U.S. Department of Labor

Office of Administrative Law Judges
Cherry Hill District Office
800 K Street, NW, Suite 400
Washington, DC 20001-8002

(856) 486-3800
(856) 486-3806 (FAX)
OALJ-CherryHill@dol.gov

Issue Date: 15 October 2021

Case No.: 2021-SDW-00001

In the Matter of:

AMIEL GROSS,
Complainant

v.

SAINT-GOBAIN CORPORATION, et al.,
Respondents

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

This matter arises from the complaint of unlawful retaliation filed by Amiel Gross ("Complainant") with the Occupational Safety and Health Administration ("OSHA") against Compagnie de Saint-Gobain, Saint-Gobain Corporation d/b/a Saint-Gobain North America ("Saint-Gobain"), Mr. Mark Rayfield, and Mr. Tom Kinisky (collectively "Respondents") under the employee protection provisions of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-9, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9610, as well as the implementing regulations at 29 C.F.R. Part 24.[1] A hearing is scheduled for December 13, 2021, before the Office of Administrative Law Judges ("OALJ").

I. Background

Complainant was employed by Saint-Gobain as in-house litigation counsel beginning in 2014. (OSHA Complaint ¶¶ 55–71.) Complainant alleges that, in 2019 and 2020, he repeatedly raised public health concerns to Respondents regarding potential chemical contamination of drinking water. (OSHA Complaint ¶¶ 72–97.) He also alerted Respondents of a duty to amend government disclosures regarding chemical usage. (OSHA Complaint ¶¶ 98–105.) As a result, Complainant contends he was bypassed for a promotion in October 2019 (OSHA Complaint ¶ 108), and on October 19, 2020, his employment was terminated. (OSHA Complaint ¶¶ 128–32.) Subsequently, Complainant asserts, Saint-Gobain continued to retaliate against him by baselessly threatening to report him to attorney disciplinary authorities and law enforcement agencies for

[11] In his complaint to OSHA, Complainant also alleged a violation of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A. In his appeal to OALJ, Complainant specified he was not requesting a hearing or raising an objection related to his SOX claim. (Complainant Objections to OSHA Findings at 3 n.2.)

mistreatment of Saint-Gobain's confidential information, with the most recent threatening communication dated March 8, 2021. (OSHA Complaint ¶¶ 134–53.) Complainant also asserts Saint-Gobain made retaliatory and defamatory statements to the media in April 2021.[2] (Complainant's Objections to OSHA Findings at 12.)

On April 6, 2021, Complainant filed his complaint with OSHA alleging unlawful retaliation under SDWA and CERCLA. On April 21, 2021, OSHA dismissed the complaint as untimely. On April 29, 2021, Complainant appealed and requested a hearing before OALJ. This matter was subsequently assigned to me for adjudication.

On July 9, 2021, Respondents filed a Motion to Dismiss. Respondents contend the majority of Complainant's claims are untimely under the applicable 30-day statute of limitations. Respondents also argue that any allegations which may be timely fail to state a cognizable claim for relief under either SDWA or CERCLA.[3] In his response dated July 23, 2021, Complainant contends his complaint is timely because Respondents engaged in a continuing series of unlawful acts, one of which occurred less than 30 days prior to the filing of his complaint. Complainant also asserts he has raised a legally sufficient claim for relief. On August 6, 2021, Respondents filed a reply brief, which I permitted. On August 24, 2021, Complainant filed his sur-response. In these subsequent briefs, both parties offered additional support for their arguments.

II. Standard of Review and Documents Considered

Pursuant to the Rules of Practice and Procedure for Administrative Hearings before OALJ, a party "may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness." 29 C.F.R. § 18.70(c). In federal courts, Federal Rule of Civil Procedure 12(b)[4] governs motions to dismiss, including motions asserting failure to state a claim upon which relief can be granted. A motion to dismiss is a facial challenge, focusing "solely on the allegations in the complaint, its amendments, and the legal arguments the parties raised—not whether evidence exists to support such allegations." *Evans v. U.S. Envtl. Protection Agency*, ARB No. 08-059, slip. op. at 10 (Jul. 31, 2012) (citing *Neuer v. Bessellieu*, ARB No. 07-036, slip. op. at 4 (Aug. 31, 2009)).

In federal civil litigation, a complainant would be required to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570

[2] I construe this allegation as an amendment to the OSHA Complaint. The applicable regulations expressly anticipate that a complainant's allegations may be supplemented after the filing of an OSHA complaint. *See* 29 C.F.R. §§ 24.104-105. Moreover, the ARB has observed that "[a] court is required to 'grant leave to amend freely when justice so requires.'" *Evans v. U.S. Envtl. Protection Agency*, ARB No. 08-05, slip. op. at 11 (Jul. 31, 2012) (citing *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1223 (9th Cir. 2007)).

[3] To prevail on a claim under SDWA or CERCLA, Complainant must prove, by a preponderance of the evidence, that (1) he engaged in protected activity, (2) he suffered an adverse employment action, and (3) the protected activity caused or was a motivating factor in the adverse employment action. 29 C.F.R. § 24.109(b)(2). If Complainant succeeds, the burden shifts to Respondent to prove, by a preponderance of the evidence, that it would have taken the same adverse employment action even absent the protected activity. *Id.*

[4] The Federal Rules of Civil Procedure "apply in any situation not provided for or controlled by the Rules, or a governing statute, regulation, or executive order." 29 C.F.R. § 18.10(a).

(2006) (cited in *Neuer*, ARB No. 07-036 at 4). In recognition of the fact that administrative whistleblower litigation before the Department of Labor differs from federal civil litigation, the Administrative Review Board ("ARB") has adopted a "fair notice" standard for testing the sufficiency of a complaint. A complaint provides fair notice by encompassing: "(1) some facts about the protected activity, showing some 'relatedness' to the laws and regulations of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) a general assertion of causation and (4) a description of the relief that is sought." *Evans*, ARB No. 08-059 at 11. Nonetheless, the ARB has recently observed that an "expanded complaint," such as one filed by counsel before an ALJ, "'should be able to state a claim upon which relief can be granted without unwarranted presumptions and pass muster when subjected to the scrutiny applied to any other complaint.'" *Moody v. Nat'l W. Life Ins. Co.*, ARB No. 2020-0014, slip. op. at 11 (ARB Mar. 31, 2021) (quoting *Solomon v. Cigna*, ALJ No. 2019-SOX-00055, slip op. at 3 (Nov. 26, 2019)).

As an initial matter, Respondents attach to their Motion to Dismiss the letters and emails that underlie Complainant's post-termination allegations of retaliation. I recognize that the consideration of evidence beyond the pleadings generally marks the material difference between the facial challenge of a motion to dismiss and a motion for summary decision. *Evans*, ARB No. 08-05 at 10; *compare also* 29 C.F.R. § 18.70(c) *with* 29 C.F.R. § 18.72(a), (c). However, as Respondents point out, the Third Circuit (in whose jurisdiction this matter arises) has held that "a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993). Otherwise, as the Court explained, "a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied." *Id.*

Complainant's OSHA Complaint expressly references the communications attached to the Motion to Dismiss, and Complainant's allegations of post-termination retaliation are based directly on those communications. *See Pryor v. NCAA*, 288 F.3d 548, 560 (3d Cir. 2002) ("Documents that the defendant attaches to the motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to the claim; as such, they may be considered by the court."). Complainant does not challenge the authenticity of these documents. Therefore, in ruling on the Motion to Dismiss, I do consider the attachments thereto, as detailed below.

III. Analysis

Respondents primarily contend Complainant's complaint is untimely because (with minor exceptions) the alleged retaliatory actions occurred more than 30 days prior to the filing of the complaint on April 6, 2021. Under SDWA, an employee who alleges unlawful retaliation may file a complaint "within 30 days after such violation occurs." 42 U.S.C. § 300j-9(i)(2)(A). The same timeline applies under CERCLA. 42 U.S.C. § 9610(b); § 29 C.F.R. 24.103(d). The 30-day limitations period begins to run "on the date that a complainant receives final, definitive and unequivocal notice of a discrete adverse employment action." *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, slip op. at 8 (Apr. 30, 2004).

Complainant's OSHA Complaint makes several allegations of retaliation: (1) he was bypassed for a promotion in October 2019 (OSHA Complaint ¶ 108); (2) Saint-Gobain terminated

his employment on October 19, 2020 (OSHA Complaint ¶¶ 128–32); (3) after his termination, and based on unsubstantiated accusations of misconduct, Saint-Gobain threatened to report Complainant to his state bars, disciplinary boards, and law enforcement authorities in a letter dated November 10, 2020 (OSHA Complaint ¶ 137, 142–43); (4) Saint-Gobain continued to make these threats in December 2020 and January 2021 and also requested that Complainant sign a declaration under oath regarding his post-termination conduct with regard to his company laptop (OSHA Complaint ¶ 145–46); (5) Saint-Gobain made baseless claims that Complainant wrongly saved confidential information (OSHA Complaint ¶ 149–50); and (6) Saint-Gobain "continued to demand that [Complainant] sign the declaration" in a communication on March 8, 2021 (OSHA Complaint ¶ 153). There is no dispute that Complainant filed his OSHA Complaint on April 6, 2021. Subsequently, in filing his Objections to OSHA's Findings on April 29, 2021, Complainant effectively amended his OSHA Complaint to include an allegation that Saint-Gobain made retaliatory and defamatory statements to the media in April 2021. (Complainant's Objections to OSHA Findings at 12.)

Complainant contends his complaint is timely under the continuing violation doctrine. "The continuing violation theory is an equitable exception to statutory limitations periods 'where the unlawful employment practice manifests itself over time, rather than as a series of discrete acts.'" *Belt v. U.S. Enrichment Corp.*, ARB No. 02-117, slip op. at 13 (Feb. 26, 2004) (quoting *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989); citing *Jackson v. Quanex Corp.*, 191 F.3d 647, 667-68 (6th Cir. 1999) *Connecticut Light & Power Co. v. United States Dep't of Labor*, 85 F.3d 89, 96 (2d Cir. 1996)). The theory "forestalls the commencement of the limitations period for as long as the continuing violation is ongoing." *Woods v. Boeing-South Carolina*, ARB No. 13-035, slip op at 2 n.3 (Mar. 20, 2014). Thus, "a single non time-barred act can save other acts that are time-barred" where there is a "course of related discriminatory conduct." *Belt*, ARB No. 02-117 at 14.

In assessing whether there is a continuing violation, the Third Circuit considers: "(1) whether the violations are part of the same subject matter and (2) whether the violations occurred frequently." *Cibula v. Fox*, 570 Fed. Appx. 129, 135 (3d Cir. 2014) (citing *Mandel v. M&Q Packaging Corp.*, 706 F.3d 157, 165-67 (3d Cir. 2013) (eliminating the permanency requirement)). However, the U.S. Supreme Court has held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002); *see also Brune v. Horizon Air Indus. Inc.*, ARB No. 04-037, slip op. at 9 (Jan. 31, 2006) (noting that *Morgan* applies to the environmental whistleblower statutes). Therefore, I must determine whether the alleged retaliatory acts were discrete acts of discrimination or whether they instead involve frequent "repeated conduct." *Morgan*, 536 U.S. at 115. "Discrete acts of discrimination or retaliation are easy to identify. Examples are failure to promote, denial of transfer, termination, and refusal to hire." *Schlagel*, ARB No. 02-092, at 8 (citing *Morgan*, 536 U.S. at 114).

A. Facially Untimely Allegations

Failure to Promote

First, Complainant alleges he was bypassed for a promotion in October 2019. (OSHA Complaint ¶ 108.) Saint-Gobain's alleged retaliatory failure to promote Complainant was a discrete act that is time barred. The Supreme Court specifically identified failure to promote as an example of a discrete discriminatory act in *Morgan*, 536 U.S. at 114. Though the exact date of this alleged retaliatory act is not included in the OSHA Complaint, Complainant was obviously definitively aware of this action and its implications at the time it occurred. The Complaint specifies: "Recognizing the adverse employment decision for the obvious retaliation it was, [Complainant] met with [his supervisor] two days later to express his concerns . . . ." (OSHA Complaint ¶ 109.) Thus, the alleged retaliatory failure to promote was a discrete act, it is not subject to the continuing violation doctrine, and it is time barred because Complainant filed his complaint more than 30 days thereafter in April 2021. *See Ilgenfritz v. U.S. Coast Guard Acad.*, ARB No. 99-066, slip op. at 7 (Aug. 28, 2001) (finding the continuing violation doctrine inapplicable where there "was no prolonged employer decision-making process that made it difficult for [complainant] to determine the actual dates of the allegedly discriminatory acts").

Termination

Likewise, Complainant's termination on October 19, 2020, was a discrete act. The complaint specifically alleges that a Saint-Gobain human resources representative called Complainant and fired him on that date. (OSHA Complaint ¶¶ 128–32.) Thus, on October 19, 2020, Complainant received definitive and unequivocal notice that an adverse action had been taken against him. *See Johnsen v. Houston Nana, Inc.*, ARB No. 00-064, slip op. at 5 (Jan. 27, 2003) ("Because [complainant] received definitive, final and unequivocal notice that adverse action had been taken against him, his complaint is barred by the aforementioned thirty-day limitations periods."). It is beyond dispute that Complainant's termination was a discrete act, it is not subject to the continuing violation doctrine, and it is time barred because he filed his complaint more than 30 days thereafter.

November 10 Letter

Complainant next alleges several instances of post-termination retaliation. First, Complainant asserts that, after he was fired, he "downloaded his Microsoft Outlook account … in order to preserve his contacts and calendar appointments," and he voluntarily disclosed this to Saint-Gobain and affirmed in writing that he had not duplicated or disseminated any confidential information. (OSHA Complaint ¶ 136, 139.) Thereafter, Complainant contends Saint-Gobain "relentlessly threatened [him] and made unsubstantiated accusations of misconduct." (OSHA Complaint ¶ 137.) Specifically, in a letter dated November 10, 2020, Saint-Gobain reminded him of his professional conduct obligations and threatened to report him to his state bars, disciplinary boards, and law enforcement authorities. (OSHA Complaint ¶ 142–43.) Saint-Gobain also "threatened to harm [Complainant] because he failed to return his laptop hard-drive until he received assurances that his personal family data would be appropriately safeguarded," though

Complainant did return the hard-drive by November 14, 2020, and he told Saint-Gobain he did not duplicate or disseminate any confidential information. (OSHA Complaint ¶ 145.)

The November 10, 2020, letter from Saint-Gobain's attorney to Complainant is attached to the Motion to Dismiss as Exhibit A. The letter explains: "Saint-Gobain has recently learned that you have returned your company laptop computer without the Company's hard drive." The letter explains Complainant has multiple legal obligations that require him to do so, including his employment agreement, Saint-Gobain's "Charter for Users of Computer Resources and Communication Networks," and the Rules of Professional Conduct. The letter goes on: "For the avoidance of doubt, this correspondence serves as an additional reminder that your obligations extend not only to Saint-Gobain but also to your state bars." The letter then notes: "As of the date of this letter, the Company has not reported your conduct to any Disciplinary Boards or law enforcement authorities." The letter demands immediate return of the hard drive, as well as assurances that copies were not made and the contents of the hard drive were not shared. The letter concludes: "If you do not return the Company's hard drive at once and provide the requested assurances and chain of custody document, Saint-Gobain will take any and all appropriate action to enforce its contractual, statutory, and common law rights and to hold you accountable."

The letter of November 10, 2020, was a discrete act. Assuming this letter constitutes an adverse action (which I do not decide), Complainant obviously was aware on the date of the letter that Saint-Gobain accused him of misconduct and was willing to notify disciplinary authorities and law enforcement of his activities with regard to his company laptop. The letter is clear and unequivocal in asserting that Complainant violated his professional obligations and in identifying the potential consequences. Complainant alleges the accusations of misconduct are "unsubstantiated." The Supreme Court specifically identified a false accusation of misconduct as a discrete act in *Morgan*, 536 U.S. at 114 (listing the discrete acts that were not time barred). Thus, the November 10, 2020, letter was a discrete act, it is not subject to the continuing violation doctrine, and it is time barred because Complainant filed his complaint more than 30 days thereafter.

December 2020 & January 2021 Communications

Next, Complainant alleges that, "throughout December 2020 and January 2021," Saint-Gobain continued to make the threats outlined in the November 10, 2020, letter and also requested that Complainant "submit his personal external drive to a forensic examination as well as sign a declaration under oath ("Declaration") allegedly to 'prove' exactly what he did or did not do between the time he was fired to the date of the signed Declaration, *i.e.*, to the present." (OSHA Complaint ¶ 146.) Complainant was willing to attest to his conduct, but after receiving drafts of the Declaration, he disagreed with certain representations and did not agree to sign it as written, and Saint-Gobain "continued to harass, threaten, and seek to punish" Complainant. (OSHA Complaint ¶ 147-48.)

Email communications between Complainant and Respondents' attorneys dated December 2021 and regarding the proposed declaration are attached to the Motion to Dismiss as Exhibit C. The unsigned draft declaration is attached to the Motion to Dismiss as Exhibit D. These communications clearly underlie the allegations in the complaint. On December 10, 2020, Saint-

Gobain's attorney emailed the draft declaration to Complainant. (Motion to Dismiss, Exhibit C.) The draft declaration generally outlines the basic facts of Complainant's employment with Saint-Gobain, outlines Complainant's post-termination conduct with regard to his company laptop and cell phone, and indicates Complainant has not used or disclosed any confidential information and also agrees not to use confidential information in connection with third parties such as employers. (Motion to Dismiss, Exhibit D.)

On December 11, 2020, Complainant responded to confirm his compliance with his post-employment obligations to Saint-Gobain and to indicate he would be requesting changes to the draft declaration. For instance—regarding the paragraph indicating Complainant would not use Saint-Gobain's confidential information in connection with third parties such as employers—Complainant requested an exception for compulsory disclosure of information by court order or government agency. On December 21, 2020, Saint-Gobain's attorney responded that he would revise the declaration accordingly.[5] He also indicated that, while Saint-Gobain was inclined to resolve the matter with a declaration, the company reserved its right to modify its position based on the forensics review of Complainant's external hard drive. He specified that Complainant's "actions in removing a company hard drive and in wiping a company cell phone were serious missteps . . . that went beyond internal rules of employment set forth in any company handbook or charter . . . ." (Motion to Dismiss, Exhibit C.)

Again, assuming these communications constitute adverse actions (which I do not decide), Complainant was aware at the time of each email that he was being accused of misconduct and was being asked to sign a declaration relating to his alleged wrongdoing. On the date of each email, he received unequivocal notice that Saint-Gobain considered him to have mistreated company property and/or confidential information and was asking him to affirm his conduct. Though these communications may be "related" (to one another and/or to the November 10 letter), they are each discrete acts that "start a new clock" for filing charges. *See Morgan*, 536 U.S. at 112–13 (explaining a previous holding, in a case involving a discriminatory pay structure, that each weekly paycheck was a discrete and actionable wrong (citing *Bazemore v. Friday*, 478 U.S. 385 (1986))).

A letter dated January 28, 2021, from Saint-Gobain's attorney to Complainant is attached to the Motion to Dismiss as Exhibit F.[6] This letter includes an allegation that Complainant violated the Texas Disciplinary Rules of Professional Conduct and the Pennsylvania Rules of Professional Conduct by threatening "to hold hostage a potential business venture between" his current client and his former client (Saint-Gobain) "until [he] 'first' receive[d] remuneration and other non-monetary relief." Assuming this letter is an adverse action (which I do not decide), this alleged retaliatory act is also time barred. On the date of this letter, Complainant was definitively aware that Saint-Gobain accused him of violating the Rules of Professional Conduct. Again, even if this email is related to the previous communications (and, based on the subject matter, it does not appear to be), it is a discrete act that starts a new clock for filing a claim. Overall, the December 2020 and January 2021 communications were each discrete acts, they are not subject to the

[5] In fact, in a later draft of the declaration, the paragraph indicating Complainant would not use Saint-Gobain's confidential information in connection with third parties was removed entirely. (Motion to Dismiss, Exhibit I.)

[6] This letter responds to a settlement offer from Complainant, which is attached to the Motion to Dismiss as Exhibit E. Because Complainant's own settlement offer does not underlie the allegations in the complaint, I do not consider it. The same is true of Exhibit G, a settlement communication from Complainant's attorney.

continuing violation doctrine, and they are time barred because Complainant filed his complaint more than 30 days thereafter.[7]

February 6 Letter

Next, Complainant alleges that, in a letter dated February 6, 2021, Respondents continued to retaliate by baselessly claiming Complainant wrongly saved data: "Given the file name and size, and considering the fact that it was created on the date of your termination from the Company, we have good reason to believe that you wrongly saved privileged and/or confidential emails (and associated materials) belonging to Saint-Gobain." (OSHA Complaint ¶ 149–50.)

This letter is attached to the Motion to Dismiss as Exhibit B. The letter explains that, upon examining the hard drive from Complainant's company laptop, Saint-Gobain discovered that Complainant "saved numerous files" to an external hard drive. With regard to one such file, as alleged, the letter does indicate Saint Gobain had reason to believe Complainant "wrongly saved privileged and/or confidential emails (and associated materials)." The letter directs Complainant to provide the external hard drive to a consultant for examination. The letter assures Complainant that Saint-Gobain will safeguard any personal information on the hard drive and concludes: "We are interested only in Saint-Gobain information, especially any privileged and/or confidential information that belongs in the custody and control of Saint-Gobain." (Motion to Dismiss, Exhibit B.)

Again, Complainant asserts Saint Gobain's allegations of mistreatment of confidential information are "baseless." (OSHA Complaint ¶ 150.) Again, Complainant was unequivocally aware that he was being accused of misconduct on February 6, 2021, the date of the letter. Again, wrongful accusation is an example of a discrete retaliatory act. *See O'Connor v. Newark*, 440 F.3d 125, 127 (3d Cir. 2006) (citing *Morgan*, 536 U.S. at 114). Thus, the February 6, 2021, letter was a discrete act, it is not subject to the continuing violation doctrine, and it is time barred because Complainant filed his complaint more than 30 days thereafter.

B. Facially Timely Allegations & Complainant's Arguments

March 8 Email

Finally, Complainant alleges, on March 8, 2021, Saint-Gobain "continued to demand that [Complainant] sign the declaration." (OSHA Complaint ¶ 153.) With regard to this action, which is the sole action alleged in the complaint that falls within the limitations period, Respondents allege Complainant fails to state a claim upon which relief can be granted. In particular,

[7] Emails from Respondents' attorneys to Complainant's attorney dated February 2021 are attached to the Motion to Dismiss as Exhibit H (regarding settlement communications) and Exhibit I (regarding the draft declaration). It is not clear whether these communications underlie the allegations in the complaint because Complainant specifically alleges that communications "throughout December 2020 and January 2021" were retaliatory. (OSHA Complaint ¶ 146.) To the extent Complainant does contend these communications constitute retaliatory acts, and to the extent any of them constitute adverse actions (which is doubtful because they primarily relate to scheduling further discussions), any claims relating to these communications are also time barred. They represent discrete acts that occurred outside the 30-day limitations period. At the time of each email, Complainant was unequivocally aware that he was still being asked to sign the declaration.

Respondents assert the email does not constitute an adverse action, and Complainant has not plausibly alleged a causal connection to his protected activity.

As set forth above, complainants in federal civil litigation are required to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2006) (cited in *Neuer v. Bessellieu*, ARB No. 07-036, slip op. at 4 (Aug. 31, 2009)). In contrast, the ARB has adopted a "fair notice standard" for testing the sufficiency of administrative whistleblower complaints. *Evans v. Envt'l Protection Agency*, ARB No. 08-059, slip op. at 11 (Jul. 31, 2012). The ARB has adopted this more lenient standard and generally disfavors motions to dismiss whistleblower actions primarily because of its "concern that wronged employees making their initial complaints to OSHA are unlikely to appreciate formal pleading requirements." *Solomon v. Cigna*, ALJ No. 2019-SOX-00055, slip op. at 3 (Nov. 26, 2019) (citing *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, slip op. at 10 (May 25, 2011)). However, the ARB has also recognized that this concern is not always at issue. Specifically, the ARB has observed that an "expanded complaint," such as one filed by counsel before an ALJ "'should be able to state a claim upon which relief can be granted without unwarranted presumptions and pass muster when subjected to the scrutiny applied to any other complaint.'" *Moody v. Nat'l W. Life Ins. Co.*, ARB No. 2020-0014, slip. op. at 11 (Mar. 31, 2021) (quoting *Solomon v. Cigna*, ALJ No. 2019-SOX-00055, slip op. at 3 (Nov. 26, 2019)).

In this case, the complaint filed by Complainant's counsel before OSHA is just such an expanded complaint. It spans 43 pages, provides an extensive description of the facts as Complainant alleges them, specifically sets forth the alleged protected activity and retaliatory actions, states three separate causes of action under three different federal statutes, includes a prayer for relief, and overall clearly demonstrates counsel's familiarity with pleading requirements.[8] Thus, the OSHA Complaint should be able to plausibly state a claim upon which relief can be granted without unwarranted presumptions.

The email of March 8, 2021, sent from Respondents' attorney to Complainant's attorney, is attached to the Motion to Dismiss as Exhibit J. Though Complainant contends this email itself constitutes actionable retaliation, the argument is meritless. The email (which is the only action alleged in the OSHA Complaint that occurred within the 30-day limitations period) is not an adverse action.

Complainant characterizes the email as threatening and malicious. (OSHA Complaint ¶¶ 152, 154.) However, the email itself reveals otherwise. *See ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 n.8 (3d Cir. 1994) ("Where there is a disparity between a written instrument annexed to a pleading and an allegation in the pleading based thereon, the written instrument will control." (citing *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206-07 (5th Cir. 1975))). The entire text of the email sent from Respondents' counsel to Complainant's counsel on March 8, 2021, is as follows:

[8] As discussed in *Solomon*, the second reason the ARB generally disfavors motions to dismiss whistleblower cases is that they usually involve inherently factual issues such as reasonable belief and motive. *See Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, slip op. at 13 (May 25, 2011). That concern also is not at issue here. I do not conclude that Complainant failed to adequately plead protected activity or causation. Rather, I conclude he failed to adequately plead an adverse action, an issue that is less inherently fact-specific.

> "Good morning and I hope you had a good weekend. I am following up on the Declaration as well as Mr. Gross' position on a transition plan and payment. Is there a good time to discuss today?"

(Motion to Dismiss Exhibit J.)

SDWA prohibits an employer from discharging or otherwise discriminating against an employee "with respect to his compensation, terms, conditions, or privileges of employment" based on the employee's protected activity. 42 U.S.C. § 300j-9(i)(1). CERCLA likewise provides that no employer "shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee" based on the employee's protected activity. 42 U.S.C. § 9610(a). Even under the broad protection afforded by federal environmental whistleblower statutes, this email would not "deter a reasonable employee from engaging in protected activity." *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002 & 09-003, slip op. at 18, 20 (Sept. 13, 2011) (citing *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)); *see also Powers v. PACE*, ARB No. 04-111, slip op. at 13 (Aug. 31, 2007) (indicating this standard applies to the environmental whistleblower Acts).

Considered alone, this email cannot be considered an adverse action and cannot support liability for unlawful retaliation. The email is entirely innocuous, and no reasonable person could conclude that this email was malicious, threatening, or intended to harass Complainant. It is bereft of any malicious or threatening language. It was not sent by Respondents or received by Complainant but exchanged between representatives. The correspondence is direct and professional. The email is simply a routine follow-up request between lawyers regarding the status of settlement negotiations; it is administrative in nature. *See Hemby-Grubb v. Ind. Univ. of Pennsylvania*, 2008 U.S. Dist. LEXIS 72481 (W.D. Pa. Sept. 22, 2008) (finding a non-harassing email from a dean to a faculty member addressing concerns about the faculty member's performance that "threatens no disciplinary action, or any adverse consequences in any way" is not an adverse action); *Saporito v. Florida Power & Light Co.*, 90-ERA-27 & 47 (Sec'y Aug. 8, 1994) (Secretary of Labor adopting ALJ's finding that two letters from Respondent's counsel "were merely a verification of information request and a letter of apology . . . The language of both the initial inquiry and the subsequent apology were not coercive, intimidating or threatening. Indeed, the correspondence appears direct and professional.").

Complainant argues that one must read and interpret this email in the context of the prior threatening communications. Even assuming the prior communications (described above) were threatening and constituted adverse actions, this email represents a discrete and non-harassing incident. There is no threat of action by Respondents and no request (explicit or implicit) that Complainant refrain from any action. The language is reasonable and straightforward and is not hostile. There is nothing in the email that would dissuade an employee from engaging in protected activity; it is merely a request for a conversation. *See Hunter v. Jefferson Par. Pub. Sch. Sys.*, 2017 U.S. Dist. LEXIS 170332 (E.D. La. 2017) (finding a telephone call from defendant's administrative assistant inquiring whether plaintiff would respond to a document request—the only act alleged within the limitations period—did not state a claim for a continuing violation because it was "entirely innocuous, non-threatening, and non-harassing"). In short, the March 8 email is

not legally sufficient to constitute a retaliatory act, it is not legally sufficient to support Complainant's continuing violation argument, and it is not legally sufficient to resurrect the prior time-barred actions.

I recognize that Complainant is entitled to all reasonable inferences at this stage in the litigation. Complainant is not entitled, however, to blind acceptance of his entirely implausible interpretation of this harmless email. With regard to the March 8 email, Complainant has failed to state a claim upon which relief can be granted because (even making all reasonable inferences in Complainant's favor) the email does not constitute an adverse action.

As indicated above, in assessing whether there is a continuing violation, one must consider: "(1) whether the violations are part of the same subject matter and (2) whether the violations occurred frequently." *Cibula v. Fox*, 570 Fed. Appx. 129, 135 (3d Cir. 2014). A complainant "must also point to an affirmative act that took place within the limitations period for the continuing violations doctrine to apply." *Id.* at 136 (citing *Cowell*, 263 F.3d at 293). Even assuming the post-termination communications[9] were "part of the same subject matter" and "occurred frequently" (which I do not decide), the March 8 email (the only alleged action that took place within the limitations period) contained no retaliatory threat and was not a legally actionable adverse action for the reasons set forth above. Thus, there was no adverse action within the statute of limitations that can render any alleged continuing violation actionable.

Moreover, the theory "is designed explicitly to address situations in which the plaintiff's claim is based on the cumulative effect of a thousand cuts, rather than on any particular action taken by the defendant." *O'Connor v. Newark*, 440 F.3d 125, 128 (3d Cir. 2006). Thus, "the filing clock cannot begin running with the first act, because at that point the plaintiff has no claim; nor can a claim expire as to that first act, because the full course of conduct is the actionable infringement." *Id.* (citing *Morgan*, 536 U.S. at 117–18.) For the reasons set forth above, Complainant's claim does not fall into this category. Complainant does not identify any underlying policy of discrimination (other than a general allegation of "harassment") that connects the alleged retaliatory acts into one full course of conduct. Rather, the complaint is based on particular actions taken by Saint-Gobain, and Complainant was aware of the allegedly adverse nature of those actions at the time they occurred. Accordingly, the claims accrued, and the filing clock began to run, with the occurrence of each discrete act.[10] Based on the foregoing analysis, I conclude each alleged retaliatory act prior to the March 8 email is time barred, and the March 8 email itself is not an actionable adverse action.

[9] Complainant apparently argues that all of the alleged retaliatory actions set forth in his complaint (including his missed promotion and termination) are actionable under the continuing violation theory. However, Complainant's only argument with respect to these factors relates to Saint-Gobain's "coercive, harassing tactics against [Complainant] after it terminated him." (Complainant Response at 12.) By Complainant's own description, this alleged retaliatory harassment occurred only after the termination. Thus, it is entirely unclear how Complainant's missed promotion and termination could be included in any alleged continuing violation.

[10] Notably, Complainant does not allege a hostile work environment, which is the type of claim to which the continuing violation doctrine typically applies. *See O'Connor*, 440 F.3d at 127; *Morgan*, 536 U.S. at 115.

Complainant's Arguments

In an attempt to avoid time barring of the allegations that are facially untimely, Complainant cites *Egenrieder v. Metro. Edison Co.*, Case No. 85-ERA-23, 1987 WL 383071 (Sec'y Apr. 20, 1987), a remand order issued by the Secretary of Labor. The Secretary remanded for consideration of whether there was a continuing violation where the employee alleged blacklisting (after the employer allegedly forced the employee to resign) because such conduct is insidious and not easily discerned and, consequently, may result in a lapse of time before an employee has any basis to suspect discrimination. First, in this case, Complainant does not allege blacklisting. Second, as described above, the retaliatory acts Complainant does allege were discrete and did not constitute discrimination that could not be easily discerned. Third, the Secretary did not decide that the continuing violation theory was applicable; he merely remanded the case for consideration of the issue. Finally, this 1987 order of remand was issued well before the Supreme Court's holding in *Morgan* in 2002 that untimely discrete acts cannot be rendered actionable by the continuing violation doctrine. Thus, Complainant's argument, based on this order, that his complaint is timely because "he was threatened with losing his license to practice law," conduct that "far exceeds blacklisting," is unpersuasive. (Complainant Opposition at 10.)

Complainant also relies on *Connecticut Light & Power Co. v. United States Dep't of Labor*, 85 F.3d 89 (2d Cir. 1996). There, the employer included in a proposed settlement agreement provisions that would have prevented the employee from providing information to regulators. Over the course of settlement negotiations, the employer continued to insist upon these gag provisions, and the employer ultimately withdrew its settlement offer within the limitations period. The Second Circuit Court of Appeals determined that this "negotiation tactic, employed over a period of months" constituted a continuing violation. *Id.* at 96. The Court reasoned that the employer's attempt to coercively induce the employee to relinquish his right to provide safety information to regulatory agencies constituted an underlying policy of discrimination designed to keep the employee quiet. *Id.* at 95–96.

Complainant argues Saint-Gobain's conduct in this case is "much more severe than the employer's negotiating tactics in *Connecticut Light & Power*" because, if acted upon, their threats to report Complainant to disciplinary authorities and law enforcement "would make it impossible for [Complainant] to practice his chosen profession at all." (Complainant Opposition at 16.) The cases are distinguishable. First, Saint-Gobain made no attempt to coerce Complainant to relinquish his rights to speak to regulators in violation of the statutory purposes at issue. As set forth above, the communications themselves are clear that any threat of reporting to disciplinary authorities related only to Complainant's conduct with regard to his company laptop (and his alleged threat to hold up Saint-Gobain's business negotiations with his subsequent employer).[11] Second, the March 8 email (the only allegedly retaliatory communication within the limitations period) made no mention of reporting Complainant to disciplinary authorities or law enforcement. Thus, it cannot be said that the post-termination course of communications constitutes a consistent underlying policy of discrimination. Assuming the initial threat was retaliatory, it did not persist

[11] As also noted above, the paragraph indicating Complainant would not use Saint-Gobain's confidential information in connection with third parties was removed from the most recent draft of the declaration at Complainant's request. (Motion to Dismiss, Exhibit I.)

throughout the course of the communications.[12] It is also worth noting that *Connecticut Light & Power* was decided before *Morgan* and that Complainant ended settlement discussions in response to the March 8 email, not Respondents. (Motion to Dismiss, Exhibit J.) In short, *Connecticut Light & Power Co.* does not compel the conclusion that there was a continuing violation or that Complainant's complaint is timely.

Media Statements

In his objections to OSHA's dismissal of his complaint, Complainant also alleges that Saint-Gobain made retaliatory defamatory statements to the media in April 2021. These allegations are timely on their face. Respondents argue Saint-Gobain's statements to media outlets do not constitute adverse actions, and there is no plausible connection between Complainant's alleged protected activity and these statements.

Complainant specifically identifies two statements made by Respondents to news outlets:

> "Mr. Gross was separated from the company following an investigation for violating company policies, including our harassment prevention policy, among others."[13]
>
> "Despite access to multiple ethics hotlines and numerous opportunities to raise concerns directly to incoming CEO Mark Rayfield and other senior leaders, Mr. Gross did not do so."[14]

(Complainant's Objections to OSHA Findings at 12.)

These statements are not adverse actions. They are simple factual statements. The Complaint itself acknowledges that Saint-Gobain investigated Complainant for insubordination. (OSHA Complaint ¶ 129.) Complainant argues Saint-Gobain's statements to the media were designed to harm his reputation because "[t]he average reader will think that harassment means sexual harassment." (Complainant's Objections to OSHA Findings at 13.) This is nothing more than wild speculation. The statement makes no mention of sexual harassment or any other criminal conduct. Again, Complainant is entitled to reasonable inferences, not acceptance of his base conjecture. Complainant contends these statements falsely imply that he "did something he should not have done or failed to do something he should have." (*Id.*) Again, though, the statements make no mention of misconduct. They state in a reasonable and non-hostile manner the circumstances surrounding Complainant's termination. Any assertion that these statements would deter a reasonable employee from engaging in protected activity is pure and patent guesswork, not a reasonable inference. *See Frederick v. Reed Smith Shaw & McClay*, 1994 U.S. Dist. LEXIS 1811

[12] In other words, Complainant does not sufficiently allege either "i) an underlying discriminatory policy or practice [or] ii) an action taken pursuant to that policy during the statutory period preceding the filing of the complaint," as is necessary to establish a continuing violation. *Connecticut Light & Power Co*, 85 F.3d at 96.

[13] B.J. Lyons, Times Union, "Saint-Gobain whistleblower says company ignored pleas to probe pollution sites," https://www.timesunion.com/news/article/Saint-Gobain-16124482.php (Apr. 24, 2021).

[14] J. Therrien, Bennington Banner, "OSHA Filing Against Saint-Gobain Could Impact Lawsuit," https://www.benningtonbanner.com/local-news/osha-filing-against-saint-gobain-could-impact-lawsuit/article_01524692-9d6c-11eb-b32f-c327d5ae0b63.html (Apr. 15, 2021).

(E.D. Pa. Feb. 18, 1994) (finding defendant's statements to the media about plaintiff's employment, termination, and lawsuit did not constitute adverse employment action as a matter of law under Title VII).[15]

In short, bare assertions and conclusory allegations that Complainant suffered an adverse action are insufficient. Complainant must present plausible grounds to infer that these statements were adverse. He has not done so. Instead, this allegation represents nothing more than a desperate attempt to rescue an untimely filing. Respondents note (and Complainant does not dispute[16]) that it was Complainant's counsel who publicized the OSHA Complaint to media outlets. Saint-Gobain's self-defense in a public forum (only after Complainant himself created a scenario necessitating a response) cannot be used to fabricate an adverse action. Permitting this allegation to go forward when the Complaint itself is untimely would be a perverse outcome. It would incentivize parties to publicize untimely allegations in an attempt to elicit any response from the opposing party, which could then be couched as retaliatory. *See Trant v. Oklahoma*, 2012 U.S. Dist. LEXIS 180732 (W.D. Okla. Dec, 21, 2012) ("Responding to media inquiries prompted by the actions of Plaintiff's own attorney is not retaliatory or malicious behavior, despite the assertions of Plaintiff."), *aff'd in part, rev'd in part*, 754 F.3d 1158 (10th Cir. 2014). With regard to Saint-Gobain's statements to the media, Complainant has failed to state a claim upon which relief can be granted because (even making all reasonable inferences in Complainant's favor) the statements do not constitute adverse actions.[17]

Finally, I note that I do recognize the serious nature of Complainant's allegations. I do not reach the substance of those allegations or minimize Complainant's safety concerns. I conclude only that Complainant failed to file his complaint in a timely manner. The nature of the safety concerns underlying the complaint simply have no bearing on that limited question. Complainant argues the 30-day limitations period itself is a dangerous "loophole." (Complainant Opposition at 10.) However, that concern is beyond my power to address. The choice of an appropriate statute of limitations is a legislative determination. Based on the statute of limitations applicable here, Complainant's allegations are nearly all untimely, and those minor allegations that are facially timely fail to state a claim upon which relief could be granted.

[15] I do not conclude that statements to the media could never constitute adverse actions. I conclude Saint-Gobain's statements to the media are not adverse actions under the set of facts Complainant alleges. I also note that, even assuming these media statements constituted adverse actions, they could not support application of the continuing violation doctrine to revive Complainant's other allegations because, as described, the prior alleged retaliatory acts were discrete acts, and any allegations related thereto are time barred. Moreover, Saint-Gobain's statements to the media are wholly unrelated to the post-termination communications.

[16] Complainant acknowledges that he "open[ed] the door to media communications." (Complainant Surresponse at 14.)

[17] Even assuming these media statements could constitute adverse actions, it is doubtful that Complainant plausibly alleged a causal connection between his protected activity and these statements, which were made six months after Complainant's termination and only after Complainant himself publicized his OSHA Complaint. *See Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, slip op. at 8 (July 31, 2001) ("[W]here the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action, the inference of causation is compromised. Because the intervening event reasonably could have caused the adverse action, there no longer is a logical reason to infer a causal relationship between the activity and the adverse action.").

IV. Conclusion and Order

Complainant's OSHA Complaint is untimely because no act of discrimination occurred within the 30 days prior to the filing of his complaint. Each alleged retaliatory act is a discrete act, and there is no continuing violation. Because neither the March 8 email nor Saint-Gobain's statements to the media constitute adverse actions, Complainant failed to state a cognizable claim for relief with regard to those allegations. Accordingly, Respondents' Motion to Dismiss is **GRANTED**, and Complainant's complaint is **DISMISSED**.

SO ORDERED.

LAUREN C. BOUCHER
Administrative Law Judge

Cherry Hill, New Jersey

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 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, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards.

If no timely petition for review is 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.

IMPORTANT NOTICE ABOUT FILING APPEALS:

The Notice of Appeal Rights has changed because the system for online filing will become mandatory for parties represented by counsel on April 12, 2021. Parties represented by counsel after this date must file an appeal by accessing the eFile/eServe system (EFS) at https://efile.dol.gov/ EFILE.DOL.GOV. Before April 12, 2021, all parties may elect to file by mail rather than by efiling.

Filing Your Appeal Online

Information regarding registration for access to the new EFS, as well as user guides, video tutorials, and answers to FAQs are found at https://efile.dol.gov/support/.

Registration with EFS is a two-step process. First, all users, including those who are registered users of the former EFSR system, will need first create an account at login.gov (if they do not have one already). Second, if you have not previously registered with the EFSR system, you will then have to create an account with EFS using your login.gov username and password. Once you have set up your EFS account, you can learn how to file an appeal to the Board using the written guide at https://efile.dol.gov/system/files/2020-10/file-new-appeal-arb.pdf and/or the video tutorial at https://efile.dol.gov/support/boards/new-appeal-arb. Existing EFSR system users will not have to create a new EFS profile.

Establishing an EFS account should take less than an hour, but you will need additional time to review the user guides and training materials. If you experience difficulty establishing your account, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

If you file your appeal online, no paper copies need be filed. During this transition period, **you are still responsible for serving the notice of appeal on the other parties to the case.**

Filing Your Appeal by Mail

Self-represented litigants (and all litigants prior to April 12, 2021) may, in the alternative, file appeals using regular mail to this address:

Administrative Review Board
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-5220,
Washington, D.C., 20210

Access to EFS for Other Parties

If you are a party other than the party that is appealing, you may request access to the appeal by obtaining a login.gov account and EFS account, and then following the written directions and/or via the video tutorial located at:

https://efile.dol.gov/support/boards/request-access-an-appeal

After An Appeal Is Filed

After an appeal is filed, all inquiries and correspondence should be directed to the Board.

Service by the Board

Registered e-filers will be e-served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, you may opt into e-service by establishing an EFS account, even if you initially filed your appeal by regular mail.