In the Matter of:

COLEEN L. POWERS, **ARB CASE NO. 04-111**

COMPLAINANT, **ALJ CASE NO. 04-AIR-19**

v. **DATE: August 31, 2007**

PAPER, ALLIED-INDUSTRIAL, CHEMICAL & ENERGY WORKERS INT'L UNION (PACE),

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER OF REMAND

Coleen L. Powers[1] filed a complaint under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West Supp. 2006), the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C.A. § 1514A (West 2006), and six environmental acts.[2] Powers, a part-time flight attendant at Pinnacle Airlines, Inc., alleges that Pinnacle, her local PACE union (Local 5-0772), and other organizations and individuals have discriminated against her in retaliation for various protected activities including pursuing a prior complaint and

[1] Powers purports to include "et al." as additional complainants. Because there is no indication that any other complainants are parties to this action, we ignore this use of "et al." and, like the ALJ, treat this complaint as filed solely by Powers.

[2] The Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998); the Federal Water Pollution Control Act (FWPCA), 33 U.S.C.A. § 1367 (West 2001); the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9 (West 2003); the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 2003); the Solid Waste Disposal Act (SWDA), also known as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. § 6971 (West 2003); and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (West 2005). We hereafter refer to these acts collectively as the Environmental Acts.

informing Pinnacle of various safety issues. After an Administrative Law Judge (ALJ) dismissed the complaint, Powers timely petitioned the Administrative Review Board (ARB) for review.[3]

The ARB accepted review in June 2004, but by the time we received the record four of the named respondents had filed for bankruptcy.[4] These respondents were Northwest Airlines, Inc., NWA, Inc., Northwest Airlines Corporation, and Mesaba Aviation, Inc. *See In re: Northwest Airlines Corporation, et al.*, Chapter 11 Case No. 05-17930 (ALG), U. S. Bankruptcy Court, S.D.N.Y. **(**Northwest Airlines, Inc., NWA, Inc., and Northwest Airlines Corporation filed for bankruptcy on September 14, 2005, and emerged on May 31, 2007); Bankruptcy Case No. 05-39258, U.S. Bankruptcy Court, D. Minn. (Mesaba filed for bankruptcy on October 13, 2005 and emerged on April 24, 2007).[5] As required by the bankruptcy code, 11 U.S.C.A. § 362(a), (c) (West 2003), we therefore stayed consideration of this action until the bankruptcy proceedings had been resolved.

Once all entities in bankruptcy had emerged, we resumed consideration of this appeal.[6] Having reviewed Powers' complaint, we conclude that the ALJ may have erred in determining that the complaint does not state a claim under any of the eight acts under which Powers brings her complaint. But because there is nothing in the record to indicate that any of the respondents were served by the ALJ, and therefore none of them have had the opportunity to respond to Powers' complaint, we do not now decide whether the complaint in fact states a claim under any of the acts. Rather, with certain exceptions (see next section), we vacate the ALJ's dismissal and remand so that the various respondents can have the opportunity to respond before a determination is made as to whether the complaint states a claim.

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[3] Prior to the issuance of the ALJ's decision, Powers filed an interlocutory appeal which the ARB declined to accept. *See Powers v. PACE*, ARB No. 04-083, ALJ No. 2004-AIR-19 (ARB July 30, 2004) (declining to accept interlocutory appeal because ALJ's decision already had issued).

[4] For reasons that are unclear, we did not receive the record until June 2006.

[5] Although neither these respondents nor Powers notified the ARB of these bankruptcy filings, we take judicial notice of their occurrence because the bankruptcy proceedings have been published by federal courts.

[6] In order to facilitate speedier review while the record was unavailable due to the ARB's recent move to new offices, PACE – at our request – provided copies of certain documents. The complete original record was checked prior to the issuance of this Order to ensure that all references were accurate.

JURISDICTION

Our jurisdiction to review the ALJ's decision is set out in Secretary's Order 1-2002, 76 Fed. Reg. 64272 (Oct. 17, 2002), which delegated to the ARB the Secretary's authority to review ALJ decisions issued under the SOX, AIR 21, and the Environmental Acts.[7] *See* 15 U.S.C.A. § 2622(b) (giving Secretary authority to decide discrimination complaints brought under TSCA); 18 U.S.C.A. § 1514A (same, SOX); 33 U.S.C.A. § 1367(b) (FWPCA); 42 U.S.C.A. §§ 300j-9(i) (SDWA); 6971(b) (SWDA); 7622(b) (CAA); 9610(b) (CERCLA); 49 U.S.C.A. § 42121(b)(3) (AIR 21); *see also* 29 C.F.R. § 24.8 (environmental statutes); 29 C.F.R. §§ 1979.110 (AIR 21); 1980.110 (SOX).

The ALJ concluded that she did not have jurisdiction over complaints arising under civil rights statutes or the U.S. Constitution. *See* Order Dismissing Claim (Order) at 3-4. We agree. Under our delegated authority, we may decide appeals only from administrative decisions arising under certain listed laws and any later laws "that provide for final decisions by the Secretary of Labor." *See* Secretary's Order 1-2002 at 64272-73 (listing various statutes, not including the U.S. Constitution or general civil rights statutes). We also decline to address Powers' allegations that the respondents violated rights guaranteed to her by the National Labor Relations Act (NLRA), the Labor Management Relations Act of 1947 (LMRA), the Railway Labor Act (RLA), and the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), *see* Amended Complaint at 1, because we do not have jurisdiction over complaints arising under these laws. *See* Secretary's Order 1-2002, 67 Fed. Reg. at 64272-73 (appeals we may decide do not include any that arise under the NLRA, LMRA, RLA, or LMDRA). Thus the ALJ need not address on remand any portion of Powers' complaint that arises under these four statutes.

For the same reason, we note our agreement with the ALJ's conclusion, *see* Order at 3-4, that she had no jurisdiction over the activities of the NLRB. In addition, we note that although the complaint also seeks redress or investigatory action from several entities in addition to the NLRB – namely, the Securities and Exchange Commission (SEC), the Federal Aviation Administration (FAA) Federal Bureau of Investigation (FBI), the National Mediation Board (NMB), DOL's Office of Labor Management Standards (OLMS), and DOL's Office of the Inspector General (OIG), *see* Complaint at 2 (NLRB, FAA, OSHA), 39-40 (NLRB), 40 (FAA); Amended Complaint at 40 (FBI, SEC, NMB, OLMS, OIG), 41-42 (OSHA) – we have no authority to direct the activities of any of these agencies. *See* Secretary's Order 1-2002, 67 Fed. Reg. at 64272-73. Thus on

[7] We review the ALJ's conclusions of law de novo. *See Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 03-SOX-8, slip op. at 7 (ARB July 29, 2005) (SOX); *Peck v. Safe Air Int'l, Inc. d/b/a Island Express*, ARB No. 02-028, ALJ No. 01-AIR-3, slip op. at 5 (ARB Jan. 30, 2004) (AIR 21); *White v. The Osage Tribal Council*, ARB No. 00-078, ALJ No. 95-SDW-1, slip op. at 2 (ARB Apr. 8, 2003) (SDWA); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 9, slip op. at 15 (ARB Feb. 29, 2000) (CAA, SWDA, CERCLA, TSC, and FWPCA). The ALJ made no factual findings.

remand the ALJ need not respond to any request or motion that was in fact directed to any of these other entities.[8]

DISCUSSION

We first discuss certain procedural issues. Then, in order to facilitate proceedings upon remand, we describe the standard for determining whether a complaint states a claim and comment briefly on the ALJ's initial analysis. Finally, we address Powers' motions and requests.

Procedural issues

In her March 27, 2004 request for a hearing Powers names as respondents ten organizations and seven individuals.[9] The organizations are Mesaba Airlines; "Mesaba Holdings, Inc. {'MAIR'}"; Northwest Airlines Corporation; NWA Inc.; Northwest Airlines, Inc.; Local 5-0772; "Pinnacle Airlines Corporation of Tennessee"; Pinnacle Airlines Corporation; Pinnacle Airlines, Inc. (Pinnacle); and Piper Rudnick, LLP. The individuals are Teresa Brents, Ted Davies, Doug Hall, Kim Monroe, Phil Reed, Phil Trenary, and Lloyd Walters. Four of these individuals were employed by Pinnacle: Davies was Pinnacle's In-Flight Director, Monroe was an employee in Pinnacle's Human Resources department, Trenary was Pinnacle's President and CEO, and Reed was Pinnacle's Vice President for In-Flight Marketing & Sales. Two of these individuals were union officials: Brents was the Acting President of Local 5-0772, and Lloyd Walters was the Vice President for PACE's Region 7, of which Local 5-0772 was a part. Hall was an attorney with Piper Rudnick, a law firm that had represented Pinnacle with regard to a previous complaint filed by Powers. Except for Monroe and Walters, each of these organizations and individuals also is named as a respondent in the February 27, 2004 complaint that Powers filed with OSHA.

OSHA acknowledged that Powers had "named numerous parties as respondents" but stated that her "factual allegations relate only to PACE." March 15, 2004 OSHA letter to Powers at 1. OSHA then dismissed all the named respondents and, it seems, substituted PACE. OSHA gave no reason for this substitution. Because OSHA sent its

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[8] We acknowledge Powers' clarification on appeal that she "never asserted that the ALJ . . . has any jurisdiction over the NLRB." Complainant's Rebuttal Brief at 6.

[9] The hearing request also lists "et al." as additional respondents. Because Powers nowhere specified the identity of any additional respondents, we understand her complaint to include only those respondents it actually names. By summarizing those names here, we make no determination as to whether the names Powers uses refer to legal entities. Nor do we express any opinion as to whether Powers herself properly served all the respondents she names.

decision only to Local 5-0772 and not to PACE, *id*. at 2, the apparent substitution may have been an administrative error.[10]

After Powers requested a hearing, the ALJ issued a show cause order noting that OSHA had "dismissed" the complaint "as to all other named Respondents," and giving "[t]he Respondent, PACE" ten days to respond to any pleading filed by Powers. April 14, 2004 Show Cause Order at 1-2.

Although Powers had named Walters, a PACE officer, her complaint had not named PACE itself as a respondent. *See* Complaint at 1; *see also* Complainant's Rebuttal Brief at 3; Complainant's April 18, 2004 Motion to Amend/Alter the Harmful Errors in the April 14, 2004 Order in 2004-AIR-19 at 3-4 (taking issue with the ALJ's dismissal of the named respondents). PACE's one-sentence motion seeking dismissal does not indicate that PACE intended to represent Walters, Brents, or Local 5-0772. *See* Motion to Dismiss at 1 (requesting dismissal on ground that complaint did not "state a cause of action against PACE").

The ALJ did not provide any explanation for treating PACE as a respondent. It is apparent, however, that the ALJ treated PACE as the sole respondent: only PACE was named in the caption, and only PACE was authorized to respond to the show cause order. (Like OSHA, the ALJ sent her order only to Brents at Local 5-0772, and not to PACE. *See* Show Cause Order, Service Sheet, at 1.) The ALJ did not indicate that she herself was either joining PACE or dismissing the other respondents. From the ALJ's reference to OSHA's dismissal, it appears that the ALJ may have believed that OSHA's dismissal already had eliminated the named respondents from the action.

But OSHA's dismissal did not itself remove the other respondents from Powers' hearing request. Upon Powers' filing a request for a hearing, OSHA's determination became "inoperative." 29 C.F.R. § 24.4(d)(2) (Environmental Acts); *see also* 29 C.F.R. §§ 1979.106(b)(1) (AIR 21) ("If a timely objection is filed, all provisions of the preliminary order shall be stayed . . . "); 1980.106 (SOX) ("If a timely objection is filed, all provisions of the preliminary order shall be stayed . . . "). Therefore, OSHA's dismissal of these respondents did not take effect, and all of the respondents remained in the action at the time that it went before the ALJ.

Of Powers' named respondents only Local 5-0772, Hall, and Piper Rudnick received the ALJ's show cause order. *See* Service Sheet at 1. Because the ALJ already had stated that PACE was "[*t]he*" only respondent, and Hall and Piper Rudnick do not represent PACE, it is not clear what the ALJ intended to accomplish by serving Hall and Piper Rudnick. In any case, we doubt that their mere receipt of the show cause order constituted effective service, when coupled with the clear statement in the order itself that only PACE was a respondent.

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[10] OSHA sent its initial notice of complaint to Local 5-0772 and not, it seems, to PACE. *See* March 5, 2004 OSHA Letter to Local 5-0772.

After Powers responded to the show cause order on April 18, 2004, only PACE submitted a pleading. *See* May 7, 2004 Motion to Dismiss. None of the named respondents responded in any way to the show cause order. In particular, and contrary to Powers' assertion, *see* Complainant's Brief at 4 and 16, Hall and Piper Rudnick did not respond to the ALJ's show cause order.

Hall did sign a pleading submitted by Piper Rudnick on April 21, 2004 in a different case administered by the same ALJ. *See* Respondent's Opposition to Complainant's Motion Dated April 18, 2004 (submitted April 21, 2004 on behalf of Pinnacle in Case No. 2004-AIR-6). But this pleading included the following footnote:

> Ms. Powers has captioned the motion as being filed jointly in Cases 2004-AIR-6 and 2004-AIR-19. The only respondent in the latter case, however, is Ms. Powers' union. Pinnacle is responding to Ms. Powers' pleading because of its reference to 2004-AIR-6, and only to the extent it is relevant to that case. Thus, for example, Pinnacle does not respond to Ms. Powers' motion to amend the Court's April 14, 2004 Show Cause Order in 2004-AIR-19, or her argument that the Court lacked authority to issue such an order. . . .

Thus, not only does the record contain nothing to indicate that either Hall or Piper Rudnick ever entered this particular case (either on their own behalf or representing any respondent named by the ALJ), the record also contains an express disclaimer of any such entry.

Similarly, the ALJ served her recommended order of dismissal only upon Powers, Brents and Local 5-0772, and Hall and Piper Rudnick. *See* Order Service Sheet at 1 (also serving various DOL personnel). Therefore, none of the other named respondents were provided by the ALJ with the "Notice of Appeal Rights" that appears at the end of the dismissal order.

The ARB repeated the ALJ's omissions. Presumably using the ALJ's service sheet as a model, the ARB sent its first two briefing schedules only to Powers, Brents and Local 5-0772, and Hall and Piper Rudnick.[11] Despite not having been served with these two briefing schedules, PACE then entered an appearance in the appeal. In its letter doing so, PACE stated that "[i]t does not seem that any representative of PACE International Union has been served with" the ARB's June 14, 2004, briefing order."[12] Because PACE made this assertion despite knowing that Brents and Local 5-0772 had

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[11] *See* Notice of Appeal and Order Establishing Briefing Schedule, June 14, 2004, Certificate of Service, at 1; Order Granting Extension of Time and Amending Briefing Schedule, July 13, 2004, Certificate of Service, at 1 (same parties served).

[12] *See* July 13, 2004 Letter from PACE at 1 (entering appearance "on behalf of the Paper, Allied-Industrial, Chemical & Energy Workers International Union ('PACE')").

received the ARB's briefing orders, it appears that PACE did not consider Local 5-0772 or Brents to be "representative[s]" of PACE.

After PACE's entry into the appeal, the ARB then sent the Board's next two orders to Powers, PACE, Brents and Local 5-0772, and Hall and Piper Rudnick.[13] PACE filed with the ARB a brief on its own behalf.[14] No named respondent entered an appearance or filed a brief in the appeal.

In omitting to serve the named respondents with her order and her decision, the ALJ may have acted inconsistently with applicable procedural requirements. The regulations implementing SOX and AIR 21 provide that both "the complainant and the named person shall be parties in every proceeding."[15] 29 C.F.R. § 1980.108(a) (SOX); *see* 29 C.F.R. § 1979.108(a)(1) (AIR 21) (same); *see also* 29 C.F.R. §§ 1979.101 (AIR 21) (defining "named person" as "the person alleged to have violated the act"), 1980.101 (SOX) (defining "named person" as the employer and/or the company or company representative named in the complaint who is alleged to have violated the Act."). These regulations also require that ALJs follow the procedural rules set forth in 29 C.F.R. § 18.3 (discussing requirements for service by Office of Administrative Law Judges). *See* 29 C.F.R. §§ 1979.109(a) (making Part 18 rules applicable to SOX cases), 1980.109(a) (same, AIR 21 cases). These rules require the Office of Administrative Law Judges to "serve[]" all "orders" upon "all parties of record." 29 C.F.R. §§ 18.3(a), (c).

We do not here decide precisely which procedural regulations apply, or whether any applicable requirements were violated, because it appears clear that none of the respondents named by Powers has yet had an opportunity to respond to Powers' complaint. Because the ALJ's analysis contains several flaws, and because there is a possibility that an analysis free of those flaws might find that the complaint states a claim, we do not think it advisable in this case to overlook the cumulative impact of the procedural irregularities and omissions we have described. Regardless whether the named respondents choose to respond after they are given the opportunity to do so, and regardless whether any such response might alter the analysis, we think it preferable that the respondents be given the opportunity to respond. Our adversarial system relies upon the fundamental concept that decisions affecting parties' rights should not be made without giving those parties notice and the opportunity to be heard. *See, e.g., Nelson v. Adams USA, Inc.*, 529 U.S. 460, 471 (2000) (noting that "judicial predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords"). We think it preferable to avoid any due process issue by

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[13] *See* July 29, 2004 Order to Show Cause, Service Sheet at 1 (serving Hall and Piper Rudnick, Brents and Local 5-0772, and PACE); Order, Sept. 9, 2004 (same).

[14] *See* Respondent's Brief at 1-3.

[15] Similarly, under the regulation implementing the Environmental Acts, the parties appear to include "the respondent (employer)." 29 C.F.R. § 24.4(d)(3). Yet Pinnacle Airlines, Inc. – Powers' employer and a named respondent – was not served by the ALJ.

deferring any ruling on whether the complaint states a claim until an opportunity to respond has been extended to all those respondents who remain in the action.

It appears likely that the four named respondents that have passed through bankruptcy should no longer remain in this action. Powers has not notified us that her claims were preserved against those four respondents, so we assume that those claims are now extinguished. *See, e.g, Davis v. United Airlines, Inc.*, ARB No. 02-105, ALJ No. 2001-AIR-5, slip op. at 3 (ARB Apr. 26, 2006) (noting that "confirmation of a Chapter 11 reorganization plan . . . [generally] discharges the debtor from any debt [including "liability" on any "claim"] that arose before the date of such confirmation"). Unless Powers presents to the ALJ evidence showing otherwise, the ALJ may dismiss these four respondents and thus need not include them in any service of orders upon the remaining respondents.

Similarly, because there is nothing in the record to indicate that PACE is representing Davies, Brents, or Local 5-0772, it is possible that PACE is not a proper party in this action. On remand, the ALJ may wish to permit argument as to whether PACE should be dismissed as improperly joined, or permitted to remain in the action as the representative of a named respondent.

Standard for determining whether a complaint states a claim

Under any of the acts upon which Powers relies, the proper standard for determining whether a whistleblower complaint states a claim is that set out in Federal Rule of Civil Procedure 12(b)(6).[16] Under this standard, as recently clarified by the U.S.

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[16] Because "[n]either the rules governing hearings in whistleblower cases, 29 C.F.R. Part 24, nor the rules governing hearings before ALJs, 29 C.F.R. Part 18, provide for dismissal of a complaint for failure to state a claim upon which relief can be granted," *Helmstetter v. Pacific Gas & Electric Co.*, 1991-TSC-1 at 3 (Sec'y Jan 13, 1993) (citing 29 C.F.R. § 18.1(a)), the Secretary has held that an ALJ in determining whether to dismiss a complaint for failure to state a claim must apply Federal Rule of Civil Procedure 12(b)(6)), and that review of such a dismissal should use the same standard. *See* 29 C.F.R. § 18.1(a) (requiring ALJs to turn to Federal Rules of Civil Procedure when ALJ procedural rules are silent); *see also Studer v. Flowers Baking Co.*, 1993-CAA-11, slip op. at 2 (Sec'y June 19, 1995) (analyzing CAA complaint under standards in Federal Rule of Civil Procedure 12(b)(6)); *Aurich v. Consolidated Edison Co.*, 1986-CAA-2, slip op. at 5 (Sec'y Apr. 23, 1987) (same); *Chase v. Buncombe County*, 1985-SWD-4, slip op. at 5 (Sec'y Nov. 3, 1986) (same, via Supreme Court decision applying 12(b)(6)). We have applied this same 12(b)(6) standard regardless of the statute under which the whistleblower complaint was brought. *See, e.g., Fullington v. AVSEC Services, L.L.C.*, ARB No. 04-019, ALJ No. 2003-AIR-30, slip op. at 5 (ARB Oct. 26, 2005) (applying 12(b)(6) standard to AIR 21 case); *High v. Lockheed Martin Energy Systems*, ARB No. 98-075, ALJ No. 96-CAA-8, slip op. at 1, 6 (ARB Mar. 13, 2001), (applying 12(b)(6) standard to complaint brought under TSCA, CERCLA, SWDA, SDWA, ERA, and CAA).

Supreme Court, although a complaint "does not need *detailed* factual allegations" it still must provide "factual allegations" that indicate the "grounds" for the complaint. *Bell Atlantic Corp. v. Twombly*, 550 U.S. __, 127 S. Ct. 1955, 1964-65 (May 27, 2007) (emphasis added) (clarifying *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002)).

While the standard remains "very charitable," *High*, slip op. at 6, under *Bell Atlantic* dismissal is no longer "reserved for those cases in which the allegations of the complaint itself demonstrate that the plaintiff does not have a valid claim." *Helmstetter, slip op.* at 5; *see Bell Atlantic*, 127 S. Ct. at 1968-69 (clarifying and limiting "'no set of facts' language" in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Rather, the complaint itself must contain "enough factual matter (taken as true) to suggest that" the alleged violation is "plausible." *Bell Atlantic*, 127 S. Ct. at 1968.

A complaint need not *prove* its "factual allegations," of course, so a decision that a complaint states a claim does not mean that the complainant has proven the elements of her claim.[17]

Insofar as the 12(b)(6) standard has been modified by any of the statutes under which the complaint is brought, or any of the regulations implementing those statues, we apply the applicable statutory standard. To date, we have not had occasion to determine whether the "gatekeeper" provisions in AIR 21 and SOX in fact set forth a more stringent standard than otherwise would apply to determinations regarding 12(b)(6)-type challenges to employment discrimination complaints. *See* 69 Fed. Reg. 52104, 52106-10 (Aug. 24, 2004) (discussing content of SOX complaint and gatekeeper requirement); 68 Fed. Reg. 31860, 31861-62 (May 28, 2003) (noting similarity of SOX gatekeeper requirement to AIR 21 gatekeeper requirement); 68 Fed. Reg. 14100 (Mar. 21, 2003) (Procedures for the Handling of Discrimination Complaints under AIR 21 – Final Rule) (noting similarity between AIR 21 gatekeeper requirement and ERA gatekeeper requirement); 67 Fed. Reg. 15454, 15455 (Apr. 1, 2002) (same); 63 Fed. Reg. 6614, 6618-19 (Feb. 9, 1998) (Procedures for the Handling of Discrimination Complaints Under Federal Employee Protection Statutes – Final Rule) (discussing ERA gatekeeper requirement); 59 Fed. Reg. 12506, 12506 (Mar. 16, 1994) (Procedures for the Handling of Discrimination Complaints Under Federal Employee Protection Statutes – Proposed Rule) (noting ERA gatekeeper requirement).

[17] The clear majority of ARB decisions have recognized that if a complaint *alleges* sufficient factual matter to survive 12(b)(6) dismissal, then to prevail the complainant still must *establish* those allegations – i.e., *prove* them or *show* them to be true. *See, e.g., Stephenson v. NASA*, ARB No. 98-025, ALJ No. 1994-TSC-5, slip op. at 13-14 (ARB July 18, 2000) (Secretary's decision that complainant had stated a claim did not constitute decision that complainant actually had engaged in protected activity). Although stray terminology in a few decisions may appear to suggest that the complaint itself must *establish* the complainant's allegations, the use of such terminology appears to have been inadvertent because none of those decisions includes any explicit discussion of any intent to depart from the standard in 12(b)(6). *See, e.g., Harvey v. Home Depot*, ARB Nos. 04-114, 115, ALJ Nos. 2004-SOX-20/36, slip op. at 11-12 (ARB June 2, 2006) (suggesting that Harvey's "'complaint'" had to "*establish[]* his right to recover," but also stating that his complaint "could . . . be dismissed under a Fed. R. Civ. P. 12(b)(6) analysis") (emphasis added);

The ALJ's analysis

In her show cause order, the ALJ quoted OSHA's assertion that Powers had not made allegations against the named respondents, and then asserted her own belief that Powers' "factual allegations relate only to PACE." Show Cause Order at 1-2. The basis for this assertion is not clear, however. Despite its rambling style, Powers' complaint[18] does appear to contain factual allegations describing activities protected by one or more of the acts under which Powers seeks redress, adverse actions at the hands of at least some of the named respondents, and a causal connection (temporal proximity) between the protected activities and the adverse actions. Such allegations generally suffice to state

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Cummings v. USA Truck, Inc., ARB No. 04-043, ALJ No. 2003-STA-47, slip op. at 4 (ARB Apr. 26, 2005) (suggesting that complainant has burden of "first establishing and ultimately proving" the elements of his claim, but also stating that "Fed. R. Civ. P. 12(b)(6)" was "properly applied" in determining whether a complaint states a claim); *Howick v. Campbell-Ewald Co.*, ARB No. 03-156, ALJ No. 2003-STA-06, slip op. at 10 (ARB Nov. 30, 2004) (suggesting that because Howick had failed to "*show"* adverse employment action, Howick had failed to "*allege*" such action, but in fact deciding case under summary decision standards rather than 12(b)(6) standard) (emphases added); *Mourfield v. Frederick Plaas & Plaas, Inc.*, ARB Nos. 00-055, 056, ALJ No. 1999-CAA-13, slip op. at 5 (ARB Dec. 6, 2002) (suggesting that "*[t]o state a claim* under the environmental acts, the complainant . . . *must prove by a preponderance of the evidence* that the employer discriminated intentionally," but actually deciding case under the preponderance of the evidence standard because a hearing already had been held) (emphases added); *Moore v. U.S. Dep't of Energy*, ARB No. 99-094, ALJ No. 1999-CAA-14, slip op. at 3 (ARB July 31, 2001) (suggesting that "to state a claim under the environmental acts, the complainant must *show"* the elements of the claim, but neither discussing nor explicitly diverging from the precedential holdings stating that the ARB applies the standard in 12(b)(6)) (emphasis added).

[18] Powers filed an initial complaint on February 27, 2004. She amended it on March 3, 2004 to add references to several other statutes including the LMRA, LMRDA, and RLA. *See* March. 3, 2004 Amended Complaint at 1, 14, 21, 37-40, 43; Complainant's Brief at 8. After OSHA had dismissed the complaint but before Powers received notice of that dismissal, Powers sent OSHA what she called a "First Amendment" to her complaint. *See* March 22, 2004 First Amendment; Complainant's Motion to Amend/Alter the Harmful Errors in the April 14, 2004 Order in 2004-AIR-19, at 1 n.1 (alleging that Powers received OSHA's March 15, 2004 notice on March 26, 2004); Complainant's Brief at 4, 15 (same). Perhaps more properly identified as a supplement to the complaint, the First Amendment does not repeat the information in the February 27 and March 3 complaints, but instead presents information about events that occurred subsequent to the filing of the February 27 complaint; for example, it alleges that Davies denied Powers a promotional opportunity. Although we discuss the allegations Powers made in her First Amendment, we do not here determine whether those allegations properly should be considered part of her complaint.

a whistleblower claim. Although we do not decide here whether Powers' allegations suffice, we think it useful to clarify several points in the ALJ's analysis.

(a) Protected activity

The ALJ erred in concluding that serving a discovery request can never be a protected activity. *See* Order at 5 ("[S]erving discovery is not 'protected activity' under any conceivable interpretation of the whistleblower statutes relied upon by the Complainant."); *see also* Complainant's Brief at 15 (arguing that "discovery *is* a protected activity"). In fact, it is possible that serving a discovery request potentially could constitute protected activity if the request was part of a whistleblower complaint.[19] Powers alleges that her discovery request related to a previous complaint brought under several whistleblower statutes.[20] If so, then her discovery request may have constituted protected activity, at least with regard to those statutes under which she had filed her previous complaint.

The ALJ also appears to have misidentified as allegations of adverse action Powers' allegations that Pinnacle was violating certain rules and regulations of the Federal Aviation Administration (FAA). *See* Order at 2-3. After making reference to those allegations, the ALJ stated that she had no "authority to adjudicate alleged violations of the rules or regulations of the [FAA]." Order at 3.

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[19] *See* 29 C.F.R. §§ 24.2(b) (Environmental Acts) (prohibiting discrimination against an employee who has "[a]ssisted or participated . . . in any manner in . . . a proceeding" filed under any of the Environmental Acts); 1979.102 (AIR 21) (prohibiting discriminate[ion] . . . because the employee has . . . [f]iled . . . a proceeding relating to any violation or alleged violation . . . of [an AIR 21-listed rule] . . . [or] [a]ssisted or participated in such a proceeding."); 1980.102(b) (SOX) (protecting against "discrimination . . . for any lawful act . . . [t]o file . . . [or] participate in . . . a proceeding . . . relating to an alleged violation [of a SOX-listed rule]").

[20] Powers has filed several previous whistleblower complaints with the DOL. *See Powers v. Pinnacle Airlines, Inc.*, 2006-AIR-4 and 5 (dismissed by ALJ March 3, 2006 for failure to cooperate in discovery and follow ALJ orders, dismissed on appeal because uncorrected non-conforming brief was struck and thus no brief was filed; *see* ARB No. 06-178 (ARB June 28, 2007)); *Powers v. Pinnacle Airlines, Inc.*, ALJ No. 2005-SOX-65 (dismissed by ALJ Nov. 30, 2005 because SOX claim filed in federal district court); *Powers v. Pinnacle Airlines, Inc.*, ALJ No. 2004-AIR-32 (dismissed by ALJ for failure to cooperate in discovery, dismissal affirmed in ARB No. 05-022 (ARB Jan. 31, 2006) and ARB No. 05-022 (ARB July 27, 2007) (denying reconsideration)); *Powers v. Pinnacle Airlines, Inc.*, ALJ No. 2004-AIR-06 (dismissed by ALJ for failure to cooperate in discovery, dismissed on appeal for uncorrected non-conforming briefs; *see* ARB No. 04-102 (ARB Jan. 5, 2005) and ARB No. 04-102 (ARB Feb. 17, 2005) (denying motion for reconsideration)); *Powers v. Pinnacle Airlines, Inc.*, ALJ No. 2003-AIR-12 (dismissed by ALJ Dec. 10, 2003; dismissal affirmed in ARB No. 04-035 (ARB Sept. 28, 2004).

We view these allegations as making a different point, however. Ultimately, in order to prove that she engaged in protected activity under AIR 21, a complainant must show that she provided information about violations of the laws or regulations listed in that Act. *See* 29 C.F.R. § 1979.102(b)(protected activity includes providing information, or participating in a proceeding, "relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States"); *see also, e.g., Rougas v. Southeast Airlines, Inc.*, ARB No. 04-139, ALJ No. 2004-AIR-3, slip op. at 14 (ARB July 31, 2006) (discussing requirements for finding protected activity in a complaint arising under AIR 21). Thus the complaint's allegations about alleged violations of such rules probably should be understood not as allegations about adverse action, but rather as support for Powers' allegations that she engaged in protected activity by reporting these alleged violations. Although Powers, a pro se complainant, may not have drawn that connection as well as it might have been done, we cannot say that her complaint was deficient merely because she seems to have assumed that we and the ALJ would understand the reason that the complaint included reference to such alleged violations. Powers alleged, for example, that Pinnacle was violating FAA regulations governing duty hours for flight personnel. *See, e.g.*, Complaint at 26-28. We have held that expressing concerns about duty hours violations can constitute protected activity. *See Clemmons v. American Airways, Inc.*, ARB Nos. 05-048, 096, ALJ No. 2004-AIR-11, slip op. at 7 (ARB June 29, 2007) (complainant's "discussions" about "violations of the duty time regulations" constituted protected activity). Therefore, Powers' expressions of concern about Pinnacle's alleged violation of the duty hours regulations may well have constituted protected activity.[21]

Upon remand, assuming that the complaint is not dismissed upon other grounds, the ALJ should determine whether the complaint alleges protected activity by using the updated standard provided in *Bell Atlantic*. Under this standard, a complaint need provide only "enough factual matter" to make its allegations "plausible."[22] *Bell Atlantic*, 127 S. Ct. at 1968. Thus, a complaint need not contain sufficient facts to support a finding that the complainant engaged in protected activity, so long as it provides more than a "formulaic recitation of the elements of a cause of action." *Id.* at 1965.

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[21] We express no view as to whether those expressions of concern did in fact constitute protected activity, nor do we express any view as to whether Powers engaged in protected activity by expressing concern about Pinnacle's other alleged violations.

[22] Powers specified not only the alleged rule and regulatory violations giving rise to her concerns, but also the dates (various dates in January 2004) and the individual (Davies) to whom she expressed these concerns. *See* Complaint at 3-4, 37. Therefore, the ALJ may wish to revisit her statement that "nowhere in [Powers'] complaint does she allege *facts* that would conceivably *support* a finding that she engaged in any protected activity." Order at 3 (emphases added).

Because both pursuing discovery and expressing concern about violations of FAA rules potentially could constitute protected activity, we hope that upon remand – assuming that the complaint is not dismissed upon procedural grounds – the ALJ will analyze with greater specificity whether Powers' allegations contain sufficient "factual matter" to survive 12(b)(6) dismissal.

(b) Adverse action

In determining whether the complaint alleges any adverse action, the ALJ applied a standard that is now outdated. The ALJ stated that an alleged adverse action must rise to the level of a "tangible consequence" in order to be "considered actionable adverse action." Order at 4-5. But, as the Supreme Court recently has clarified, the appropriate standard is whether the actions were "materially adverse": that is, "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern Ry. Co. v. White*, 548 U.S. ___, 126 S.Ct. 2405, 2409 (June 22, 2006) (addressing degree of impact that employer's action must have on employee in order to be adverse under Title VII of Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-3(a), and further noting that the reasonable worker must be assumed to be "in the [complainant's] position, considering 'all the circumstances'"). We already have applied this standard in AIR 21 cases,[23] and we believe it also is appropriate to apply this standard in cases arising under the SOX and the Environmental Acts.[24] It is possible that Powers' allegations might meet the *Burlington* standard, even if they did not rise to the level of a "tangible consequence."

The ALJ also appears to have overlooked the gravamen of Powers' allegation that Local 5-0772 did not investigate or conduct a hearing on grievances she had filed against Pinnacle, refused to provide her with copies of documents, and denied her legal help she otherwise would have received. Order at 2. Rather than analyze whether these allegations described potentially adverse action, the ALJ appears to have ignored them on

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[23] *See Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 160, ALJ No. 2003-AIR-47, slip op. at 11-12 & n.28 (ARB Jan. 31, 2007) (applying *Burlington* and noting Supreme Court's injunction in *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) that standards applied by Supreme Court must be given retroactive effect in cases still on direct review); *Keener v. Duke Energy Corp.*, ARB No. 04-091, ALJ No. 2003-ERA-12, slip op. at 12 & n.94 (ARB July 31, 2006) (same).

[24] The regulations implementing the SOX, like those implementing AIR 21, prohibit "any . . . manner" of discrimination. *Compare* 29 C.F.R. § 1980.102(a) (SOX) ("No company . . . may discharge, demote, suspend, threaten, harass *or in any other manner* discriminate against any employee with respect to . . . employment") (emphasis added) with § 1979.102(b) (AIR 21) ("It is a violation . . . to intimidate, threaten, restrain, coerce, blacklist, discharge or *in any other manner* discriminate" against an employee) (emphasis added). The Environmental Acts also provide broad protection. *See* 29 C.F.R. § 24.2(a) ("No employer . . . may discharge any employee or otherwise discriminate . . . with respect to the employee's compensation, terms, conditions, or privileges of employment").

the ground that she had "no jurisdiction over disputes between a union and its member, including the interpretation of collective bargaining agreements, or a union's duty of representation." Order at 4. PACE recites the same argument on appeal. *See* Respondent's Brief at 1-2.

But the complaint alleges not only that the union failed to provide assistance, but also that Powers was entitled to this assistance, *see* Complaint at 2, 4-5, 10, and that Pinnacle (through Hall and Piper Rudnick) asked Local 5-0772 to deny Powers this assistance, *id.* at 14 n.2, 35. Construed generously, as we must construe the complaint of a pro se litigant,[25] these allegations taken together appear to be an allegation that Local 5-0772 acted as Pinnacle's agent in denying Powers assistance to which she otherwise would have been entitled. *See* Complainant's Rebuttal at 7 (while "'failure of duty in representation' in a grievance process is [within] the jurisdiction . . . of the . . . Federal Courts. . . . PACE local union and named persons . . . colluded in their retaliation and discrimination against [Powers] . . . , and this collusion is against . . . 29 CFR Part 1980").

The SOX covers the actions of a covered employer's agent, as Powers obliquely notes.[26] *See* Complainant's Brief at 12 (arguing that "Local 5-0772, . . . Brents . . . [and] Walters, are a 'person' by definition pursuant to . . . 29 C.F.R. 1980.101"), 13 (arguing that this conduct constituted retaliation because it was prompted by Powers' November 18, 2003 filing of a complaint with the SEC); Complainant's Rebuttal at 3 (noting that PACE did not take issue with Powers' assertion that Local 5-0772 and its officials could be covered by the SOX), 6 (noting that "[n]amed persons are not exclusively required to be 'employers').[27] Therefore, the proper inquiry is whether the facts Powers alleges were sufficient to make it "plausible" that Local 5-0772 was acting as Pinnacle's agent when it denied Powers the assistance she requested and, if so, whether this denial could have dissuaded a reasonable worker in Powers' position from making or supporting a whistleblower complaint.

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[25] *See Smith v. W. Sales & Testing*, ARB No. 02-080, ALJ No. 2001-CAA-17, slip op. at 12 (ARB Mar. 31, 2004) (pro se complaints should be liberally construed).

[26] The SOX's expansive coverage is broader than the coverage in AIR 21 and the Environmental Acts, all of which cover only an employer. *Compare* 29 C.F.R. § 1980.100-101 (SOX) (extending coverage to company representatives) *with* 29 C.F.R. §§ 24 .101-102 (Environmental Acts) (limiting coverage to employers) and 29 C.F.R. 1979.102(a) (AIR 21) (limiting coverage to air carriers and contractors and subcontractors thereof).

[27] Although AIR 21 and the Environmental Acts cover only a complainant's employer, the SOX extends coverage both to employers and to their "company representative[s]." 29 C.F.R. §§ 1980.102(a) (extending coverage to both a "company" and a "company representative"), 101 (defining "company representative" to include "any officer, employee, contractor, subcontractor, or agent" of a company); *see also Klopfenstein v. PCC Technologies Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-11, slip op. at 12-16 (ARB May 31, 2006) (SOX coverage extends to employer's officers, employees, and agents).

The ALJ also did not provide any explanation for her conclusion that the alleged denial of Powers' request to volunteer for emergency training, *see* Complaint at 21 & n.4, 37, was not sufficiently adverse to be actionable. In particular, the ALJ did not distinguish this alleged denial from an employer's decision not to select an employee for a training program – even though the Secretary has previously held that non-selection for a training program could constitute an adverse action. *See Studer*, slip op. at 3 (under then-current standard for adverse action, "training and educational programs that advance an employee in his career or enable him to perform his work more efficiently are a privilege of employment"; complainant's "allegation concerning his non-selection for a training program therefore constitutes a sufficient allegation that [employer] took an adverse action against [complainant]"). On remand, if the ALJ has occasion to address this allegation, then the ALJ should evaluate *Studer* in light of *Burlington*.

The ALJ did not discuss, and thus may have overlooked, certain of Powers' other allegations of adverse action.[28] These included Powers' allegations that Pinnacle prohibited Powers' supervisor from completing a work reference form and thereby prevented Powers from applying for a safety professional credential, Complaint at 35; "refuse[d] to correct" Powers' employment records, *id*. at 23; and placed a backdated written warning in Powers' personnel file, *id*. at 4, thereby barring Powers from interviewing for a promotional opportunity, *see* Complainant's Brief at 14 (noting allegation in Amended Complaint and First Amendment that this action was taken by "Monroe, acting at the retaliatory 'advice of Doug Hall, Ted Davies, Phil Reed, Alice Pennington'")).[29] These also included Powers' allegations that Hall and Piper Rudnick "attempted to coerce and improperly influence the PACE Local 5-0772 union to 'not help Coleen with her lawsuits.'" Complaint at 35. On remand, if the ALJ has occasion to address any of these allegations, then the ALJ should determine whether any of these allegations describe consequences that might have been "materially adverse" to Powers.

The same standard should be used if it is necessary to analyze the complaint's other allegations of adverse action, including the allegations that Pinnacle purposely overpaid Powers several times in an attempt to establish a basis for discipline, *see* Complaint at 41-42; threatened Powers on January 16, 2004 with a written warning, *see* Complaint at 41-42; and assigned Powers to work on New Year's Eve, in violation of various regulations and contrary to her seniority status, *see* Complaint at 3 n.1 (alleging that Powers had served discovery on Pinnacle Dec. 30, 2003), 28-31 (alleging that Powers was assigned work on December 30 and 31 in violation of FAR regulations), 36 (same); Complainant's Brief at 12-13.

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[28] Our listing of these and other allegations in the complaint should not be understood as a determination that these allegations are timely or sufficient to support a whistleblower complaint.

[29] We note the complaint's allegation that Monroe followed Hall's "advice" without deciding whether the giving of such advice justifies SOX coverage over Hall and Piper Rudnick.

(c) Respondents' roles in the adverse actions

The ALJ stated that Powers did not allege "that she suffered an 'adverse employment action' . . . at the hands of PACE . . . or any of the other parties that she alleges are respondents." Order at 3. But we do not understand the ALJ's statement to reflect any determination by the ALJ that the complaint lacked allegations that the named respondents had inflicted the allegedly adverse actions. Rather, we understand this assertion only as a description of the ALJ's conclusion that the alleged adverse actions were insufficiently adverse to be actionable.

Were we to understand the assertion otherwise, we would be puzzled, because the complaint appears to contain multiple allegations that at least some of the named respondents took an active part in inflicting the adverse actions.

On remand, assuming that the complaint is not dismissed for procedural reasons, it would be helpful for the ALJ to determine with more precision what allegations are made against which named persons and organizations, and under which statute(s). We recognize the difficulties of making such a determination with regard to this particular complaint, and we reaffirm our previous holding that "when confronted with th[is] kind of prolix, rambling complaint . . . an ALJ has the authority to demand that a complainant come forward with a clear articulation of . . . her case." *High*, slip op. at 6.

Powers' motions and requests

Because of our decision to remand, we need not address Powers' arguments that the ALJ erred in dismissing her complaint without a hearing, a response to her request for an extension of time, or a motion from a respondent. S*ee* Complainant's Brief at 7-9, 23-25; Complainant's Rebuttal at 8-9. Nor need we address Powers' requests for oral argument and permission to file additional information.[30] Complainant's Rebuttal at 10. Because we do not have jurisdiction to review OSHA's actions, we also do not address Powers' arguments that OSHA "erred" in various ways. *Id.* at 4.

[30] Powers also offers multiple arguments that appear to relate only to other cases, all of which have been finally decided. *See, e.g.,* Complainant's Brief at 17-20 (presenting arguments that a discovery request served in a prior case did indeed request relevant information, and taking issue with arguments that it did not), 20-23 (presenting other arguments related to other cases). Because those cases were never consolidated with this one, we ignore any arguments that relate only to such other cases. Insofar as Powers seeks sanctions against Hall and Piper Rudnick, we understand her request to be based upon their alleged behavior in one or more prior cases. As we noted previously, there is no indication that Hall or Piper Rudnick have entered an appearance in this case. We therefore ignore any such request.

Powers' request for default judgment, premised upon the named persons' "failure to answer" her complaint, *see* Complainant's Rebuttal at 4, is denied for the reasons explained above. Powers' request that we consolidate this case with an earlier AIR 21 complaint, ALJ No. 2004-AIR-6, *see* Complainant's Brief at 27 and Complainant's May 12, 2004 Motion at 22, is moot because the ARB already has issued its final decision regarding that complaint. See footnote 20.

Powers also argues that the ALJ has displayed prejudicial bias and lack of impartiality, and requests that we assign her case to a different ALJ. *See* Complainant's brief at 26-27.[31] Powers offers no facts in support of this request other than her arguments that the ALJ's orders in this and prior cases "show[] plain and harmful errors, an abuse of discretion, judicial favorable bias towards named persons and unfavorable prejudice against the Complainant and the ALJ's resentment toward Complainant based on Recusal Motion and Judicial complaint filed against the ALJ." *Id*. We presume that an ALJ is unbiased unless a party alleging bias can support that allegation; and bias generally cannot be shown without proof of an extra-judicial source of bias. *See, e.g.*, *Matter of Slavin*, ARB No. 04-088, ALJ No. 2004-MIS-2, slip op. at 15-18 (ARB Apr. 29, 2005); *Eash v. Roadway Express, Inc.*, ARB No. 00-061, ALJ No. 1998-STA-28, slip op. at 8 (ARB Dec. 31, 2002); *Matter of Powell and Building Maintenance Specialists, Inc.*, B.S.C.A. 32, 1989 WL 549946, at *2 n.5 (BSCA June 22, 1989). Unfavorable rulings and possible legal errors in an ALJ's orders generally are insufficient to prove bias. Therefore, we deny this motion.

Finally, we deny Powers' request that we reject PACE's brief because it failed to identify the ARB case number, *see* Complainant's Rebuttal at 2 n.1, because PACE did identify the ALJ case number. We also deny Powers' request, *see* Complainant's Brief at 9-11, 25-26, that we sanction PACE and its attorney for allegedly ex parte communication in filing its May 7, 2004 Motion to Dismiss with the ALJ by fax and mail, while serving Powers only by mail. Powers admits that she was served with PACE's allegedly ex parte motion. Although she alleges that she received the motion by mail whereas the ALJ received it by fax, she does not point us to any applicable authority indicating that such differential service techniques amount to ex parte communications.[32]

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[31] Although the record does not contain any indication that the ALJ answered it, Powers does appear to have filed a recusal motion with the ALJ as required by 29 C.F.R. § 18.31(b). *See* Order at 1 (acknowledging filing of, but not answering, recusal motion); *see also* Complainant's Motion for Recusal of ALJ Chapman in 2004-AIR-6 & 2004-AIR-19, received April 22, 2004. We treat the ALJ's silence as a decision to deny recusal.

[32] Powers argues that Federal Rules of Civil Procedure "5, 7, 8, or 12" require that all filings be "served at the same time as filed directly with the ALJ." Complainant's Brief at 11. Even if these service rules apply – and we make no decision as to whether they do – no such requirement is contained within those rules. Indeed, Rule 5 states that filing may be made by hand delivery, mailing, faxing, or leaving a copy with the clerk of the court (if the person has no known address). *See* Fed. R. Civ. P. 5. There is no suggestion in the rule that,

We also note that the ALJ's order does not appear to have relied upon PACE's motion. *See* Order at 1-5; *see also* Respondent's Brief at 3. Even if it had, we review the ALJ's order rather than PACE's motion, so Powers' presentation of the merits of her case has not been affected. Although Powers alleges that she was harmed because her delayed receipt of PACE's motion prevented her from relying in her initial notice of appeal upon this alleged violation of procedure, any such harm has been redressed because Powers became aware of PACE's motion in time to include in her brief various arguments regarding that motion.[33]

CONCLUSION

It is possible that Powers' complaint, reviewed under the correct standards, may state a claim. But because of the procedural concerns outlined above, we do not reach any conclusion about whether it does. Instead, we remand so that every respondent can be given the opportunity to respond, and so that the ALJ can make an initial judgment as to whether this complaint states a claim. Therefore, and without expressing any view on the merits of Powers' complaint, we **VACATE** the ALJ's dismissal and **REMAND** for further proceedings consistent with this Order.

SO ORDERED.

A. LOUISE OLIVER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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for example, hand delivery to one party is invalid unless all other parties are also hand-served at the same instant.

[33] It is true that in cases brought under AIR 21, SOX, and the Environmental Acts the ARB "generally" does not accept appeals of matters not raised in a petition for review. 29 C.F.R. § 24.110(a) (Environmental Acts); *see also* 29 C.F.R. §§ 1979.110(a) (AIR 21), 1980.110(a) (SOX). In order to avoid any harm to Powers from the delay she experienced in receiving PACE's motion, we address Powers' argument relating to the alleged ex parte motion even though she did not include it in her initial petition for review.