



**Issue Date: 17 February 2016**

**CASE NO.: 2014-TSC-00003**

**IN THE MATTER OF**

**LAVERNE B. KELLY-LUSK,  
Complainant**

**v.**

**DELTA AIR LINES, INC.,  
Respondent**

**ORDER ON RESPONDENT'S MOTION FOR SUMMARY DECISION**

**BACKGROUND**

This matter involves a complaint which was originally filed under the whistleblower protection provisions of both the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21)<sup>1</sup> and the Toxic Substances Control Act of 1986 (TSCA)<sup>2</sup> by Complainant against Respondent. At the factual core of her complaint was an incident on 17 Aug 87, when she mixed powdered iced tea mix into a liquid from a plastic bottle in the galley. She and another crewmember drank the liquid, believing it to be water, but it turned out to be methanol. She alleges that when she complained to Respondent about the incident, she was subjected to various adverse actions.

Complainant filed her pro-se complaint with the U.S. Department of Labor Occupational Safety and Health Administration (OSHA), which dismissed it. She then objected and requested a hearing. Following an initial scheduling order, she filed a complaint seeking relief for violations of a number of occupational safety and health standards and various statutes, but only two were whistleblower provisions.

Respondent filed a motion to dismiss under AIR21. I granted Respondent's Motion to Dismiss as to the entire AIR21 complaint and dismissed the complaint under the TSCA as to all adverse actions except for the delayed issuance of the retirement plan checks.<sup>3</sup>

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<sup>1</sup> 49 U.S.C. § 42121 *et seq.*

<sup>2</sup> 15 U.S.C. § 2622.(hereinafter the Act).

<sup>3</sup> The Motion argued the absence of a genuine issue of material fact standard (Fed. R. Civ. P. 56), but since no discovery had been conducted, I applied a failure to state a claim standard, in which all facts in the complaint, whether raised by a genuine issue of material fact or not, are assumed to be true (Fed. R. Civ. P. 12(b)(6)).

Complainant then obtained counsel, who filed a new, amended complaint alleging the following protected activities<sup>4</sup>:

- 1) On 17 Aug 87, she reported to Respondent and disclosed the injuries she suffered as a consequence of a failure to properly contain and label a bottle of methanol solvent on the aircraft preparing to operate as Respondent's Flight 26.
- 2) The same day, she objected to giving the bottle to Yvonne Johnson and Ellen Allman, who were going to then give it to Respondent's manager, Pati Raso.
- 3) On 18 Aug 87, she asked Raso for the material safety data sheet (MSDS) and OSHA HazMat safety information, along with a sample of the solvent for testing by Dr. Denny Tharp.
- 4) The same day, she objected to "Rusk" about the mishandling and loss/destruction of the bottle.
- 5) During 1988-89, she spoke to various current and former employees of Respondent about "toxic dangers." Complainant explained that the bottles kept showing up and she spoke with a former chief pilot, officials from Respondent, and union representatives about toxic dangers for employees, passengers, and the public. She added that she asked the DFW flight attendant manager for OSHA bulletins and directives and became active in making others aware of the danger of toxic exposure aboard aircraft.
- 6) During or around 1989, she filed a lawsuit against Contractors Chemical. Complainant explained that her suit was for inadequate labeling of the methanol by Contractor Chemical.
- 7) During or around January 1993, she joined other flight attendants in an EEOC charge against Respondent concerning weight issues. Complainant explained that part of her claim was that the methanol exposure and subsequent treatment for that exposure affected her weight.
- 8) During or around 1993, she filed a complaint with the Georgia Department of Labor. Complainant explained that the complaint was that Respondent terminated her in reprisal for her protected activities and refusing to drop her law suits and claims.
- 9) During or around 1997, she wrote to a friend about toxics and reprisals and continued engaging with other flight attendants. Complainant explained that she communicated with a union rep and other flight attendants to make them aware of the need to learn about toxic exposure, the rules that apply, and reprisals.
- 10) During or around 2004, she disclosed her biopsy reports and a doctor's notice of occupational disease or illness to Respondent and requested an MSDS and medical records. Complainant explained that the report and request related to her toxic exposure to methanol.
- 11) Around the same time, she sent a letter about test results and asked to file a workman's compensation claim. Complainant explained that she contacted Respondent's human resources department, explained the exposure, and asked about filing a compensation claim. She noted that she was concerned about possible exposure to passengers and crew.
- 12) During or around 2007, she filed a workman's compensation claim. Complainant explained that she sought her records and help with filing a claim.

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<sup>4</sup> As amended by a bill of particulars.

- 13) During or around 2013, she wrote a letter to Robert Kight, Respondent's VP for human resources and also sought pension information. During 1988-89, she spoke to various current and former employees of Respondent about "toxic dangers."
- 14) On 27 Sep 13, she filed her whistleblower complaint in this matter.

Respondent then moved to dismiss the amended complaint on its face. I denied the motion as to alleged protected activities 1-5, 9-11 and 13. I granted it as to 6-8, 12, and 14.

Respondent then filed a motion for summary decision, arguing there was no reasonable issue of material fact that would allow for a finding that (1) there were any protected activities; (2) there was any adverse action; or (3) there was any nexus between any of the alleged protected activities and the alleged adverse action. Complainant answered with a number of arguments in opposition, but also insisted that the motion for summary decision would not be ripe for adjudication until such time as she had a full opportunity for discovery. I therefore continued the hearing date to allow Complainant an opportunity to develop evidence that would create a genuine issue of material fact. Following the extended period of discovery, the parties filed supplemental briefs.

#### **APPLICABLE LAW**

The Act provides

No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has-

- (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter;
- (2) testified or is about to testify in any such proceeding; or
- (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.<sup>5</sup>

The elements for a whistleblower claim are that (1) an employee of a covered employer engaged in protected activity; (2) the employee was then subjected to adverse action by the employer; (3) the employer knew of the protected activity when it took the adverse action; and (4) the protected activity contributed to the adverse action.<sup>6</sup> The complainant must show that it is more likely than not that individuals who either made or had input into the adverse action decision knew of the protected activity.<sup>7</sup>

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<sup>5</sup> 15 U.S.C. § 2622(a).

<sup>6</sup> See, e.g., *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Carroll v. United States Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1996).

<sup>7</sup> *Crosby v. Hughes Aircraft Co.*, 85-TSC-2 (Sec'y Aug. 1, 1993); *Shirani v. Comed/Exelon Corp.*, (ARB Sept. 30, 2005) (Where new manager fired him and claimed no knowledge of protected activity, Complainant's allegation that

The regulation promulgated pursuant to the Act direct that “proceedings will be conducted in accordance with the rules of practice and procedure and the rules of evidence for administrative hearings before the Office of Administrative Law Judges, codified at part 18 of title 29 of the Code of Federal Regulations.”<sup>8</sup> Those rules, in turn, provide for a “summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law.”<sup>9</sup>

The moving party may establish the absence of a genuine issue of material fact by citing particular parts of materials in the record as conclusively establishing the fact or showing that an adverse party cannot produce admissible evidence to support the fact.<sup>10</sup> In assessing a motion for summary judgment, all reasonable evidentiary inferences must be drawn light most favorable to the party opposing the motion.<sup>11</sup> In many whistleblower cases, there is no direct evidence that the protected activity contributed to the adverse activity and the complainant is forced to rely on circumstantial evidence and timing. In those cases, respondents have a difficult challenge in justifying summary decision and denying the complainant a full evidentiary hearing.<sup>12</sup> Nonetheless, summary decision is appropriate where a reasonable fact finder would be unable to find any connection between protected activity and adverse action.<sup>13</sup>

#### DISCUSSION

Of the three grounds offered by Respondent for dismissing the complaint, the most straightforward is the argument that no one involved in the alleged adverse action knew anything about any sort of protected activity by Complainant. That question is one of fact and does not require an interpretation of what qualifies under the Act as protected activity or a determination of what would dissuade a reasonable employee from engaging in protected activity. It is true that unless the adverse action decision makers concede that they were aware of the alleged protected activity, complainants must rely on circumstantial evidence to establish knowledge. In the context of a motion for summary decision, that circumstantial evidence must be viewed in the light most favorable to Complainant.

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termination was part of a broad conspiracy by employer was rejected as “barely rank speculation” without evidence that the managers who declined to offer him the position he applied for knew about the alleged protected activity.)

<sup>8</sup> 29 C.F.R. § 24.107.

<sup>9</sup> 18 C.F.R. §18.72(a).

<sup>10</sup> 18 C.F.R. §18.72(c)(1); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

<sup>11</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

<sup>12</sup> *Franchini v. Argonne National Laboratory*, 2009-ERA-14 (ARB Sept. 26, 2012).

<sup>13</sup> *Boegh v. Energy Solutions, Inc.*, (W.D.Ky. May 3, 2012) (case below ALJ No. 2006-ERA-26)(the complainant “presented no evidence, other than speculations and conspiratorial ... theories, to show that [the individual making the adverse action decision] knew of [the] protected activities or was influenced by others with knowledge of his protected activities.”); *Hasan v. Enercon Services, Inc.*, 2003-ERA-31 (ARB May 18, 2005)(managers swore they had no knowledge of the complainant's previous whistleblower activities when they made the decision not to hire him and complainant's only response to the motion was speculation that the respondent had not hired him because “some background check” must have disclosed his earlier whistleblower activities or that the affiants must have committed perjury.); *Durham v. Tennessee Valley Authority*, 2006-CAA-3 (ALJ Feb. 13, 2006)(decision to deny the complainant's disability retirement application was made by a legal entity separate that was distinct from the respondent and was not the complainant's employer, and the adverse action decision makers had no knowledge of the complainant's protected activity.)

## Respondent's Submissions

In support of its motion, Respondent relies in large part upon Complainant's deposition, along with a number of other depositions and documents.

### *Complainant's Deposition*

In her deposition, Complainant named the employees of Respondent to whom she communicated about the incident shortly after it happened as Ellen Allmon, Yvonne Johnson, Patty Raso, and Bud Putter. She added that she discussed it with Bob Byrd sometime in 1989 or 1990, and then talked about it in a conference call with Byrd, a Mr. Coggins, and a vice president of mechanics. He also noted that she had talked about it with Jenney Pool. Complainant was sure there were others, but could not recall specific individuals.

Complainant stated that she continued to work for Respondent until 1993. She was unable to recall details about any inquires she made about her retirement account with Respondent over the next couple of decades. She was able to recall that in 2013 she received a notice that the account was no longer accruing any additional value and advised her to begin withdrawing from it. Complainant said that she took steps to start collecting her pension and about the same time contacted Respondent HR vice president Robert Kight, asking for documents related to the incident.

Complainant further testified that she received her first retirement check in the mail at her house in August 2013, but did not receive her September and October checks until late October 2013. Complainant could not recall where she received those checks, but did remember that her November check was mailed to her PO Box, instead of her house. She confirmed that there have been no other delays and her pension payments are up to date.

Complainant said she believed the delay in her checks was in retaliation for her communication to Kight asking for material data sheets. However, she also noted that she had no idea of how the pension administration worked or how anyone involved in issuing her checks would have any knowledge about any of her communications about the ice tea incident.

### *Little Affidavit<sup>14</sup>*

Linda Little is an HR employee of Respondent. Ellen Allmon left Respondent in 1989, Yvonne Johnson and Patty Raso retired in 2001, Marshall Putter retired in 1989, Bob Byrd retired in 1990, and Jenny Poole retired in 1999. None of them had anything to do with Complainant's retirement checks.

Respondent contracts with Xerox to administer its pension plans, to include the processing of payment checks and dealing with returned checks. Once an employee is approved for benefits the process becomes automated and checks are issued by computer, ceasing only if

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<sup>14</sup> Complainant objects to the consideration of the affidavit as it was not based on personal knowledge. The strict rules of evidence do not apply and given her position I found her statement sufficiently reliable to consider, particularly since it was consistent with the deposition testimony offered by Complainant.

affirmative action is taken (such as upon the death of an employee.) Xerox employees have no access to employment records other those necessary to issue pension checks.

Complainant was vested in the plan, elected to start receiving benefits as of May 2013, and received her first check (covering May-August) on 1 Aug 13. No changes were made and the computer issued a check for Complainant in September. The check was mailed to Complainant's physical home address. On 5 Sep 13, Complainant initiated a change of address from her home address to her PO Box. The September check was returned to Xerox from the post office.

Xerox gathers information from returned checks and makes an automated call asking the employee to contact the employee service center. It makes the automated calls once a month. By the time Complainant's check had been returned and the information collected, the September call had been made.

However, based on the change of address Complainant entered on 5 Sep 13, her October check was mailed not to her home, but to her PO Box. After Complainant received the October automated call, she called on 18 Oct 13 to say she had not received either her September or October check. She was told that those checks would be cancelled and new ones issued. That was done by 22 Oct 13, which was a standard time for that task.

#### *Tahovnen Affidavit*

Greg Tahovnen is Respondent's Vice President for Global HR. He reports to Bob Kight, Senior Vice President of Labor Relations and HR. Respondent contracts with Xerox to administer its pension plans. Xerox administers the call center under Respondent oversight and similarly oversees retiree payroll. Once an employee applies and is approved for retiree pay, Xerox manages payment. A returned check triggers a process to identify the problem. Once the problem is identified it can take 7 to 10 business days to cancel and reissue a new check.

When Complainant called the service center in early September, the change of address was accomplished but since Xerox hadn't received the returned check yet, they didn't initiate the return check process. The records available to Xerox would indicate if an employee was "termed," which applies equally to retired and terminated employees. It only means they are not currently active employees. Once an employee vests, it makes no difference whether they retire, quit, or are fired.

#### **Complainant's Submissions**

Complainant responds by arguing that there is sufficient circumstantial evidence to at least create a genuine issue of material fact and require a hearing on whether anyone involved in the delay of the pension checks knew about her alleged protected activities. She cites Respondent's animus toward her, temporal nexus, deviation from normal practice, and pretext as

evidence that the delay was not simply random or a mistake but a result of knowledge of her protected activity.<sup>15</sup>

Complainant begins by offering the affidavit of Dana Mehen, a flight attendant who worked with Complainant and stated that Complainant's accident with the methanol was well-known among Respondent's employees. She also submitted records indicating that (1) she called on 5 Sep 13 to update her address and make sure her check had not been returned and was told the check had not been returned and to wait for mailing time; (2) she called on 6 Sep 13 to ask why she had not received severance and vacation pay when she was terminated; and (3) she called on 18 Oct 13 to say she had not received her September or October checks and was told they would be canceled and new checks issued to the right address.

Complainant also cited the deposition of Steve Tochilin, who is Respondent's general manager for environmental sustainability. He testified that the first time he heard of Complainant or her episode with methanol was in preparing for the deposition. He now understands that Complainant and another flight attendant accidentally drank methanol. He is not familiar with Respondent's administration of pensions. He stated that in 2013, pursuant to an agreement between OSHA and the FAA, OSHA expanded its jurisdiction over flight attendants. Neither Respondent nor its trade group played any role in that expansion, but did meet with OSHA to clarify any new requirements. The new agreement involved no change to Respondent's operations. He knows Robert Kight very generally and thinks he is a senior vice president in HR. He has seen a document that appears to be a 7 Oct 13 letter from Complainant to Kight requesting material data sheets.

Complainant additionally submitted the deposition of four Xerox employees. Jacob Palmer testified that he does not recall talking to Complainant, but has reviewed the call records. They indicate that on in September 2012, she called and asked to delay the start of her pension. On 6 Sep 13, Complainant called to complain that she had never received severance and vacation pay to which she was entitled. He found no checks in their system and opened a case to have it reviewed. He has never heard of Robert Kight and does not know Greg Tahovnen.

Xerox Employee Abby Hanke testified that Xerox does payroll, retirement, and benefits for Respondent, but she does not know Greg Tahovnen. She thinks she has seen the name Robert Kight on letters and has had employees ask about those letters. She doesn't independently recall anything about receiving calls from Complainant. She first learned of an issue relating to Complainant in October 2015. She reviewed the call records and saw that the records of her calls were saved twice, under two different names. That is not common, but it does happen. The "t" stands for terminated, which means no longer actively employed with Respondent. The records indicate that she sent a request to resend Complainant's checks. They normally advise the caller to give it ten business days to get the check. They can accelerate that on special request. She does not know when the checks were actually mailed or arrived.

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<sup>15</sup> Complainant's counsel also noted that his client's diminished mental capacities (which, he suggested, may be due to her methanol ingestion) weigh in favor of an in person hearing so that her credibility may be fully assessed. That argument misses the point that in considering Respondent's motion for summary decision, I must assume her to be credible.

Xerox employee Jeremy Spears testified that when they get a call from a retiree who is missing a check, they verify the address and if it is correct, wait five days, after which they cancel the lost check and issue a new one. He knows Robert Kight is a high level employee with Respondent. He does not recall talking to Complainant, but in reviewing the notes, he sees that Complainant called on 26 Apr 13 and was coded as no longer working for Respondent, but pension eligible. Complainant requested benefits start on 1 May 13. On 20 Jun 13, Complainant called to ask about the amount of her benefits. On 30 Jul 13 Complainant called again and the record showed term failed standards. It's a Respondent code and he does not know what it means, except that the employee is not eligible for medical or travel benefits. He does not know Greg Tahovnen.

Xerox employee Kevin Tso testified that he does not know Robert Kight or Greg Tahovnen. He doesn't have any direct contact with Respondent's employees. Retirement checks are normally sent out to arrive on the first of the month. Termed means separated from Respondent but not how or why. He doesn't recall having talked to Complainant, but has reviewed call records. It appears that Abby Hanke took a call from Complainant, who asked to update her address and see if her check had been returned.

### **Analysis**

Complainant argues that the circumstantial evidence in the record is sufficient to create a genuine issue of material fact. The circumstantial evidence she points to is an amalgam of pretext/animus, timing, and irregular practices.

The record does raise a genuine issue of fact concerning an adversarial relationship between Respondent and Complainant, but that was while she was working for Respondent. Notwithstanding the fact that she left Respondent in 1993, some 20 years before her delayed checks, Complainant insists that she remains the target of Respondent's animus. She noted that the record available to the Xerox administrators showed her status as "termed." However, that code applied equally to former employees who had retired, quit, or were fired, and there is no indication that she was treated differently than any other former employee in that regard.<sup>16</sup>

It was twenty-six years between the methanol incident and the delayed checks. It was twenty years between her last day of work for Respondent and the delayed checks. Based on context, timing can be sufficient circumstantial evidence to raise an inference and require a full hearing. However, while there may be sequence in this case, there is not even a hint of coincidence between protected activity and any of the alleged protected activities, save the letter to Kight asking for material data sheets. Indeed, Complainant testified that she believed the delay in her checks was in retaliation for that letter.

However, she conceded that she had no idea of how the pension administration worked or how anyone involved in issuing her checks would have any knowledge about any of her communications about the ice tea incident. Although Complainant identified a list of individuals

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<sup>16</sup> Complainant also complains that Respondent's counsel used her former name and was harsh in his cross examination of her at her deposition. Complainant made no objection at the deposition and a review of the alleged offending exchange discloses nothing beyond a common cross examination of an adverse witness.

to whom she made protected communications, she also indicated there were probably more, and a genuine issue of material fact does exist that Respondent's employees who were aware of her protected activity is not limited to that list. However, the affidavit of Complainant's that the methanol incident was well known does not mean her protected activity was well known.

The Little affidavit, and testimony of Tahovnen, Tochilin, and the four Xerox employees were fundamentally consistent with each other and even that of Complainant. Weighing the evidence in the light most favorable to Complainant does not require an assumption that everything said contrary to her position was a lie. Complainant's argument that there is a genuine question of fact that Xerox employees knew about Complainant's letter to Kight, or any other alleged protected activity, is no more than speculation or a conspiratorial theory, unsupported by even the most favorable evidentiary inferences. The record in this case allows for no rational conclusion other than that Complainant's retirement checks were issued and mailed by Xerox. The Xerox employees who dealt with Complainant had no specific knowledge of her or anything even remotely related to any letter she may have sent Robert Kight.

Since the remaining adverse action has no nexus to any protected activity, the complaint is **Dismissed**.

In view of the foregoing, the hearing scheduled on **25 Feb 16** in **Atlanta, Georgia** is hereby **CANCELLED**.

**SO ORDERED** this 17<sup>th</sup> day of February, 2016 at Covington, Louisiana.

**PATRICK M. ROSENOW**  
**Administrative Law Judge**

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this 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

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

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 a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.