**In the Matter of:**

**KIM SCHAFERMEYER**, **ARB CASE NO. 07-082**

**COMPLAINANT,** **ALJ CASE NO. 2007-CAA-001**

**v.** **DATE: September 30, 2008**

**BLUE GRASS ARMY DEPOT,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***
**Paula Dinerstein, Esq., *Public Employees for Environmental Responsibility,* Washington, District of Columbia**

***For the Respondent:***
**B. Kevin Bennett, *Blue Grass Army Depot,* Richmond, Kentucky**

## FINAL DECISION AND ORDER

The Complainant, Kim Schafermeyer, has filed a complaint alleging that the Respondent, Blue Grass Army Depot,[1] terminated his employment in violation of the whistleblower protection provisions of the Resource Conservation and Recovery Act (more

[1] The Respondent avers in its Motion for Summary Judgment, "Although Blue Grass Army Depot is listed as the Respondent in this matter, the Complainant was an employee of the Blue Grass Chemical Activity. This is a separate tenant organization located on Depot property." Motion for Summary Judgment at 1 n.1. As neither party has moved to amend the caption, we will continue to refer to the Respondent as "Blue Grass Army Depot" or "the Depot."

commonly known as the Solid Waste Disposal Act (SWDA))[2] and the Clean Air Act (CAA).[3] A Department of Labor (DOL) Administrative Law Judge (ALJ) granted the Depot's Motion for Summary Judgment because he agreed that Schafermeyer had failed to satisfy his burden to demonstrate the existence of a genuine issue of material fact regarding his entitlement to tolling of the limitations period for filing a CAA or SWDA complaint.[4] Presented to the Administrative Review Board for determination is the question whether Schafermeyer raised a genuine issue of material fact relevant to the issue whether he filed a timely complaint for relief under the CAA and SWDA in the wrong forum. We agree with the ALJ that he did not. Accordingly, we accept the ALJ's recommendation that we deny Schafermeyer's complaint.

## BACKGROUND

The United States Army Chemical Materials Agency, Blue Grass Chemical Activity (BGCA), hired Schafermeyer as a Physical Scientist on August 22, 2005.[5] Shortly before the end of Schafermeyer's probationary period, the Agency notified him in a letter, which he received on July 12, 2006, that his employment was terminated as of July 18, 2006.[6] The termination letter stated that the Agency was removing him from his position because he failed to complete testing assignments in a timely manner; failed to accomplish his performance objectives; and he had made inappropriate and disrespectful remarks to supervisors, staff, and BGCA's Commander.[7] It also noted that if he wished to contest his dismissal, he should file an appeal within thirty calendar days after its

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[2] 42 U.S.C.A. § 6971 (West 2003).

[3] 42 U.S.C.A. § 7622 (West 2008). The SWDA and CAA implementing regulations are found at 29 C.F.R. Part 24 (2006). The United States Department of Labor (DOL) has amended these regulations since Schafermeyer filed his complaint. *See* 72 Fed. Reg. 44,956 (Aug. 10, 2007). Because Schafermeyer filed the complaint prior to the effective date of the amendments, and DOL has not indicated that the new regulations should be applied retroactively, we will apply the regulations in effect when Schafermeyer filed the complaint. *See Ramos v. Lee County School Bd.*, No. 2:04CV308FTM-33SPC, 2005 WL 2405832, at *3 n.4 (M.D. Fla. Sept. 29, 2005). We note that neither party has suggested that applying the amended regulations would change the result of this case.

[4] Recommended Decision and Order Granting Respondent's Motion for Summary Decision & Cancellation of Hearing (R. D. & O.) at 3.

[5] *Id.*

[6] *Id.* Schafermeyer stated in the complaint that he filed with the Department of Labor's Occupational Safety and Health Administration (OSHA), "On July 6, 2006, I was notified of my termination effective July 18, 2006."

[7] *Id.*

effective date with the Merit Systems Protection Board (MSPB).[8]

In August and September 2006, Schafermeyer met with representatives of the Army's Criminal Investigation Command primarily to discuss his concerns about the safety and environmental problems he believed to exist at BGCA, but he did make "a concise statement to them about the retaliation against [him]."[9] He also discussed his safety and environmental concerns with representatives of the Kentucky Department of Environmental Protection in September 2006.[10]

Schafermeyer filed a complaint with the MSPB on August 17, 2006, thirty-six days after he received notification of the termination of his employment. Schafermeyer stated on his MSPB Form 185-2 that the agency was wrong to terminate his employment because 1) BGCA failed in its responsibility to provide adequate resources for him to successfully perform his duties, 2) it failed to provide him with a safe work environment, 3) the Certifying Official failed to give him a reasonable amount of time to file a written answer to the notice of proposed adverse action, and 4) the Certifying Official failed to inform him of all his rights, including a right to answer.[11]

In an additional filing with the MSPB dated September 2, 2006, Schafermeyer stated, "I was denied the ability to perform my duties successfully due to a Partisan Political Work Atmosphere that existed prior to my employment at BGCA . . . ."[12] Schafermeyer continued:

> Blue Grass Chemical Activity . . . has a history of an inappropriate, politically polarized work atmosphere . . . . This inappropriate federal work environment existed prior to my employment at BGCA and was not made known to me prior to my tenure at BGCA. In 2005 Mr. Donald Van Winkle encountered these phenomena when he reported safety concerns and was inappropriately reprimanded and segregated form his work station about August of 2005. Among his legal recourse actions were the US Labor Department complaint #2006ERA24, 14 July2006 . . . . Mr. Van Winkle is represented by Mr. Richard Condit,

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8 *Id.*

9 Declaration of Kim R. Schafermeyer, Exhibit 1 to Summary Judgment Opposition (Schafermeyer Dec.) at 6, para. 25.

10 *Id.* at para. 19.

11 Exhibit 7 to Summary Judgment Opposition.

12 Exhibit 3 to Motion for Summary Judgment at 1.

> P.E.E.R. Attorney, . . . and he may be contacted for further details.
>
> On 22 August, 2005, uniformed, I entered a closed and controlled work environment that was previously segregated along inappropriate local political loyalties and affiliations. I remained in my position without alignment to any artificial criteria at great emotional cost to myself and my family. I was then and I am compelled now, by the rigors of my scientific training to deliver a safe work environment for my fellow workers and those most immediately affected by this sacred public trust, at Blue Grass Army Depot, Richmond, Kentucky.
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> Therefore; **I Pray** the Merit Systems Protection Board vacate my termination under 5 CFR 315.804 as not appropriate and was not properly effected in accordance with the correct procedural requirements of sections 5 CFR 315.805 and CFR 315.806 and Federal and State Laws.[13]

Finally, on September 22, 2006, Schafermeyer filed a third document with the MSPB stating:

> The existence of an abusive management team in a self-contained, isolated military depot, has produced a self-sustained community in the later development stages of an ideologue cult similar to a political party. It is this self-containment that defines the non-traditional polarized political parties at Blue Grass Chemical Activity, Richmond, Kentucky, (herein BGCA)**.** In that the choice is involuntary is a matter of illegality.[14]

Continuing, Schafermeyer described his belief that the BGCA had misled the KDEP concerning the "use of live CASARM chemical weapons agent to standardize analytical instruments."[15] Schafermeyer complained:

> These omissions are suspected by a safety conscious staff but are not openly discussed due to a cult-like obedience required by [BGCA managers]. In a post "9-11" atmosphere, this loyalty requirement is inappropriate and

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13 *Id.*

14 Exhibit 4 to Motion for Summary Judgment at 1.

15 *Id.*

> constitutes political fraud**.** In that this polarized political atmosphere is editing the Army's stated Mission to the citizens of the United States and numerous International Treaties, the situation at BGCA constitutes treason. To dismiss this situation as "office politics" is dangerous and irresponsible by officers of the court.
>
> We can not allow local interpretation of environmental laws and international treaties. In-depth review of Certifying Officials and local managements' application to federal and state policies is the very bedrock of our National Security. This review process will begin to heal the broken trust between the public and civil servants who work for the Department of the Army. The integrity of the civil service and the publics' confidence in its' [sic] government is at stake.
>
> Again I ask for a proctored hearing and binding arbitration to review my action with the Department of the Army. Only in that hearing can staff and management of BGCA speak without fear of reprisal and revenge.[16]

On October 23, 2006, the administrative law judge assigned to Schafermeyer's MSPB proceeding called Schafermeyer and informed him that he was going to dismiss his complaint because it was not legally cognizable given that he was a probationary employee when BGCA terminated his employment.[17] The Judge advised Schafermeyer that his complaint "belong[ed] in [the] OSHA Whistleblower protection program, not MSPB . . . ."[18] On October 25, 2006, 105 days after BGCA terminated his employment, Schafermeyer voluntarily withdrew his MSPB complaint and filed a whistleblower complaint with OSHA.[19]

OSHA investigated the complaint and found it to have no merit.[20] In particular OSHA found that Schafermeyer had failed to file his complaint within thirty days of the date on which BGCA notified him of its intention to terminate his employment and he failed to establish that he was entitled to tolling of the limitations period beyond 30

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16 *Id.* at 1-2.

17 Schafermeyer Dec. at 7-8, para. 30.

18 *Id.* at 8.

19 *Id.* at para. 31.

20 Secretary's Findings (Dec. 6, 2006).

days.[21]

Schafermeyer requested a hearing before a DOL Administrative Law Judge.[22] The ALJ recommended that the Depot's motion for summary judgment be granted because Schafermeyer failed to raise a genuine issue as to any material fact relevant to the question whether he was entitled to equitable tolling of the 30-day limitations period for filing a SWDA and CAA complaint.[23]

Schafermeyer filed a timely appeal with the Board.[24] The Board issued a Notice of Appeal and Order Establishing Briefing Schedule and both parties filed briefs in response. The Depot also filed a Motion to Allow Newly Discovered Evidence, which Schafermeyer opposed.

## JURISDICTION AND STANDARD OF REVIEW

The environmental whistleblower statutes, including the SWDA and the CAA, authorize the Secretary of Labor to receive complaints of alleged discrimination in response to protected activity and, upon finding a violation, to order abatement and other remedies.[25] The Secretary has delegated the authority to the Administrative Review Board (ARB) to review Department of Labor Administrative Law Judges' initial recommended decisions under the environmental whistleblower statutes and to issue the final agency decision.[26]

The Board reviews an ALJ's recommended grant of summary decision de novo; the same standard that the ALJ applies in initially evaluating a motion for summary decision governs our review.[27] The standard for granting summary decision is essentially

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21 *Id.*

22 See 29 C.F.R. § 24.4(d)(3).

23 R. D. & O. at 12.

24 29 C.F.R. § 24.8(a).

25 *E.g.*, 42 U.S.C.A. § 6971(b); 42 U.S.C.A § 7622(b).

26 *See* 29 C.F.R. § 24.8. *See also* Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

27 *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 2000-ERA-036, slip op. at 4 (ARB Mar. 25, 2003).

the same as the one in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts.[28] Thus, the ALJ may grant summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."[29] A "material fact" is one whose existence affects the outcome of the case.[30] And a "genuine issue" exists when the nonmoving party produces sufficient evidence of a material fact so that a factfinder is required to resolve the parties' differing versions at trial. Sufficient evidence is any significant probative evidence.[31]

Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation.[32] The non-moving party may not rest upon mere allegations, speculation, or denials in his pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof.[33] If the non-moving party fails to sufficiently show an essential element of his case, there can be "'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."[34]

Accordingly, the Board will grant summary decision if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact.[35]

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**28** *Hasan v. Burns & Roe Enters., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-006, slip op. at 6 (ARB Jan. 30, 2001).

29 29 C.F.R. § 18.40(d)(2008).

**30** *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

**31** *Id.* at 249, citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-290 (1968).

**32** *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998).

**33** *Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(e).

**34** *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

**35** *See Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064, ALJ No. 1999-TSC-004, slip op. at 4 (ARB Feb. 10, 2003) ("[I]n ruling on a motion for summary decision we . . . do not weigh the evidence or determine the truth of the matters asserted. Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact.") (internal citation and quotation marks omitted); *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 1999-STA-021, slip op. at 6 (ARB Nov. 30, 1999).

Schafermeyer submitted a declaration signed "under penalty of perjury" in support of his opposition to the Depot's motion for summary judgment.[36] The ALJ found that the declaration was not a properly executed affidavit for purposes of summary judgment.[37] However, he noted that "even had I given the proffered signed statements the weight of an affidavit for purposes of summary decision – I still would have come to the same conclusion: that summary decision is appropriate in this instance."[38] Schafermeyer argues, "Material facts to defeat summary judgment can be established in a party's own declaration or those of his witnesses."[39] We agree.[40] But in this case the ALJ's error is harmless because he stated that even if he had given the statements full weight, they would not have altered the outcome and, in any event, we have de novo review.

## DISCUSSION

An employee who alleges that his employer has retaliated against him in violation of the SWDA and CAA must file his complaint with OSHA within thirty days after the alleged violation occurred, i.e., when the retaliatory decision has been both made and communicated to the complainant.[41] No particular form of complaint is required but the complaint must be written and "should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation."[42] In this case, Schafermeyer concedes that the Depot terminated his employment more than thirty days

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[36] Schafermeyer Dec. at 10.

[37] R. D. & O. at 2.

[38] *Id.* at 2 n.4.

[39] Complainant Kim Schafermeyer's Brief in Support of Reversal of the Recommended Decision and Order Granting Motion for Summary Decision and Cancelling Formal Hearing (Compl't. br.) at 14.

[40] *See Doyle v. Hydro Nuclear Servs.*, ARB Nos., 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022, slip op. at 11 (ARB May 5, 2000)(signed affidavit containing statement indicating that under penalty of perjury it was "true and correct" was admissible in support of motion for summary judgment.

[41] 42 U.S.C.A. § 6971(b); 42 U.S.C.A § 7622(b). *See Ross v. Florida Power & Light Co.*, ARB No. 98-044, ALJ No. 1996-ERA-036, slip op. at 4 (ARB Mar. 31, 1999)(statute of limitations begins to run "on the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person with a reasonably prudent regard for his rights").

[42] 29 C.F.R. § 24.3(c).

before he filed his OSHA complaint.

However, the SWDA and CAA limitations periods are not jurisdictional and therefore they are subject to equitable modification.[43] In determining whether the Board should toll a limitations period, the Board has been guided by the discussion of equitable modification of statutory time limits in *School Dist. of Allentown v. Marshall.*[44] In that case, which arose under the whistleblower provisions of the Toxic Substances Control Act,[45] the court articulated three principal situations in which equitable modification may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when "the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum."[46] To successfully invoke the "wrong forum" option, the filing of the claim in the wrong forum must be timely.[47] As the court explained in *Allentown*, "The tolling exception is not an open-ended invitation to the courts to disregard limitations periods simply because they bar what may be an otherwise meritorious cause. We may not ignore the legislative intent to grant the defendant a period of repose after the limitations period has expired."[48]

In *Rose v. Dole,*[49] a case arising under the whistleblower provisions of the Energy Reorganization Act (ERA),[50] the United States Court of Appeals for the Sixth Circuit held that it was not error for the Secretary of Labor to rely on the *Allentown* factors in concluding that Rose was not entitled to equitable tolling, even though the court might have "come out differently on the equities than the *City of Allentown* court."[51] An appeal of the Board's decision in this case would lie within the jurisdiction of the Sixth Circuit

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43 *Accord Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-050, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128; ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30, 2001).

44 657 F.2d 16, 19-21 (3d Cir. 1981).

45 15 U.S.C.A. § 2622 (West 2004).

46 *Allentown*, 657 F.2d at 20 (internal quotations omitted).

47 *Id.*

48 *Id.*

49 945 F.2d 1331, 1336 (1991).

50 42 U.S.C.A. § 5851(a) (West 2007).

51 *Rose*, 945 F.2d at 1336.

Court of Appeals.[52]

Schafermeyer ultimately bears the burden of justifying the application of equitable modification principles.[53] His inability to satisfy one of the *Allentown* elements is not necessarily fatal to his claim but courts "'have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.'"[54] Furthermore, while we would consider an absence of prejudice to the other party in determining whether we should toll the limitations period once the party requesting modification identifies a factor that might justify such modification, "[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures."[55]

**1. <u>Timeliness of Complaint in Wrong Forum</u>**

Schafermeyer relies on the third *Allentown* tolling element, alleging that he filed the precise statutory claim with the MSPB. Schafermeyer concedes that his complaint with the MSPB was not timely filed under either the SWDA or the CAA because it was not filed within thirty days of the date that he learned that BGCA intended to terminate his employment.[56] Nevertheless, Schafermeyer argues that we can ignore the thirty day statutory limitations period, since he timely filed his MSPB complaint within thirty days of the effective date of his dismissal, and thus it was a timely complaint with the MSPB.[57] However, as the court held in *Allentown*:

> The choice of the appropriate time [for filing actions] is not entrusted to the administrative agency or to the courts. It is the result of legislative determinations made after weighing the various interests at stake. Obviously, Congress intended that complaints be made and resolved within a very short time after the alleged violation occurred. **It is not for us or the Secretary to casually ignore the statutory limitation. . . .**

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[52] 42 U.S.C.A. § 5851(c).

[53] *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995)(complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

[54] *Id.*, quoting *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

[55] *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 152 (1984).

[56] Compl't. br. at 25.

[57] *Id.*

> It is clear that we may not read the clear terms out of the statute merely because the short period between the violation and the filing of the complaint did not create the risk of inadequate evidence through fading memories or loss of witnesses. This prejudice to defendant, or lack of it, is simply irrelevant when Congress has drawn a line at the point where it believed claims should be barred.[58]

Thus we must decline Schafermeyer's invitation to disregard the applicable limitations period that Congress intended for complaints under the CAA and SDWA. Because Schafermeyer has conceded that he failed to file a timely complaint in the wrong forum, he has failed to raise a genuine issue of material fact regarding his entitlement to tolling of the limitations period on the ground that he filed a timely complaint in the wrong forum.

2. **Precise Statutory Claim**

Even if Schafermeyer had timely filed his complaint, he still could not prevail because he has failed to raise a genuine issue of material fact regarding the question whether he filed the precise statutory claim at the MSPB. To recover under the environmental whistleblower provisions, a complainant must first allege and ultimately prove that he engaged in protected activity, that his employer knew about his protected activity, and that his employer took adverse employment action because of his protected activity.[59] Thus to state a claim that entitles him to relief, Schafermeyer's complaint must establish his right to recover against BGCA for the company's violation of the environmental whistleblower protection provisions, i.e., he must demonstrate that BGCA terminated his employment because he engaged in protected activity.

Schafermeyer argues that when he filed his MSPB complaint, he filed the precise statutory claim in the wrong forum. He acknowledges that he did not know that he had a potential cause of action under the environmental laws until the MSPB ALJ so informed him in a telephone call on October 23, 2006.[60] So this was not a case in which a complainant intended to file an environmental whistleblower complaint, but instead of filing it with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resided (a correct forum), he filed it with Occupational Safety and Health Commission (an incorrect forum).[61] Instead,

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[58] 657 F.2d at 20 (emphasis added)(citation omitted). *Accord Rose,* 945 F.2d at 1336.

[59] *Sayre v. Veco Alaska, Inc.*, ARB No. 03-069, ALJ No. 2000-CAA-007, slip op. at 5 (ARB May 31, 2005); 29 C.F.R. § 24.2(a).

[60] Schafermeyer Dec. at 7-8, para. 30.

[61] *See* 29 C.F.R. § 1979.103(c).

Schafermeyer argues that even though he did not intentionally file a CAA or SWDA complaint, his MSPB complaint raised the precise statutory claim in the wrong forum. We do not find Schafermeyer's arguments to be persuasive.

*Burnett v. New York Cent. RR Co.*[62] is frequently cited for the proposition that a federal limitations period may be tolled if the precise statutory claim is filed in the wrong forum.[63] In *Burnett*, the plaintiff brought a timely action under the Federal Employer's Liability Act (FELA)[64] in a state court of competent jurisdiction and served the defendant with process. When the state court dismissed the action for improper venue, the plaintiff re-filed the same action in federal court, eight days prior to the date on which the time for appealing the state decision expired. The Court held that the limitations period for filing the FELA action was tolled and the action was considered timely. The Court acknowledged that statutes of limitations

> "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."[65]

But the Court reasoned that while statutes of limitations are primarily intended to assure fairness to defendants by preventing them from being surprised by the revival of stale claims, in this case, "Respondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy; in fact, respondent appeared specially in the Ohio court to file a motion for dismissal on grounds of improper venue."[66] Thus in *Burnett*, the plaintiff filed the precise statutory claim, i.e., a FELA claim, in both the state court, the wrong forum, and the federal court, the correct forum.

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62 380 U.S. 424 (1965).

63 *See, e.g., Electrical, Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 237 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975); *School Dist. v. Marshall*, 657 F.2d 16 at 20.

64 45 U.S.C.A. § 51 (West 1986).

65 380 U.S. at 428, quoting *Order of RR Telegraphers v. Railway Express Agency, Inc*, 321 U.S. 342, 348-349 (1944).

66 *Id.* at 429-430.

In *Johnson v. Roadway Express, Inc.*,[67] the plaintiff relied on *Burnett* in support of his argument that the timely filing of an employment discrimination charge with the Equal Employment Opportunity Commission pursuant to the equal opportunity provisions of the Civil Rights Act of 1964[68] tolled the limitations period applicable to an action under the Civil Rights Act of 1866[69].[70] In rejecting this reliance as not "helpful," the Court initially noted that Section 1981 is not coextensive in its coverage with Title VII and that the "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."[71] The Court wrote

> [P]erhaps most importantly, the tolling effect given to the timely prior filings in American Pipe[72] and Burnett depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted. This factor was more than a mere abstract or theoretical consideration because the prior filing in each case necessarily operated to avoid the evil against which the statute of limitations was designed to protect.[[73]]

The Court acknowledged the petitioner's argument that the timely filing of the EEOC charge adequately notified the employer that he was asserting a discrimination claim and permitted the employer to protect itself against a stale claim.[74] But the Court ultimately concluded, "[o]nly where there is complete identify of the causes of action will the protections suggested by petitioner necessarily exist and will the courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period."[75] Accordingly the Court held that the filing of the EEOC complaint did not toll

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67 421 U.S. 454, 466 (May 19, 1975).

68 42 U.S.C.A. § 2000e-5 (West 2003).

69 42 U.S.C.A. § 1981 (West 2003).

70 421 U.S. at 466.

71 *Id.* at 460, 461, 466.

72 414 U.S. 538 (1974).

73 421 U.S. at 467.

74 *Id*. at 467 n.14.

75 *Id*. at 467 (citation omitted).

the limitations period for filing an action based on the same facts under the Civil Rights Act of 1866.[76]

We conclude that the uncontested facts of this case are more nearly aligned with *Johnson* than *Burnett.* In *Burnett* both claims were unequivocally and intentionally filed under precisely the same statute, the FELA. Here, Schafermeyer admits that he did not file his environmental whistleblower complaint because he was not even aware of existence of the whistleblower protections until the MSPB Judge informed him of them in October 2006. In neither his initial complaint to the MSPB, nor in any of his supplemental statements did Schafermeyer ever aver that BGCA retaliated against him by terminating his employment because he made any complaints or engaged in any specific protected activity of which his employer was aware. Instead he complained that BGCA should not have fired him because it did not give him the resources to do his job, including "viable Standard Operational Procedures" and a "safe work environment" and therefore "the action taken against me is **procedurally** improper."[77] In fact, Schafermeyer continues at length to describe what he believed to be the procedural improprieties of his firing,[78] how BGCA denied him the ability to perform his duties successfully "due to a Partisan Political Work Atmosphere,"[79] and the "politically polarized work environment where partisan loyalties have replaced civil service."[80] Ultimately, while Schafermeyer contended that BGCA had committed treason "in that this polarized political atmosphere is editing the Army's stated Mission to the citizens of the United States and numerous International Treaties,"[81] nowhere do his filings contain the simple statement that he was entitled to relief because he engaged in protected activities under the environmental whistleblower statutes, BGCA knew of these activities, and as a result, BGCA terminated his employment.[82]

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[76] *Id*. at 467.

[77] Exhibit 7 to Summary Judgment Opposition.

[78] *Id*.

[79] Exhibit 3 to Motion for Summary Judgment at 1.

[80] *Id*.

[81] Exhibit 4 to Motion for Summary Judgment at 1.

[82] Schafermeyer cites *Immanuel v. Wyoming Concrete Indus., Inc.*, ARB No. 96-022, ALJ No. 1995-WPC-003 (ARB May 28, 1997), in support of his argument that his MSPB complaint was the precise statutory complaint in the wrong forum. This reliance is misplaced because the two cases are critically distinguishable. In *Immanuel,* the employer terminated the complainant's employment less than a week after a company picnic where the complainant distributed a flier in which he raised various grievances, including environmental concerns regarding oil and cement acid spills directly into the ground. *Id.* at 2, 4. The complainant filed a letter with Delaware's Division of Natural Resources and

The application of the *Johnson* holding to the facts of this case is consistent with precedent established by the Secretary of Labor. In *Lewis v. McKenzie Tank Lines, Inc.*,[83] the Secretary considered the applicability of the wrong forum ground for tolling in a case arising under the whistleblower protection provisions of the Surface Transportation Assistance Act of 1982 (STAA).[84] The complainant had filed a timely charge of discrimination with the EEOC in which he claimed that his employer had violated the Age Discrimination in Employment Act[85] by firing him for a safety-related refusal to drive. Even though the complainant's EEOC complaint referenced a protected activity, a safety-related refusal to drive, and an adverse action, termination of the complainant's employment, the Secretary held that "[t]he EEOC complaint was not asserted under the STAA and thus did not involve the precise claim mistakenly raised in the wrong forum."[86]

As a matter of law, we conclude that the Depot is entitled to summary judgment because Schafermeyer's MSPB complaint was insufficient to put it on notice that Schafermeyer was asserting a claim of whistleblower discrimination against it under the environmental protection acts. Therefore, Schafermeyer is not entitled to equitable tolling because he did not assert the precise statutory claim in the wrong forum.

3. **Schafermeyer's diligence**

The remainder of Schafermeyer's brief is dedicated to establishing that he acted diligently to pursue his whistleblower complaint in the absence of actual or constructive knowledge of the limitations period and given BGCA's failure to inform him of his right to file a whistleblower complaint (while informing him of his right to file an MSPB complaint). Schafermeyer first challenges the ALJ's conclusion that he did not

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Environmental Control indicating that he believed he was fired for raising environmental concerns and requesting help. He attached to the letter a copy of the flier he had distributed and the letter included a statement that the flier contained a description of environmental problems at his employer's plant and that the employer terminated his employment less than a week after he distributed the flier [at the company picnic]. *Id.* at 4. In finding the letter sufficient to toll the limitations period, the Board held, "This letter connects his termination with whistleblowing activity." *Id.* Schafermeyer's MSPB complaint fails to make even this simple connection.

[83] No. 1992-STA-020 (Nov. 24, 1992).

[84] 49 U.S.C.A. § 31105 (West 1997).

[85] 29 U.S.C.A. § 621 (West 1999).

[86] No. 1992-STA-020, slip op. at 3-4. *Accord Ferguson v. Boeing Co.*, ARB 04-084, ALJ No. 2004-AIR-005 (ARB Dec. 29, 2005).

believe that Schafermaeyer was unaware of the whistleblower protections because of his familiarity with Van Winkle's ERA whistleblower case and because he is a highly educated man who had the capacity to discover the law if he truly believed BGCA retaliated against him for environmental whistleblowing.[87] Schafermeyer argues that the ALJ failed to credit his "Declaration testimony that he believed the remedy Van Winkle pursued was only available to union members. (Schafermeyer Decl., par 36)" and "failed to draw the inferences from the facts which are most favorable to Schafermeyer as required by the summary judgment standard."[88] While we agree that in considering a motion for summary judgment the ALJ should not make credibility judgments and should draw inferences in favor of the non-moving party, even if he erred in this case, his error is harmless. Even assuming that Schafermeyer was in fact ignorant of his rights under the whistleblower statutes, as the court held in *Rose*,

> It is well-settled that ignorance of the law alone is not sufficient to warrant equitable tolling. . . . Basically Rose's arguments boil down to the fact that he did not know about his statutory rights until he saw an attorney after the expiration of the limitations period. Absent a showing that he was somehow deterred from seeking legal advice by his employer, this is simply not enough to warrant equitable tolling.[[89]]

Similar to complainant Rose, Schafermeyer argues in essence that he was unaware of his rights until the MSPB Judge told him that his complaint should be filed under the whistleblower protection statutes. Although Schafermeyer avers that BGCA limited its appeal instructions to the MSPB and did not inform him of any whistleblower protections, Schafermeyer does not argue that BGCA actively misled him from seeking legal advice, nor would Schafermeyer's declaration or the evidence he submitted in support of his opposition to the Depot's motion for summary judgment support an inference that BGCA deterred him from seeking such advice. BGCA had no legal obligation to inform Schafermeyer of any environmental whistleblower rights and its

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87 Compl't. br. at 11.

88 *Id*. at 16. We note that while Schafermeyer now characterizes his declaration as stating that he believed that the remedy was only available to union members, his declaration, in fact, contains a rather different statement: "I thought I could not file a complaint like Mr. Van Winkle's **through PEER."** Schafermeyer Dec. at 9, para. 36." A statement that one believes that a union member's counsel was not available to a non-union member is critically distinguishable from a statement that one believes that as a non-union member, filing an environmental whistleblower complaint was not an available option.

89 945 F.2d at 136. *See also Allentown*, 657 F.2d at 21 ("When all the chaff is stripped away, the naked reason for the delay was [the complainant's] lack of knowledge about the remedy.")

recitation of his MSPB rights can not reasonably be read to suggest that Schafermeyer had no other legal recourse.[90]

Finally, regardless whether the ALJ properly concluded that "some level of prejudice would result to the Respondent by allowing equitable tolling to apply," as the ALJ correctly found, the absence of prejudice is not an independent basis for invoking equitable tolling.[91]

## CONCLUSION

We agree with the ALJ that Schafermeyer has failed to raise a genuine issue as to any material fact regarding his entitlement to equitable tolling on the grounds that he timely filed the precise statutory complaint in the wrong forum. Accordingly, we accept the ALJ's recommendation to grant the Depot's motion for summary judgment and we **DENY** Schafermeyer's environmental whistleblower complaint.[92]

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**
**Chief Administrative Appeals Judge**

**WAYNE C. BEYER**
**Administrative Appeals Judge**

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[90] Similarly, even if, as Schafermeyer argues, Compl't. br. at 18-19, the ALJ incorrectly concluded that his contacts with the Kentucky Department of Environmental Protection occurred outside the limitations period, such contacts, even if we agree that they showed a degree of diligence, would not be a sufficient basis upon which to toll the limitations period in the absence of a material question of fact regarding the applicability of any of the *Allentown* factors. Furthermore, we agree with the ALJ that the union contacts, which Schafermeyer made before BGCA terminated his employment, could not, as a matter of law, demonstrate diligence in pursuing a complaint for a termination that had not yet occurred.

[91] *Baldwin County Welcome Ctr.*, 446 U.S. at 152; *Allentown,* 657 F.2d at 20.

[92] Given our decision in this case, it was not necessary for us to address the Depot's Motion to Allow Newly Discovered Evidence, and so we decline to do so.