



**Issue Date: 13 August 2018**

Case No.: 2018-NTS-00002

In the Matter of

**JAMES S. HAWKINS-EL, III**  
Complainant

v.

**NEW YORK CITY TRANSIT AUTHORITY**  
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”), which was enacted on August 3, 2007, as Section 1413 of the Implementing Regulations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, and is found at 6 U.S.C. § 1142. Implementing regulations were published on November 9, 2015. See “Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and Federal Railroad Safety Act,” 80 Fed. Reg. 69,138 (Nov. 9, 2015) to be codified at 29 C.F.R. Part 1982.<sup>1</sup> A hearing in this matter was scheduled for July 13, 2018, and canceled pending a decision on this motion by Order issued July 5, 2018. Complainant is not represented by counsel.

**I. PROCEDURAL BACKGROUND**

James S. Hawkins-El, III (“Complainant”) filed a complaint with OSHA under the Act on August 24, 2017, asserting that his superintendent retaliated against him and other employees for alerting the superintendent to safety and health issues with the New York City Transit Authority (“Respondent”). After Complainant filed complaints with his agency and the New York State Department of Labor, Respondent allegedly passed over Complainant and denied him overtime hours, which he received prior to submission of his complaint.

On November 29, 2017, OSHA dismissed Complainant’s complaint, finding that he failed to timely file within the 180-day statutory period. Specifically, OSHA held that Complainant raised safety, health, and workplace violence concerns dating back to December 31,

---

<sup>1</sup> Unless otherwise noted, all references to regulations are to Title 29, Code of Federal Regulations (C.F.R.). References to the implementing regulations will cite to the applicable provision in Part 1982, rather than to the Federal Register.

2016, but did not submit his complaint until July 27, 2017.<sup>2</sup> Complainant appealed OSHA's findings on December 19, 2017.

The undersigned received the case thereafter and issued an Initial Notice of Hearing and Pre-Hearing Order on January 2, 2018. The Notice set a hearing date of May 1, 2018 in New York, New York.

By correspondence dated April 20, 2018, Employer requested a sixty-day adjournment of the hearing to complete discovery. On April 26, 2018, the undersigned issued an Order rescheduling the hearing for July 13, 2018 and adjusting the evidentiary deadlines accordingly.

On June 4, 2018, Respondent filed a Motion to Dismiss. Complainant submitted his Objection to Respondent's Motion to Dismiss on June 13, 2018. Complainant's Objection introduced new allegations of protected activity and adverse actions not brought before OSHA, which this Order will discuss in detail below.

By Order issued July 5, 2018, the undersigned cancelled the hearing scheduled for July 13, 2018 pending a decision on the Motion to Dismiss.

## **II. PARTIES' EXHIBITS**

As part of Respondent's Motion to Dismiss, it included the following exhibits:

- A. Transcript and audio recording of Complainant's interview with OSHA on November 7, 2017
- B. Case Activity Worksheet (OSHA complaint) dated August 24, 2017
- C. New York State Public Employee Safety and Health Bureau ("PESH") investigation narrative
- D. Letter advising Complainant of the completion of the investigation dated November 29, 2017
- E. Complainant's appeal dated December 18, 2017
- F. Complainant's interrogatory answers and discovery responses dated March 13, 2018
- G. Complainant's email regarding practical hearing test dated April 25, 2017
- H. Practical field test summary report
- I. On-the-job injury form dated June 1, 2017
- J. On-the-job injury form dated June 27, 2017
- K. Complainant's memorandum dated June 27, 2017
- L. Complainant's memorandum dated June 2, 2017
- M. Improper practice charge filed by Complainant with State of New York Public Employment Relations Board on December 21, 2017
- N. Arbitration Award dated December 15, 2017

In his response, Complainant included two exhibits:

- G. Complainant's written notice to Superintendent Joe Micelotta notifying him of hazardous working condition at the practical test location dated April 24, 2018

---

<sup>2</sup> The undersigned notes that, although OSHA's findings stated that Complainant filed his complaint on July 27, 2017, the OSHA complaint shows that Complainant filed it on August 24, 2017.

O. Notice of Decision of Complainant's State of New York Workers' Compensation Board case dated December 13, 2017.

### **III. FACTS PRESENTED IN THE LIGHT MOST FAVORABLE TO COMPLAINANT**

The facts presented in the light most favorable to Complainant include the following:<sup>3</sup>

- A. From late 2016 to early 2017, Complainant raised safety concerns about improper flagging and workplace violence. See Respondent's Exhibit A ("EX A") at 16-17, 22.
- B. Around the same time period, Respondent reduced Complainant's work and overtime hours. See EX A at 21.
- C. At no time did Complainant refuse a work assignment. See EX A at 23.
- D. On April 21,<sup>4</sup> Complainant received a notice of a practical field test for his hearing to take place on May 5.
- E. On April 25, Complainant sent an email and written notice to Mr. Micelotta notifying him of the hazardous working conditions at the location designated for the practical field test; he requested that it take place instead at the Linden Yard.
- F. On May 3, Complainant learned of the cancellation of the practical field test.
- G. On May 22, Complainant received and signed a notice of a practical field test scheduled for May 25 at the same location as the cancelled test.
- H. On May 23, Complainant sent Ms. Gloria Bolt the same notice he previously sent to Mr. Micelotta on April 25.
- I. On May 25, under protest and extreme duress, Complainant completed the practical field test.
- J. On May 31, Complainant completed an on-the-job injury form.
- K. Respondent took Complainant out of work on June 1, 2017.
- L. On August 24, Complainant filed a complaint with OSHA, alleging that Respondent denied him overtime because he had raised safety, health, and workplace violence concerns.
- M. On December 7, the State of New York Workers' Compensation Board found that Complainant had suffered a work-related injury and traumatic exacerbation of hearing loss during the May 25 practical field test.

### **IV. THE PARTIES' ARGUMENTS ON THE MOTIONS**

#### **A. Respondent's Motion to Dismiss**

In moving for dismissal of this complaint, Respondent argues that Complainant cannot raise new claims that OSHA has not previously considered, citing to 6 U.S.C. § 1142(c)(1). Here, the only claim presented to OSHA occurred in November 2016 when Complainant alleged that his complaint about lack of flagging led to his denial of overtime. His subsequent complaints surrounding a practical field test for his hearing substantially differ from his flagging complaint. Complainant now contends that the denial of overtime occurred over the period from

---

<sup>3</sup> Unless otherwise indicated, all facts originate from Complainant's Initial Disclosures.

<sup>4</sup> All dates going forward in this section occurred in 2017.

June 1, 2017 to August 30, 2017 instead of late 2016 into early 2017. See Respondent's Motion at 6.

In the alternative, Respondent asserts that the overtime claim brought before OSHA is time barred by the statute of limitations, which requires complainants to file NTSSA-related complaints within 180 days of the date the alleged violation occurs. Although Complainant alleged that the retaliation for his filing safety complaints occurred in November 2016, he did not file his claim with PESH until July 27, 2017, a period in excess of 180 days. Therefore, this lapsed time period renders Complainant's OSHA complaint untimely. See Respondent's Motion at 7.

Moreover, Respondent contends that the election of remedies doctrine bars Complainant's claim, citing to 6 U.S.C. § 1142(e) which states an "employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the public transportation agency." Because Complainant seeks to recover under the NTSSA for his denial of overtime and regular pay, as well as under Article 14 of the Civil Service law, his claims are therefore barred. See Respondent's Motion at 7-8.

As for the substance of his complaint, Respondent avers that Complainant's objection to taking a hearing test on August 25, 2017 and May 23, 2017 does not constitute protected activity in that Complainant did not attempt to notify Respondent about a violation of any Federal law, rule, or regulation relating to public transportation safety or security or report a hazardous safety or security condition. The hearing test complained about by Complainant actually serves to ensure that Complainant can work safely. It measures his ability to hear a train horn, flagman's whistle, verbal instructions, and identify the direction of approaching trains while working with and around heavy machinery in a train yard for the sake of his and his co-workers' safety. Complainant cannot articulate a reasonable basis for believing that his objection to a hearing test constitutes protected activity under the Act, according to Respondent, as legitimizing Complainant's complaint would undermine the purpose of the statute. See Respondent's Motion at 8-9.

Finally, Respondent asserts that it would have taken the same action irrespective of the complaints filed by Complainant. Assuming Respondent denied Complainant overtime, it did so to ensure a fair distribution of overtime to its employees. Complainant's gang filed a grievance through the collective bargaining process, arguing that the overtime belonged to it and a neutral arbitrator found against the gang. Moreover, the practical field test would have taken place in the absence of his complaints and Respondent gave Complainant sufficient notice of the test. Respondent also denies that Complainant did not receive the results of the test. Lastly, any denial of overtime and/or regular pay was precipitated by Complainant's claim of damaged hearing and request for restricted duty work, as Complainant had previously filed for Workers' Compensation benefits. See Respondent's Motion at 10-11.

#### B. Complainant's Objection to Respondent's Motion to Dismiss

Complainant responded to Respondent's Motion to Dismiss on June 12, 2018. Much of Complainant's objection focuses on a statement made by the undersigned during the prehearing conference call on January 30, 2018. In describing the appeal procedure of OSHA's initial determination and the scope of an administrative law judge's review, the undersigned explained:

[O]nce OSHA dismisses the complaint and you file a request for a hearing before an administrative law judge...at that point, I don't get any of the material that you filed before OSHA. All I get is a copy of the letter...with OSHA's findings...Because the idea is that I'm going to hear this case fresh, and so whatever OSHA did and whatever OSHA found doesn't matter to me. I get to hear it as if I'm the first person to hear your complaint.  
Tr. at 9.<sup>5</sup>

In addressing Respondent's first two arguments that Complainant cannot raise claims not presented below to OSHA and as to the untimeliness of Complainant's complaint, Complainant cites this excerpt from the prehearing conference call. Regarding the election of remedies provision, Complainant accuses Respondent of mixing his case with those of the other members of his gang, as only he suffers from a hearing disability. See Complainant's Objection at 5-6.

In response to Respondent's argument that a hearing test does not constitute protected activity, Complainant clarifies that he actually complained about excessive noise during the practical field test, which posed a hazardous safety condition, not the test itself. According to Complainant, he expressed his true belief of the imminent and permanent danger of damage to his hearing and stated that he did not see a reason to be tested in a hazardous work environment that does not mirror his own, and argued that a reasonable person in his position would feel likewise. He characterized the test as inconsistent with Respondent's doctor's medical advice that he avoid excessive noise, as Respondent knew that Complainant failed a hearing test on March 7, 2017. Moreover, Mr. Micelotta agreed to transport him from the test site to avoid the noise hazard associated with the subway. Complainant further requested medical clearance prior to the test. See Complainant's Objection at 6-9.

Lastly, Complainant disputes the notion that Respondent would have taken the same unfavorable personnel action in the absence of the alleged protected activity. Again, Complainant avers that Respondent knew that sending a hearing-disabled employee with a medical restriction into a hazardous safety condition of excessive noise with the choice of wearing hearing protection violated Occupational Noise Standards, citing to 29 C.F.R. § 1910.95. Complainant also denied filing or requesting the June 1, 2017 and July 27, 2017 on-the-job injury forms or receiving compensation benefits as a result of completing these forms. See Complainant's Objection at 9-10.

## **V. LEGAL STANDARD**

When deciding a motion to dismiss a complaint for failure to state a claim, pursuant to 29 C.F.R. 18.70(c), the administrative law judge may refer to cases adjudicating Federal Rule of Civil Procedure ("FRCP") 12(b)(6) motions as general guidance. See 29 C.F.R. § 18.10. The U.S. Court of Appeals for the Second Circuit<sup>6</sup> has stated that a court must "accept as true the factual allegations of the complaint, and draw all inferences in favor of the pleader." Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993); see also Gorman v. Consol. Edison Corp., 488 F.3d 586, 591-92 (2d Cir. 2007). In addition, the Tribunal must give Complainant's claims "a liberal construction." Johnson v. New York City Transit Auth., 639 F. Supp. 887, 891

---

<sup>5</sup> "Tr." refers to the transcript of the January 30, 2018 prehearing conference call.

<sup>6</sup> As Complainant works in New York, case law from the U.S. Court of Appeals for the Second Circuit is applicable.

(E.D.N.Y. 1986) (citing Haines v. Kerner, 404 U.S. 519, 520-21 (1972)), aff'd in part and vacated in part on other grounds, 823 F.2d 31 (2d Cir. 1987). However, the undersigned is not required to accept the truth of legal conclusions couched as factual allegations. See Papasan v. Allain, 478 U.S. 265, 286 (1986).

In Bell Atl. Corp. v. Twombly<sup>7</sup> and Ashcroft v. Iqbal,<sup>8</sup> the Supreme Court clarified the pleading standard under which courts are to evaluate a motion to dismiss. When deciding a motion to dismiss, this Tribunal should consider whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft, 556 U.S. at 678 (quoting Bell Atl. Corp., 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft, 556 U.S. at 678; see also Hayden v. Paterson, 594 F.3d 150, 160 (2d Cir. 2010). Under this heightened pleading standard, labels, conclusions, and mere recitation of the elements of a cause of action will not suffice. Id.; see also Bell Atl. Corp., 550 U.S. at 555. Instead, a complainant must provide enough factual support that, if true, would "raise a right to relief above the speculative level." Id. However, "plausibility" does not rise to the level of probability, but requires "more than a sheer possibility that a defendant has acted unlawfully." Barbosa v. Continuum Health Partners, Inc., 716 F. Supp. 2d 210, 215 (S.D.N.Y. 2010) (internal quotation marks omitted). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); see also Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995), *cert. denied*, 519 U.S. 808 (1996).

In the Second Circuit, a complainant need not establish a *prima facie* case in a whistleblower claim to survive a motion to dismiss; however, the complainant must at least plausibly allege that a similarly situated employee might reasonably possess a belief that the employer's conduct constituted a violation. See Ott v. Fred Alger Mgmt., Inc., 2012 U.S. LEXIS 143339 at \*16 (S.D.N.Y. 2012.) "With respect to causation, although detailed pleading of the facts is not required...a complaint must allege a factual predicate concrete enough to warrant further proceedings." Id. at 17 (internal citations omitted).

## VI. DISCUSSION

Several times in Complainant's Objection, he cited the excerpt of the January 30, 2018 prehearing conference call transcript referenced above and construed it as an order barring OSHA's findings. Unfortunately, Complainant's interpretation misses the mark, for "the OSHA investigation is an absolute prerequisite for a hearing and subsequent appeals." Coates v. Southeast Milk, Inc., ARB Case No. 05-050, ALJ Case No. 2004-STA-060, slip op. at 8 n.3 (July 31, 2007). In Coates, a *pro se* truck driver filed a STAA claim contending that his employer terminated him for reporting the dumping of contaminated milk into the state's commercial milk supply. Id. at 8. On appeal to the Administrative Review Board ("ARB" or "the Board"), the truck driver argued that the ALJ erred in not permitting him to amend his complaint to add a charge of discrimination under the Toxic Substances Control Act ("TSCA"). Id. at 8 n. 3. In affirming the ALJ's finding, the Board held that the truck driver never filed a TSCA complaint with OSHA and OSHA never issued findings concerning the TSCA-related complaint. Therefore, the ALJ did not have the power to adjudicate the complaint. Id. In

---

<sup>7</sup> 550 U.S. 544 (2007).

<sup>8</sup> 556 U.S. 662 (2009).

support of its holding, the Board cited to an Eleventh Circuit case where an employee's OSHA complaint omitted certain individuals as respondents, which deprived OSHA of the opportunity to investigate their actions and caused the employee to not exhaust his administrative remedies. Id.; see also Bozeman v. Per-Se Techs., 456 F. Supp. 2d 1283, 1358 (N.D. Ga. 2006).

Complainant, likewise a *pro se* litigant, similarly did not present his claim of protected activities involving the practical field test that took place in April and May 2017 to OSHA on August 24, 2017. Not only would acceptance of these omitted allegations on appeal compromise OSHA's ability to adjudicate the claim, it would also prejudice Respondent, who has a right to know the allegations levied upon it prior to the matter reaching the appellate level so it can properly prepare its case. The undersigned's statement at the prehearing teleconference that she would conduct this hearing *de novo* did not excuse Complainant from his obligation to apprise Respondent of each and every alleged violation in his OSHA complaint. He cannot now present claims not previously made to OSHA. Because Complainant's OSHA complaint failed to give Respondent notice of the allegations related to the practical field test, the undersigned will not consider these instances of alleged protected activities.

Even assuming Complainant had properly included this claim in his OSHA complaint, he has not satisfactorily proven that objecting to the practical field test for fear of exposure to excessive noise plausibly constitutes protected activity. Citing to 6 U.S.C. § 1142(b)(1)(A), Complainant claimed that he expressed his true belief that the excessive noise at the work site presented a hazardous safety condition and that a reasonable person in his position would feel the same way. See Objection, at 7. Based on his assumption that the test would take place underground and on the premise that the conditions of excessive noise underground do not resemble his actual working conditions, Complainant initially refused to take the test. He added that he works in an open air environment at the Linden Shop with little train traffic and minimal noise. Undergoing this evaluation would put him at an extreme risk of exacerbating a serious hearing injury stemming from a prior work incident, according to Complainant. See Complainant's EX G. Complainant also presented a Notice of Decision from the State of New York Workers' Compensation Board substantiating his work-related hearing loss. See EX O.

Based on the motion to dismiss standard laid out above, Complainant must present sufficient factual content supporting a plausible claim that he reported a hazardous safety or security condition pursuant to § 1142(b)(1)(A) in order to advance his case. Despite Complainant's documented hearing disability, he has failed to do so. Complainant cited 29 C.F.R. § 1910.95 in support of his refusal to take the test. That regulation requires that "[p]rotection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table G-16 when measured on the A scale of a standard sound level meter at slow response." Complainant did not indicate whether sound levels of the practical field test exceeded the values from Table G-16. Because Complainant has not adequately documented that the excessive noise of the Practical Field Test posed a hazardous safety condition to him under 6 U.S.C. § 1142(b), his report to Respondent cannot be considered protected activity under the Act.

Moreover, contrary to Complainant's argument that the excessive noise during the field test presented a hazardous condition, Respondent conducted the field test in order to determine whether Complainant "could function well in the actual job environment while wearing his hearing aids." See EX H. The evaluators reported that Complainant did not adequately respond

to hearing an approaching train or identify its direction. Id. Had Complainant not undergone this testing, it stands to reason that his inability to hear an oncoming train while on the job would have increased the risk of a miscommunication that could lead to an accident or some other hazardous condition, endangering him or his co-workers. Therefore, the testing serves to enhance the safety of the train yard rather than create a hazardous safety condition under subsection (b)(1)(A).

Although Complainant did not explicitly cite the subsection, his refusal to undergo the hearing test may also reasonably fall under subsection (b)(1)(B), which identifies a refusal to work in a hazardous safety condition as protected activity. A refusal is protected under the Act when:

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that—

(i) the hazardous condition presents an imminent danger of death or serious injury; and

(ii) the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal; and

(C) the employee, where possible, has notified the public transportation agency of the existence of the hazardous condition and the intention not to perform further work, or not to authorize the use of the hazardous equipment, track, or structures, unless the condition is corrected immediately or the equipment, track, or structures are repaired properly or replaced.

6 U.S.C. § 1142(b)(2)

Accepting as true Complainant's contentions and drawing all inferences in his favor, the undersigned finds that Complainant notified Respondent of his refusal to take the test in emails dated April 25, 2017 and May 23, 2017. However, Complainant represented that the May 23, 2017 email exchange reflects that his superintendent agreed to transport him from the test site to avoid the excessive noise. See Objection, at 8. This statement infers that a reasonable alternative did exist at the time of his refusal, although it remains unclear what came of that option. Finally, while Complainant averred that the excessive noise presented an imminent danger of damage to his hearing, he did not represent that the urgency of the situation did not allow for sufficient time to eliminate the danger without such refusal. Because Complainant has not satisfied the elements described in subsections (b)(2)(A) and (B), his refusal to undergo the field test does not amount to protected activity under § 1142(b)(1)(B).

Having established that Complainant's OSHA complaint omitted information about the hearing test, the undersigned now addresses the timeliness of Complainant's sole allegation in his complaint to OSHA. Complainant alleged retaliation by his superintendent after advising of safety and health issues when Respondent passed him over for overtime hours. The undersigned

notes that Complainant's complaint, as reflected on the Case Activity Worksheet, does not indicate when he "brought up safety and health issues with the employer." When interviewed by OSHA, Complainant struggled to recall the date that Respondent denied him overtime. At one point, he recollected that it took place in late 2016 and at another, he thought it might have occurred in January 2017. See EX A at 12, 17.

The NTSSA allows a complainant to file a complaint with OSHA within 180 days of the alleged violation. See 6 U.S.C. § 1142(c). Complainant filed the complaint at issue with OSHA on August 24, 2017. See EX B. Therefore, any alleged violations that he became aware of **prior to February 24, 2017** are untimely pursuant to 6 U.S.C. § 1142(c), unless Complainant can successfully argue that the statute of limitations should be equitably tolled.<sup>9</sup> However, Complainant makes no such argument. Assuming that Complainant was denied overtime on the later of the dates he recalled during the interview (for argument's sake, January 31, 2017), his complaint would still be rendered untimely because the incident occurred outside of the 180-day period. Thus, even before reaching the merits, Complainant is time-barred from bringing this claim.

Based on the foregoing, the undersigned **GRANTS** Respondent's Motion to Dismiss.

SO ORDERED.

**THERESA C. TIMLIN**  
Administrative Law Judges

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

---

<sup>9</sup> "Equitable tolling should be applied sparingly and only when exceptional circumstances prevented timely filing through no fault of the plaintiff.... Only exceptional circumstances, not garden variety claim[s] of excusable neglect, allow us to toll the statute of limitations." Bohanon v. Grand Trunk Western Railroad, ARB No. 16-048, ALJ No. 2014-FRS-003, slip op. at 3 (Apr. 27, 2016).

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](mailto: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).