U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 May 2014

CASE NO: 2013-FRS-00070

In the Matter of:

ROBERT K. BRUCKER,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

ORDER GRANTING MOTION FOR SUMMARY DECISION

This matter arises under the employee-protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 ("FRSA"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Act"), Pub. L. No. 110-53. (Aug. 3, 2007) and Section 419 of the Rail Safety Improvement Act of 2008 (RSIA), Pub. L. No. 110-432 (Oct. 16, 2008). A hearing is scheduled to begin on May 20, 2014 in Kansas City, Kansas.

On April 7, 2014, this Office received Respondent BNSF Railway Company's Motion for Summary Decision and Motion in Limine Regarding the Same Claims or Evidence, along with its memorandum in support of the motion and supporting evidence. After receiving an extension of time, Complainant Robert K. Brucker filed his opposition to BNSF's motion, along with supporting evidence. Upon review of the Complaint, motion, opposition, and supporting affidavits and evidence, I find:

1. Complainant's initial complaint with OSHA was untimely to the extent that it seeks to hold Respondent liable for employment actions that occurred more than 180 days before his OSHA complaint was filed;
2. Respondent's report of injury did not contribute to BNSF's decision to terminate his employment, as no rational finder of fact could find that it did;
3. BNSF has shown by clear and convincing evidence that it would have terminated Mr. Brucker had he not engaged in protected activity.

Accordingly, BNSF's motion for summary decision will be granted.

Undisputed Facts

On June 24, 1993, Mr. Brucker applied for employment as a machinist with BNSF. [Respondent's Motion for Summary Decision (hereafter Motion), Ex. B, Ex. 15 thereto[1].] He began employment shortly thereafter. On the employment application, Mr. Brucker answered "no" to the question "Other than traffic violations, have you ever been convicted of a crime?" [*Id.*, p. 2.]

By letter dated December 10, 2009, Mr. Brucker's counsel informed BNSF that his firm had been retained to represent Mr. Brucker in a claim for injuries to his shoulders, allegedly sustained over his career with BNSF. [Complainant's Opposition to Motion for Summary Decision (hereafter Opposition), Ex. 1[2], p. 7.] On January 26, 2010, Mr. Brucker filed an Employee Personal Injury/Occupational Illness Report with BNSF, alleging that he had, over the course of his employment with Respondent, sustained cumulative injury to both shoulders. [Opposition, Ex. 2.]

On February 13, 2005, Mr. Brucker received counseling for unauthorized absenteeism. [Motion, Exhibit A.]

On December 16, 2005, Mr. Brucker received a record suspension for being absent without authority and failure to follow instructions between November 30, 2005 and December 15, 2005. [Opposition, Ex. 4.]

On May 21, 2006, Mr. Brucker received counseling for unauthorized absenteeism. [Motion, Exhibit A.] Mr. Brucker noted on the counseling form that he had undergone surgery and was absent from November 30, 2005 to December 14, 2005, and had received discipline for his absence. [*Ibid.*]

On August 28, 2006, Mr. Brucker received counseling for unauthorized absenteeism. [Motion, Exhibit A.]

On May 30, 2007, Mr. Brucker received counseling for unauthorized absenteeism. [Motion, Exhibit A.]

On March 4, 2008, Mr. Brucker received counseling for unauthorized absenteeism. [Motion, Exhibit A.]

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[1] Respondent's Motion has only one marked exhibit: Exhibit A. It consists of a number of documents related to two different matters: (1) BNSF's attendance policy, and (2) Complainant's deposition of February 28, 2014, along with exhibits attached to the transcript thereof. The second group of documents – the deposition transcript and attached exhibits – are hereby re-marked as Exhibit B for easier reference.

[2] The exhibits to the Motion, the exhibits to the Opposition are numbered confusingly. Some pages are marked Petitioner's Exhibit, some are marked Plaintiff's Exhibit, and some are marked simply Exhibit. Comparing the references in the Opposition to the cited exhibits, I have determined that the documents marked Petitioner's Exhibit are the actual attachments to the Opposition. Thus, references in this Order to "Opposition, Ex. 1" and the like refer to the documents marked Petitioner's Exhibit 1, etc.

On September 30, 2009, Mr. Brucker received counseling for unauthorized absenteeism. [Motion, Exhibit A.] Mr. Brucker noted on the counseling form that he believed it was BNSF policy to allow workers to stay home if they were sick and contagious. [*Ibid.*]

On May 4, 2010, Mr. Brucker was allegedly observed operating a yard truck without wearing a seat belt. [Opposition, Ex. 1.] On June 15, 2010, BNSF conducted an investigation into the charge of driving without a seat belt, and on June 29, 2010, Mr. Brucker received a 30-day suspension and a three-year probation period. [*Ibid.*] Mr. Brucker obtained a statement from a co-worker who was in the yard truck with him, who said that Complainant was in fact wearing a seat belt but that the view of the person who thought he was not wearing a seat belt was obscured by darkness and the vehicle itself. [Opposition, Ex. 12.] Mr. Brucker, however, was not permitted to introduce this statement at his investigative hearing. [Opposition, Ex. 6, p. 101.] Mr. Brucker testified at his deposition that he was wearing his seat belt at the time. [*Id.*, pp. 98-100.]

On July 6, 2011, Mr. Brucker was charged with "resetting the open PCS" on a three-locomotive consist, which released the brake and allowed the locomotives to move while being serviced, causing damage to a fuel stanchion. [Opposition, Ex. 3.] The investigation was held on August 10, 2011, and on August 27, 2011, Mr. Brucker received a 30-day record suspension with a three-year review period. [Opposition, Ex. 1 and Ex. 4.] Mr. Brucker defended against this charge by obtaining testimony from a co-worker that the co-worker had in fact failed to set the brakes on the consist. [Opposition, Ex. 13, pp. 37-39.] Although the co-worker testified at the investigation, *ibid.*, discipline was imposed on Mr. Brucker.

On July 21, 2010, Mr. Brucker received counseling for unauthorized absenteeism. [Motion, Exhibit A.]

On February 3, 2011, Mr. Brucker received counseling for unauthorized absenteeism. [Motion, Exhibit A.]

On February 12, 2012, Mr. Brucker received counseling for unauthorized absenteeism. [Opposition, Ex. 5.] He signed the counseling notice under protest. [*Ibid.*] He testified at his deposition that he did not believe that counseling was warranted, because a day of absence without leave is no longer counted after a year goes by. [Opposition, Ex. 6, pp. 118-120.] He further testified that he requested and was not permitted to have union representation at the counseling session, and that he was told to sign the counseling notice or face charges of insubordination. [*Id.*, p. 120.]

Under Respondent's attendance policy, when an employee is absent without leave three times in a calendar year, the employee's immediate supervisor must review the attendance policy with the employee, explaining the importance of working regularly and full time. [*Ibid.*] For the fourth through sixth absences without leave during the same calendar year, the General Foreman must take the same measure. Additional absences result in further counsel and may, eventually, result in formal discipline, although Mr. Brucker's absences never reached that level. Three of his counseling sessions involved fourth through sixth absences in a calendar year, while the remainder involved the first through three absences. [*Ibid.*] There is no evidence that his

absenteeism resulted in any formal discipline, other than the record suspension of December 16, 2005.[3]

Sometime in July 2012, BNSF discovered that Mr. Brucker had been convicted on a misdemeanor charge of assault in the third degree in 1985. [Opposition, Ex. 1, last page.] On July 19, 2012, Mr. Brucker was given notice that he was charged with violation BNSF's Mechanical Safety Rule (MSR) 28.2.7, by failing to furnish information and MSR 28.6 (dishonesty) for stating on his initial employment application that he had never been convicted of a crime other than traffic violations. [Opposition, Ex. 1.] As of July 19, 2012, Mr. Brucker was held out of service pending the investigation into those charges. [*Ibid.*] He was walked off BNSF property at that time, in front of a number of co-workers. [Opposition, Ex. 6, pp. 143-145.] He was walked on and off BNSF property in August so that he could retrieve personal items from his lockers, and again was walked on and off in front of his co-workers. [*Ibid.*] BNSF's investigation was held on August 8, 2012, and Mr. Brucker was dismissed on August 16, 2012 for violation of the two cited MSRs. Mr. Brucker's position is that he did not intentionally withhold information or make a false statement when he did not disclose his earlier misdemeanor conviction, because he made a full report of that conviction to Mr. Underwood, the assistant superintendent at that time, who told him they only needed information about felony convictions. [Opposition, Ex. 6, pp. 62-63.]

Mr. Brucker filed a complaint of discrimination with OSHA on January 9, 2013. [Opposition, Ex. 1.]

Legal Standards

Summary decision may be entered pursuant to 29 C.F.R. § 18.40(d) under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See Gillilan v. Tennessee Valley Authority*, 91-ERA-31 at 3 (Sec'y, Aug. 28, 1995); *Flor v. United States Dept. of Energy*, 93-TSC-1 at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. *Anderson*, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, however, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, summary decision should be entered only when no genuine issue of material fact need be litigated. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). When a respondent moves for summary decision on the ground that the complainant lacks evidence of an essential element of his claim, the complainant is then required under Fed. R. Civ. P. 56 and 29 C.F.R. Part 18 to present evidence demonstrating the existence of a genuine issue of material fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Celotex Corp. v. Catrett*, *supra.*

[3] Although there is no dispute that these counseling events occurred, Mr. Brucker disputes whether some of the allegations were correct.

To prevail on a claim of discrimination under the FRSA, a complainant must demonstrate by a preponderance of the evidence that (1) the complainant engaged in protected activity; (2) the complainant suffered an unfavorable personnel action[4]; and (3) the protected activity was a contributing factor in the unfavorable personnel action.[5] If Complainant satisfies that burden, a respondent may escape liability only if it can show by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected behavior. 49 U.S.C. § 20109(b)(2)(B)(ii); 29 C.F.R. § 1982.109(b).

Under the FRSA, a complaint is timely if it is made to OSHA within 180 days of the adverse personnel action. 49 U.S.C. § 20109(d)(2)(A)(ii); 29 C.F.R. § 1982.103(d).

Conclusions of Law

A. *Timeliness*

Mr. Brucker filed his complaint with OSHA on January 9, 2013. Thus, only adverse actions that occurred on or after July 13, 2012 fall within the 180-day time for filing complaints. In this case, the only adverse actions alleged by Mr. Brucker that occurred on or after July 13, 2012 were his being publicly walked off the property when he was served with his investigation notice on July 19, 2012; his being public walked on and off the property in August of 2012 when he retrieved his personal possessions from his lockers; and his termination on August 16, 2012. Complainant agrees that any adverse actions occurring before that date cannot form the basis of liability against BNSF. [Opposition, p. 14.] Accordingly, summary decision is granted in favor of Respondent to the extent that the liability claim is based on any adverse action occurring before July 13, 2012, on the basis that the OSHA claim was untimely filed.

B. *Merits*

1. Protected Activity

Protected activity under the FRSA includes an employee's report of injury. 49 U.S.C. § 20109(a)(4). Mr. Brucker reported injuries to his shoulders to BNSF on January 10, 2010. BNSF does not dispute that his report of injury constituted protected activity under the FRSA, and I find for purposes of this Decision that it did.

2. Adverse Action

BNSF does not dispute that Mr. Brucker was subjected to an adverse personnel action when he was terminated on August 16, 2012. Furthermore, I find for purposes of this Order that BNSF's actions in walking Mr. Brucker off the property on July 19, 2012, and walking him on

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[4] The terms "unfavorable personnel action," "adverse employment action," and "adverse action" appear in the FRSA, in the incorporated provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121, and the regulations implementing both statutes. The terms are used interchangeably in this Decision and Order.

[5] 49 U.S.C. § 20109(d)(2) (incorporating the burdens of proof set forth in 49 U.S.C. § 42121(b)); 29 C.F.R. §§ 1982.104(e)(2), 1982.109. *See Hamilton v. CSX Transportation, Inc.*, ARB No. 12-022, ALJ No. 2010-FRS-025, slip op. at p. 3 (Apr. 30, 2013).

and off the property in August of 2012, in front of his co-workers and causing him humiliation and embarrassment. The Administrative Review Board has held that the *Burlington Northern*[6] "materially adverse" standard applies to the anti-retaliation laws adjudicated before the Department of Labor. *Melton v. Yellow Trans. Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 24 (ARB Sept. 30, 2008). In *Burlington Northern*, the Supreme Court held that for the employer action to be deemed "materially adverse," it must be such that it "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Melton*, slip op. at 19 (citing *Burlington Northern*, 548 U.S. at 71-73. For purposes of the retaliation statutes that the Labor Department adjudicates, the test is whether the employer action could dissuade a reasonable worker from engaging in protected activity. Id. slip op. at 19-20. A "reasonable worker" is a "reasonable person in the plaintiff's position." *Melton*, slip op. at 20. I find that a reasonable worker in Mr. Brucker's position – accused of a violation of company policy that he believes he did not commit, after having worked with the company for almost two decades – would be dissuaded from filing an injury report if he or she believed that the company would take steps to embarrass them in front of their co-workers.

These adverse actions were all part of the disciplinary process, and ultimate termination, for Mr. Brucker's failure to disclose his misdemeanor conviction on his employment application. As they are intertwined, references to "termination" in the rest of this Decision include both the walking-on and walking-off events of July and August, and the actual termination.

3. Contributing Factor

Although the FRSA's regulations do not define "contributing factor," the Administrative Review Board ("ARB") has done so. "Contributing factor" means "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *DeFrancesco v. Union Railroad Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6-7 (ARB Feb. 29, 2012).[7] The ARB went on to say:

> The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.

Id., slip op. at 7. *See also Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003 at 11-12 (ARB June 24, 2011); *and Chen v. Dana-Farber Cancer Inst.*, ARB No. 09-058, ALJ No. 2006-ERA-9, at 10-11 (ARB Mar. 31, 2011) (dissenting opinion).

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[6] *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

[7] This definition is consistent with that applied by the ARB in retaliation claims brought under other statutes. *See, e.g.*, *Blackie v. Smith Transp., Inc., et al.*, ARB No. 11-054, ALJ No. 2009-STA-43, at 9 (ARB Nov. 29, 2012) (quoting *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, at 6 (ARB Jan 31, 2011)); *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, 2012 WL 4714686 (ARB Sept. 26, 2012).

Mr. Brucker makes several arguments in support of his position that his injury report contributed to his termination. First, he testified that after he filed his injury report in January of 2010, his supervisors changed their behavior toward him, watching him (but not other employees) while he worked on virtually every shift until he was terminated in August of 2012. [Opposition, Ex. 6, pp. 123-128.] Second, he argues in effect that the disciplinary actions taken against him after his injury report were pretextual – that although he was disciplined for failing to wear his seat belt, he was in fact wearing his seat belt; and that although he was disciplined for allowing a three-train consist to move, damaging a fuel stanchion, it was another employee who failed to set the brakes. Third, he suggests that his counseling notice in February of 2012 was inconsistent with company policy, because he did not have three absences without leave during the preceding year. Taken together, he says, these events show that his injury report contributed to his termination – that if he had not reported his injury, he would not have been subjected to termination.

I conclude that no reasonable finder of fact could find that Mr. Brucker's injury report contributed in any way to his termination. Mr. Brucker made his injury report in January of 2010, and the termination events began in July of 2012, about 2½ years later. The impetus for his termination was BNSF's discovery in July of 2012[8] that he had not disclosed a criminal conviction on his employment application. That 2½-year period between the injury report and the notice of investigation argues against any contribution by the injury report to the ultimate termination. Further, there is an absence of evidence of any connection between the injury report and Employer's seeking information about Complainant's criminal record. In the context of summary decision, when the moving party points out an absence of evidence, the burden is on the non-moving party to present evidence demonstrating the existence of a genuine issue of material fact. *Lujan v. Defenders of Wildlife, supra,* 504 U.S. at 555, 561. As Employer points out, the other formal discipline imposed on Mr. Brucker took place four months and 16 months after his injury report. Two isolated incidents in the 30-month period between the injury report and the termination do not suffice to show that the injury report played a part in the termination. Likewise, I find that BNSF's constant watching of Mr. Brucker (assuming as I must that it happened) played no part in BNSF's learning that he had been convicted of a crime. The information was obtained from a county circuit court, and not from any observation of Mr. Brucker's work habits.

4. <u>BNSF's Burden</u>

Had Mr. Brucker successfully shown that his injury report contributed to his termination, the burden would have shifted to BNSF to show by clear and convincing evidence that it would have taken the same action even in the absence of the injury report. The ARB has held that:

> The burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard. Clear and convincing evidence

[8] The fact of Mr. Brucker's conviction was certified by the clerk of the Clay County, Missouri circuit court in July of 2012 (Opposition, Ex. 1, last page) and Mr. Brucker was notified of the investigation into his failure to disclose that conviction on July 19, 2012 (Opposition, Ex. 9). It is clear then that BNSF learned about the conviction in the month of July 2012.

> denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain. Clear and convincing evidence that an employer would have disciplined the employee in the absence of the protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability.

DeFrancesco, supra, slip op. at 8. In the event that reviewing authorities disagree with my analysis of the "contributing factor" element of this case, I will address whether BNSF has shown by clear and convincing evidence that it would have terminated Mr. Brucker even if he had not made an injury report in January of 2010.

The employment application asks, "Other than traffic violations, have you ever been convicted of a crime?" The question is followed by two boxes marked "yes" and "no," which the applicant must check. If the applicant checks "yes," there is a space in which the applicant is instructed to "describe in detail." Mr. Brucker checked "no." The application requires the applicant to acknowledge that "If employed, I realize that false information will be grounds for dismissal at any time, regardless when such information is discovered." In addition, BNSF has a company policy against withholding information, and a company policy against dishonesty, memorialized in two of its Mechanical Safety Rules. Because (1) BNSF has clearly stated policies against withholding information and against dishonesty, (2) BNSF specifically warns job applicants that information on the employment application must be truthful or the applicant may be terminated "at any time, regardless when such information is discovered"; and (3) BNSF took action to terminate Mr. Brucker immediately upon receipt of the certified conviction report from Clay County, Missouri, I find that BNSF has shown by clear and convincing evidence that it would have terminated Mr. Brucker whether or not he made his injury report.[9]

Conclusion

For the reasons set forth above, I find (1) that a claim for damages based on events that occurred before July 9, 2012 are barred as untimely; (2) although, based on the record before me, Complainant engaged in protected activity and was subjected to an adverse employment action, he has not shown a dispute of material fact whether his report of injury contributed to his termination, and I conclude that it did not; and (3) even if his report of injury contributed to his termination, Mr. Brucker has not shown a dispute of material fact affecting whether BNSF would have terminated his employment even if he had not made an injury report, and I conclude that it would have done so. Accordingly, BNSF's motion for summary decision will be granted. All other motions will be denied as moot.

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[9] Mr. Brucker makes much of the fact that, according to him, Mr. Underwood told him that BNSF was only interested in felony convictions, and that is the reason that he checked "no" on the employment application. Mr. Brucker had the full opportunity to, and did, present that evidence at his disciplinary hearing, and it is clearly company policy that Mr. Underwood was wrong in so telling Mr. Brucker – they terminated his employment. Furthermore, given that the application has a space to explain any conviction, there can be no doubt that BNSF expected a truthful answer to the question.

ORDER

It is hereby ORDERED:

1. Respondent's motion for summary decision is GRANTED;
2. All other motions set out in Respondent's moving papers are DENIED as moot;
3. The hearing scheduled to commence on May 20, 2014 is CANCELED; and
4. Mr. Brucker's complaint is DENIED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 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).

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

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix

(one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

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 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).