of failure that attend his decision to forgo expert assistance." Griffith v. Wackenhut Corp., ARB No. 98-067, ALJ No. 97-ERA-52, slip op. at 10 n.7 (ARB Feb. 29, 2000), quoting Dozier v. Ford Motor Co., 702 F.2d 1189, 1194 (D.C. Cir. 1983). Affording a

¹¹ I note that I may not remand to the ARA for another investigation or reevaluation of Complainant's claim. See 29 C.F.R. § 1982.109(c).

¹² FELA, I will presume, is short for the Federal Employers' Liability Act, which is the federal workers' compensation statute for railroad workers. See 45 U.S.C. § 51. Complainant uses the full name of the statute later in his complaint.

pro se complainant undue assistance in developing a record would compromise the role of the adjudicator in the adversary system. See Young v. Schlumberger Oil Field Serv., ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 9, citing Jessica Case, Note: Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law and (sic) Excuse?, 90 Ky. L.J. 701 (2002).

Peck v. Safe Air Int'l, Inc., ARB No. 02-028 (ARB Jan. 30, 2004); see also Wallum v. Bell Helicopter Textron, Inc., ARB No. 09-081 (ARB Sept. 2, 2011).

Even when interpreted in a light most favorable to Complainant, his complaint and Response taken together still fail to state a claim for which relief can be granted under the employee protection provisions of the NTSSA. Viewed in a light most favorable to Complainant, I find that Complainant is most likely alleging that the adverse employment action he suffered was being forced to work in the toxic work-area on October 16, 2003 just after TWU Local 100 members complained and refused to work in the area.¹³ However, these allegations do no raise even “some facts” regarding causation.

i. Protected Activity

Respondent argued that Complainant’s allegations do not allege protected activity because: (1) Complainant’s allegations predate the NTSSA’s August 3, 2007 enactment, and (2) Complainant’s allegations regarding a hazardous work condition did not implicate protected activity under the NTSSA, which is primarily concerned with enhancing the ability of the Nation’s transit systems to prevent terrorist attacks. Neither of Respondent’s arguments hold merit.

Respondent argued that the NTSSA’s primary goal is to enhance the ability of the nation’s transit systems to prevent terrorist attacks and to protect American citizens. Motion at 7 (citing 6 U.S.C. § 1132). Respondent then asserted that “most provisions of the law are specifically tailored to address this goal.” Motion at 8. Thus, Respondent argued, when reading the employee protection provisions of the NTSSA in the context of the statute as a whole, Complainant’s allegation regarding being exposed to a toxic weed killer does not implicate the goals of the NTSSA. See Motion at 8, 10-11. Essentially, Respondent argued that the employee protection provisions are not implicated by employee safety concerns; rather, the protections only apply to terrorist prevention and security concerns.

This argument has no merit. By its express terms, the NTSSA prohibits public transit agencies from discriminating against an employee if such discrimination is due, in whole or in part, to the employee’s good faith act “to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to public transportation safety or security.” 6 U.S.C. § 1142(a)(1)(A) (emphasis added). Moreover, “a public transportation agency... or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for

¹³ As discussed above, that would make this complaint untimely.

reporting a hazardous safety or security condition.” 6 U.S.C. § 1142(b)(1)(A) (emphasis added). Thus, the employee protection provisions of the NTSSA are directed at both safety and security.

Furthermore, § 1521 of the Implementing Recommendations of the 9/11 Commission Act, which updated the NTSSA and the Federal Railroad Safety Act (FRSA), states:

The Conference substitute adopts a modified version of the Senate language. It modifies the railroad carrier employee whistleblower provisions and expands the protected acts of employees, including refusals to authorize the use of safety-related equipment, track or structures that are in a hazardous condition.

Section 1521 continues:

The Conference notes that railroad carrier employees must be protected when reporting a safety or security threat or refusing to work when confronted by a hazardous safety or security condition to enhance the oversight measures that improve transparency and accountability of the railroad carriers.

H.R. Rep. No. 110-259, at 348 (2007) (emphasis added). By inserting these provisions into the NTSSA, Congress evinced a goal to enlarge the scope of the statute beyond matters promoting public safety and preventing terrorist attacks. The language in the first paragraph cited above plainly indicates an aim to prohibit railroad carriers from taking retaliatory action in response to an employee’s refusal to authorize the use of safety-related equipment. The reference to safety-related equipment cannot reasonably be read to apply only to hazards that expose the public to danger based on the language relating to “use” of safety-related equipment. Riders on railroad or public transit systems do not utilize safety-related equipment on their commute, but employees use safety-related equipment on a regular basis in the ordinary course of their employment. It may be argued that Congress did not modify the NTSSA whistleblower protection to include the reporting of safety equipment in hazardous condition, only the refusal to authorize its use. However, the use of the word “including” suggests that Congress did not intend to limit such protected activity to a refusal to authorize, but instead used “refusal to authorize” as just one example of many types of unenumerated protected activities that it anticipated the statute would address. Moreover, the second cited paragraph makes particular reference to the importance of protecting employees who report a safety hazard.

Complainant asserted two allegations that could be related to protected activity under the NTSSA. First, Complainant alleged that TWU Local 100 members exercised their “FELA” right to refuse to work in the toxic condition just prior to Complainant’s October 16, 2003 exposure.¹⁴ Second, Complainant alleged that he submitted an oral complaint to OSHA and a written complaint to his union regarding his exposure on October 17, 2003. I find that the allegations regarding the safety conditions of the rail tracks that Complainant and his coworkers had to work in do implicate employee safety concerns under the employee protection provisions of the

¹⁴ I note that Complainant did not allege that he participated in this refusal to work in the toxic weed killer, and that he alleged he did work in the hazardous area just after Local 100 members refused. However, at this motion to dismiss stage, I will give Complainant the benefit of the doubt and presume that he did participate with the Local 100 members that refused to work in the weed killer.

NTSSA and its regulations. If he participated, Complainant's refusal to work in the toxic week killer would have constituted protected activity under 6 U.S.C. § 1142(b)(1)(B). Complainant's report to OSHA would be protected under 6 U.S.C. § 1142(b)(1)(A).

In addition, case law suggests that ALJs in the past have treated similar workplace safety concerns as protected activity under the NTSSA. In Serrano v. Metro Transit Auth. and NYCTA, ALJ No. 2008-NTS-00001, slip op. 4, 10-11 (ALJ Oct. 17, 2008), the complainant reported that other workers failed to use the required mats intended to protect them from the electric third rail that powers the subway system. Despite the fact that these safety issues did not concern safety to the public or the prevention of a terrorist attack, the ALJ deemed the complainant's report as protected activity under subsection (b)(1)(A) of the NTSSA. Id. at 11. Similarly, in Winters v. S.F. Bay Area Rapid Transit. Dist., ALJ No. 2010-NTS-00001, slip op. 6, 17 (ALJ July 16, 2012), the ALJ determined that the complainant's complaint about the insufficiency of cleaning products and the need for proper protective equipment used to clean vomit from a train car constituted protected activity under the same subsection. In Graves v. MV Transp., Inc., ALJ No. 2011-NTS-00004, slip op. 7, 14 (ALJ Apr. 18, 2012), the parties stipulated that the complainant's memorandum objecting to the practice of backing his bus between two other buses in the yard without a spotter was protected activity. Finally, in Harte v. MTA Transit Auth., ALJ No. 2015-NTOS-00002 (ALJ Sept. 27, 2016), the ALJ found that the complainant engaged in protected activity under §§ (a)(1)(A) and (b)(1)(A) of the NTSSA when he raised concerns over the operability of a drill press during a safety inspection. The protected activity at issue in these cases mirror that of the Complainant because, like the reporting of exposure to toxic substances, they invoked workplace safety concerns and did not concern prevention of a terrorist attack, yet were deemed protected activities under subsection (b)(1)(A) of the NTSSA.

Regarding retroactivity of the NTSSA, Respondent's argument is misplaced because the Board looks to the date of the adverse action, not the protected activity, to determine whether a claim is actionable in accordance with the enactment date of a whistleblower statute. See, e.g., Brune v. Horizon Air Indus., Inc., ARB No. 04-037 (ARB Jan. 31, 2006) (holding that the adverse actions the respondent engaged in prior to the statute's enactment were not actionable because the statute was not retroactive); Saban v. Morrison Knudsen, ARB Case No. 03-143 (ARB Mar. 30, 2005) (unpub.).

In Saban, the Board relied on the United States Supreme Court decision in Landgraf to determine whether a statutory cause of action may be retroactively applied. See Saban, ARB Case No. 03-143. The Board quoted the Supreme Court's guidance on how to determine whether to apply a statute retroactively:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate

retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Saban, ARB Case No. 03-143 (quoting Landgraf, 511 U.S. at 270) (emphasis added).

Therefore, according to the Board and the Supreme Court, retroactivity is dependent upon when the potentially liable party acted; when the respondent subjected the complainant to an adverse employment action. The presumption against statutory retroactivity serves to prevent a respondent from liability for conduct it engaged in before a statute made the conduct legally impermissible.

It is true that the NTSSA is not retroactive, and therefore Complainant may not bring a claim of retaliation against Respondent for any adverse employment action that it took against Complainant prior to the NTSSA's enactment. See § (b)(ii)(1) infra. However, this does not necessarily mean that Complainant could not have engaged in protected activity before the Act's passage. For example, if Complainant lodged his complaint to OSHA as he alleged on October 17, 2003, and Respondent terminated Complainant's employment on August 4, 2007, one day after the Act's enactment, because of Complainant's complaint four years earlier, Complainant could bring a claim for retaliation. Respondent would have taken an impermissible adverse action against Complainant after the NTSSA's enactment based on his whistleblower activity, which the NTSSA prohibits. The presumption against statutory retroactivity serves to prevent a respondent from being held liable for its "past conduct," not its conduct after the statute is enacted.

Accordingly, I find that Complainant adequately alleged some facts regarding protected activity, which is enough to withstand dismissal at the motion to dismiss stage. Local 100's refusal to work in the hazardous work-area and Complainant's complaint to OSHA on October 17, 2003 would both constitute protected activity under the NTSSA.

ii. Adverse Employment Action

The Complainant alleged that Respondent exposed him to a toxic weed killer on October 16, 2003, and that Respondent (as well as OSHA, TWU Local 100, and Blue Cross Blue Shield) are controlling and hiding his medical information, results of medical tests, and diagnoses. Regarding the withholding of his medical information, Respondent maintained that this allegation was unfounded and did not constitute an adverse employment action. Respondent asserted that it did not discharge, demote, suspend, or reprimand the Complainant, or adversely affect Complainant's employment in any way. Rather, Respondent explained, Complainant voluntarily retired from his employment with Respondent on December 20, 2013.

1. Complainant's Exposure to Toxic Weed Killer on October 16, 2003

Complainant's exposure to the toxic weed killer in 2003 could not constitute an adverse employment action because it predated the NTSSA's August 3, 2007 enactment. In general, acts of Congress are not retroactively applicable, "unless such construction is required by explicit language or by necessary implication." See Brune v. Horizon Air Indus., Inc., ARB No. 04-037

(ARB Jan. 31, 2006), slip op. at 7 (holding the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”) are not retroactive) (quoting Landgraf, 511 U.S. at 270); see also Saban v. Morrison Knudsen, ARB Case No. 03-143 (Mar. 30, 2005) (unpub.) (holding the employee protection provisions of the Pipeline Safety Improvement Act of 2002 (“PSI”) are not retroactive). Moreover, the NTSSA was modeled on the AIR 21 statute, which the Board in Brune already found not to be retroactive. See ALJ’s Order, Lewis v. NY Transit Auth., Docket No. 2010-NTS-00003 (Dep’t of Labor Sept. 26, 2011) (finding that “[t]here is no suggestion, either in the [NTSSA] or the legislative history, that Congress intended the Act to have any retroactive effect”).

Applying the general presumption against retroactive application of statutes, I find that the NTSSA is not retroactive, and therefore, Respondent could not have subjected Complainant to an adverse action prior to the NTSSA’s enactment. Accordingly, I find that Complainant’s October 16, 2003 exposure does not constitute an actionable adverse employment action.

2. Hiding Medical Information

At this motion to dismiss stage, I will presume that Complainant’s allegation regarding Respondent hiding his medical information constitutes an adverse employment action.

In conclusion, Complainant’s complaint regarding the adverse action that took place in 2003 must be dismissed because the NTSSA is not retroactive. I will not dismiss Complainant’s complaint with regard to Complainant’s allegation that Respondent is hiding his medical information because I will presume that it constitutes an adverse employment action.

iii. Causation

The Board has held that to survive a motion to dismiss, a complainant need only make a “general assertion” that the complainant’s protected activity was the cause of the respondent’s adverse employment action. See Evans, ARB No. 08-059, slip op. at 6. Respondent correctly argued in its Motion that “even if [Complainant] alleged an adverse action – which he does not – he fails to provide any evidence to raise the inference that the alleged protected activity or perception of a protected activity was a contributing factor in the supposed adverse action.” Motion at 11. Complainant made no assertion in his complaint or Response regarding causation. Complainant also made no assertion of an adverse employment action, but presuming that Respondent’s adverse employment action was either subjecting him to the toxic weed killer or hiding his medical information,¹⁵ Complainant made no assertion that either of these actions were caused by any alleged protected activity he engaged in. He did not assert that Respondent forced him to work in the weed killer because of any complaints that he or TWU Local 100 members made; he did not assert that Respondent is hiding his medical information because of any complaints he made or refusals to work he engaged in in 2003.

¹⁵ As mentioned above, Respondent could not have subjected Complainant to an impermissible adverse employment action under the NTSSA prior to its August 3, 2007 enactment because the statute is not retroactive.

Complainant's complaint and Response made no assertion of causation, and thus failed to allege a prima facie case of retaliation under the NTSSA. Accordingly, Complainant's complaint must be dismissed because he failed to state a claim for which relief can be granted under the NTSSA.

iv. Conclusion

Complainant's complaint must be dismissed because he failed to state a claim for which relief can be granted under the employee protection provisions of the NTSSA. Complainant failed to allege a prima facie case of whistleblower retaliation because he alleged no facts regarding causation. He alleged no facts that would indicate Respondent took an adverse employment action against him because he engaged in protected activity under the NTSSA. Accordingly, Complainant's complaint is dismissed.

Conclusion

Presuming Complainant participated in Local 100 members' refusal to work in the toxic work-area and presuming Complainant made an oral complaint to OSHA on October 17, 2003, Complainant did adequately allege protected activity pursuant to §§ 1142(b)(1)(B) and 1142(b)(1)(A) of the Act. However, Complainant's complaint is dismissed with regard to Complainant's allegation that Respondent forced him to work in a toxic weed killer on October 16, 2003 because: (1) his April 16, 2016 complaint was untimely; (2) this alleged adverse action predated the NTSSA's enactment, and was therefore not actionable; and (3) Complainant made no assertion that Respondent subjected Complainant to this adverse action because he engaged in protected activity. Complainant's complaint is dismissed with regard to Complainant's allegation that Respondent is hiding his medical information because he made no assertion that Respondent engaged in this adverse action because he engaged in protected activity.

Accordingly, because Complainant failed to allege any facts regarding causation with regard to either of the two alleged adverse employment actions, I find that Complainant failed to state a claim for which relief can be granted under the NTSSA. Therefore, I GRANT Respondent's Motion to Dismiss.

SO ORDERED.

ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) 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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(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, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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. §§ 1982.109(e) and 1982.110(a). 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. §§ 1982.110(a) and (b).