In the Matter of:

RICHARD CANTE, **ARB CASE NO. 08-012**

COMPLAINANT, **ALJ CASE NO. 2007-CAA-004**

v.

NEW YORK CITY DEPT. OF EDUCATION, **DATE: July 31, 2009**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Michael C. Rakower, Esq., *Rakower Law*, New York, New York

For the Respondent:
Michael Best, Esq., and Mary McKenna Rodriquez, Esq., *New York City Department of Education*, New York, New York

FINAL DECISION AND ORDER

Richard Cante filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, New York City Department of Education (NYCDOE), demoted him after he complained about his supervisor illegally removing asbestos from a work site. Cante claims that this action violated the employee protection provisions of the environmental statutes.[1] On summary decision, a Labor Department

[1] Section 322 of the Clean Air Act (CAA), 42 U.S.C.A. § 7622; Section 110 of Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.A. § 9610;

Administrative Law Judge (ALJ) recommended that Cante's complaint be dismissed because it was not timely filed. Cante appealed. We affirm.

BACKGROUND

During the spring of 2006, Cante was a custodian ("fireman") working at a NYCDOE public school (P.S. 181) in Queens, New York. Robert Baker, Custodian Engineer and NYCDOE employee, supervised Cante.

On April 26, 2006, Baker asked Cante to remove asbestos tiles from a room in P.S. 181. Cante refused, citing asbestos related safety reasons.[2] Baker removed the tiles himself. On April 27, Cante filed a grievance with his union, Local 74, complaining that Baker violated law by removing the tiles and by asking him to remove the tiles.[3] Cante claims that shortly after refusing to remove the tiles and filing the grievance, Baker began harassing him in job assignments and interfering with his ability to accomplish his job.[4] The union held a stage one hearing on Cante's grievance on May 5, 2006. Cante claims Baker continued to harass him after the stage one hearing and even continued to ask him to remove asbestos tiles from P.S. 181.[5] Cante refused Baker's request and asked that Baker put his requests to remove asbestos tiles in writing. According to Cante, hours later, Baker issued him a citation for failing to complete a job task.[6]

On June 15, 2006, Baker informed Cante in writing that he would have to join a different union, Local 94, or be terminated effective July 1st.[7] Local 74 serves public schools with less than 55,000 square feet, and Local 94 serves public schools with more than 55,000 square feet.[8] Approximately six years earlier, after Cante had been working at P.S. 181 for several years, the school expanded, modifying the size of the building from under 55,000 to over 55,000 square

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Section 507 of the Federal Water Pollution Control Act of 1972 (FWPCA), 42 U.S.C.A. § 1367; Section 1450 of the Safe Drinking Water Act of 1974 (SDWA), 42 U.S.C.A. § 300j-9(i); Section 7001 of the Solid Waste Disposal Act of 1976 (SWDA), 42 U.S.C.A. § 6971 and Section 23 of the Toxic Substances Control Act of 1976 (TSCA), 42 U.S.C.A. § 2622.

2 Nov. 28 Letter to OSHA at 6.

3 *Id.*

4 *Id.*

5 *Id.* at 6-7.

6 *Id.* at 7.

7 Cante July 2 Resp. to Mot. to Dis., Ex. H.

8 Cante July 2 Resp. to Mot. to Dis., Ex. G at 2 (union agreement).

feet.[9] Baker interpreted the collective bargaining agreement to require firemen in P.S. 181 to become members of Local 94. Cante disagreed with Baker's interpretation of the contract and refused to make the switch due to differences in medical benefits.[10]

On June 30, 2005, before Cante's anticipated termination took effect, Baker sent Cante a letter informing him that effective July 1st he would be demoted to a cleaner.[11] On or about July 10th, Cante filed a second union grievance concerning his demotion. On July 19, 2006, Cante and Baker attended a stage one hearing on Cante's demotion. The stage two hearing for the demotion grievance was initially scheduled for August 16, 2006, but postponed until August 25 and postponed again until September 12, 2006.[12]

Meanwhile, in late August, Cante hired counsel, and on September 11, 2006, filed the aforementioned complaint with OSHA seeking an investigation into all applicable whistleblower claims.[13] OSHA found Cante's complaint to be untimely, and dismissed the complaint on April 9, 2007. Cante appealed OSHA's determination and asked for a hearing before an ALJ. NYCDOE moved to dismiss on the grounds that Cante's complaint to OSHA was untimely filed and that Cante was not entitled to equitable tolling of the 30 day statute of limitations. The ALJ dismissed Cante's claim for untimeliness. Cante appealed.

JURISDICTION AND STANDARD OF REVIEW

The environmental whistleblower statutes authorize the Secretary of Labor to hear complaints of alleged retaliation against an employee who engages in protected activity and, upon finding a violation, to order abatement and other remedies. The Secretary has delegated authority for review of an ALJ's initial decision to the Board.[14]

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9 Cante July 2 Resp. to Mot. to Dis. at 3.

10 Nov. 28 Letter to OSHA at 8 n.7.

11 Nov. 28 Letter to OSHA at 9.

12 Nov. 28 Letter to OSHA at 10.

13 In addition to the environmental statutes, OSHA investigated whether NYCDOE violated Section 211 of the Asbestos Hazard Emergency Response Act of 1986 (AHERA), 15 U.S.C.A. § 2651, and Section 11(c) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C.A. § 660(c). Neither the ALJ nor this Board has jurisdiction to decide whether NYCDOE violated these statutes. Our discussion is limited to the environmental whistleblower statutes listed at n. 1.

14 29 C.F.R. § 24.8 (2007). *See also* Secretary's Order No. 1-2002, 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)).

We review an ALJ's recommended grant of summary decision de novo.[15] That is, the standard the ALJ applies also governs our review. The standard for granting summary decision is essentially the same as that found at Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts. Accordingly, summary decision is appropriate if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based.[16] A genuine issue of material fact is one, the resolution of which "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[17]

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.[18] "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.'"[19] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[20] Furthermore, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing."[21]

DISCUSSION

While the six environmental statutes contain different language, the general requirements of a whistleblower complainant are the same. To prevail on the merits, Cante must establish by a preponderance of the evidence that he engaged in a protected activity. He must also prove by a

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15 *King v. BP Prod. N. Am., Inc.*, ARB No. 05-149, ALJ No. 2005-CAA-005, slip op. at 4 (ARB July 22, 2008). The ALJ properly converted the motion to dismiss to a motion for summary decision, 29 C.F.R. § 18.40 (2008), because he considered evidence contained outside of the pleadings. Recommended Decision and Order (R. D. & O.) at 2.

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

17 *Bobreski v. U.S. Envtl. Prot. Agency*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

18 *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (ARB Dec. 13, 2002).

19 *Bobreski*, 284 F. Supp. 2d at 73 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

20 *Bobreski*, 284 F. Supp. 2d at 73.

21 29 C.F.R. § 18.40(c); *Webb v. Carolina Power & Light Co.*, No. 1993-ERA-042, slip op. at 4-6 (Sec'y July 14, 1995).

preponderance of evidence that NYCDOE was aware of the protected activity, that he suffered an adverse employment action, and that the protected activity was the reason for the adverse action.[22]

In Cante's case, however, we do not reach the merits of his complaint because we are reviewing the ALJ's summary decision concerning whether Cante's complaint was timely. All of the statutes have a 30 day limitations period.[23] Cante filed his complaint with OSHA on September 11, 2006. Determining that the complaint was filed more than 30 days after Cante's July 1, 2006 demotion, OSHA dismissed Cante's complaint as untimely. Cante objected to OSHA's findings. As earlier noted, NYCDOE filed a motion to dismiss Cante's claim as untimely. NCYDOE observed that Cante had unequivocal notice of the adverse action on June 15th or, at the latest, July1st.[24] Because Cante filed his whistleblower claim on September 11, 2006, more than 30 days after July 1, NYCDOE argued that his complaint was untimely. NYCDOE further argued that under a recent Supreme Court case, *Ledbetter v. Goodyear*,[25] each paycheck Cante received at the cleaner rate of pay did not constitute a separate, actionable discrete act that rekindled the 30 day limitations period.

Cante, responding to the motion to dismiss, argued before the ALJ that OSHA erred in pooling all of NYCDOE's actions as one single adverse action starting on June 15th.[26] Cante argued that since he received paychecks within 30 days before he filed with OSHA, under *Bazemore v. Friday*,[27] the post-July 1 paychecks at the cleaner rate of pay were issued with discriminatory animus and thus were separate actionable events. Therefore, his complaint was timely. Cante also argued that NYCDOE should be estopped from asserting an untimely filing because he was pressured into pursuing a union grievance mechanism in response to his demotion.[28] Under the principle of equitable estoppel, a statute of limitations will be tolled if the

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[22] *Seetharaman v. Gen. Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 5 (ARB May 28, 2004).

[23] Section 322 of the Clean Air Act (CAA), 42 U.S.C.A. § 7622(b)(1); Section 110 of Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.A. § 9610(b); Section 507 of the Federal Water Pollution Control Act of 1972 (FWPCA), 42 U.S.C.A. § 1367(b); Section 1450 of the Safe Drinking Water Act of 1974 (SDWA), 42 U.S.C.A. § 300j-9(i)(2)(A); Section 7001 of the Solid Waste Disposal Act of 1976 (SWDA), 42 U.S.C.A. § 6971(b) and Section 23 of the Toxic Substances Control Act of 1976 (TSCA), 42 U.S.C.A. § 2622(b); 29 C.F.R. § 24.3(b) (providing 30 day time period for complainant to file complaint).

[24] NYCDOE June 28 Mot. to Dis. at 5.

[25] 550 U.S. 618 (2007).

[26] Cante July 2 Resp. to Mot. to Dis. at 1, 5, 8.

[27] 478 U.S. 385 (1986).

[28] Cante July 2 Resp. to Mot. to Dis. at 10.

complainant can show that the employer misled the complainant and thus caused the delay in filing the complaint.[29]

NYCDOE contended that *Bazemore* is inapposite because that case involved a facially discriminatory pay structure. NYCDOE also argued that Cante failed to satisfy the grounds for equitable tolling of the statute of limitations.[30]

Bazemore and Ledbetter

In *Bazemore*, the Court held that the defendant had a duty to eradicate salary disparities between white and black workers even though the discriminatory disparities were set in motion before Title VII applied to the defendant employer.[31] Before 1965, the defendant employer maintained two separate branches, one for black employees, one for white employees.[32] After Title VII became law, the employer merged the two branches. The plaintiffs presented statistical evidence demonstrating that the pay of black employees pre-merger and post-merger was less than that of white employees.[33] In concurrence, Justice Brennan clarified that each paycheck delivering less to a similarly-situated black employee constitutes actionable wrong under Title VII despite the fact that the practice began prior to the effective date of Title VII.[34] Justice Brennan distinguished other cases which did not constitute a present, ongoing discriminatory practice from the acts of the defendant employer in maintaining the present discriminatory salary structure.[35]

The basic facts in *Ledbetter* were that plaintiff Lilly Ledbetter worked for Goodyear from 1979 to 1998. In 1998 she filed a claim of sex discrimination based on Title VII and the Equal Pay Act but abandoned the latter claim.[36] Pay rates at Goodyear were determined over time based on employer evaluations. Ledbetter claimed that sex discrimination affected her employer evaluations and thus her rate of pay.[37] The employer argued below that all pay decisions that

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29 *See Prybys v. Seminole Tribe of Florida*, ARB No. 96-064, ALJ No. 95-CAA-15, slip op. at 5 (ARB November 27, 1996).

30 NYCDOE June 28 Mot. to Dis. at 5.

31 *Bazemore*, 478 U.S. at 386-87.

32 *Id.* at 390-91.

33 *Id*. at 391.

34 *Id*. at 395-96.

35 *Id*. at 396 n.6.

36 *Ledbetter*, 550 U.S. at 621.

were made outside of the Equal Employment Opportunity Commission (EEOC) charging period were time barred and any pay decisions occurring within the charging period were non-discriminatory and thus non-actionable.[38] Two pay raise denials occurred within the charging period.[39] The 11th Circuit held that a Title VII discrimination claim cannot be based on pay decisions occurring before the pay decision which affected pay within the charging period.[40] Ledbetter filed a petition asking the Court to determine whether a plaintiff can bring a Title VII claim of illegal pay discrimination when the disparate pay is received during the charging period but the intentional discrimination occurred outside the charging period.[41]

The Supreme Court, in a 5-4 split, ruled against Ledbetter. The majority opinion, distinguishing *Bazemore*, held that the paycheck itself was not discriminatory but a neutral effect of alleged discriminatory personnel evaluations occurring before the charging period. The *Ledbetter* majority reasoned that discriminatory intent of long past evaluations did not transfer to subsequent paychecks.[42] The majority reaffirmed precedent by stating that a pay-setting decision is a discrete act which begins the charging period and the receipt of a neutral paycheck is not an unlawful practice which breathes life into prior, uncharged discrimination.[43]

The ALJ's Decision

The ALJ ruled in favor of NYCDOE and recommended that Cante's complaint be dismissed because it was not timely filed. Complainants alleging a violation of the environmental whistleblower statutes must file a complaint within 30 days of a discrete adverse action. The 30-day limitations period begins to run on the date that a complainant receives final, definitive and unequivocal notice of a discrete adverse employment action. The date that an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation.[44] Discrete acts of discrimination or

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37 *Id*. at 622.

38 *Id*.

39 *Id*. at 623.

40 *Id*. at 622.

41 *Id*. at 623.

42 *Id*. at 629.

43 *Id*. at 628.

44 *See Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, slip op. at 6 (ARB Jan. 30, 2004); *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-002, slip op. at 14 (ARB Feb. 28, 2003); *see generally Chardon v. Fernandez*, 454 U.S. 6 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful);

retaliation are easy to identify. Examples are failure to promote, denial of transfer, termination, and refusal to hire.[45] "A discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.' A party therefore must file a charge within [the number of days allowed by the relevant statute] of the date of the act or lose the ability to recover for it."[46]

Cante argued to the ALJ that because he was demoted to a lower paying job on July 1, each paycheck he received thereafter constitutes a new, disparate act of discrimination, rather than merely a consequence of the demotion. Therefore, since he received at least one of these checks within 30 days of filing his complaint on September 11, his complaint was timely filed.[47]

Though the ALJ recognized our precedent, he concluded that Ledbetter was dispositive.[48] The ALJ did not cite specifically to *Bazemore*, but found that Cante did not allege that the cleaner's rate of pay was "discriminatorily set." Therefore, under *Ledbetter*, the paychecks Cante received after July 1 were nondiscriminatory acts entailing only the adverse effects of the demotion.[49] The ALJ also noted Cante's argument that the lower paychecks were the result of his refusal to heed Baker's attempts, which continued into the limitations period, to force him to switch unions. But, again citing *Ledbetter*, the ALJ rejected this argument because "[t]he fact that possible adverse action occurred during the period when Complainant received paychecks at the cleaner's rate of pay does not turn that nondiscriminatory action into actionable discriminatory activity."[50]

Thus, since there was no issue of fact that Cante filed his complaint more than 30 days after receiving Baker's June 15 letter that he would be terminated effective July 1 and more than 30 days after actually being demoted on July 1, and since Cante did not demonstrate that he was entitled to equitable estoppel, the ALJ concluded that Cante's complaint was untimely.[51]

Delaware State College v. Ricks, 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated).

45 *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002); *Belt v. United States Enrichment Corp.*, ARB No. 02-117, ALJ No. 01-ERA-19, slip op. at 9 (ARB Feb. 26, 2004).

46 *Morgan*, 536 U.S. at 110; see also *Belt*, slip op. at 14-15.

47 Brief [to ALJ] in Support of Complainant Richard Cante's Appeal; R. D. & O. at 4.

48 R. D. & O. at 6.

49 *Id.* at 4, 5.

50 R. D. & O. at 6.

51 *Id.* at 6-7.

Cante's Appeal

On appeal to us, Cante makes two arguments. First, he contends that the ALJ erred because he "failed to consider" that during the limitations period, NYCDOE compensated him as a cleaner but required him to do fireman duties. Cante argues that he sent a letter to the OSHA investigator stating, "I am currently employed as a cleaner, earning the wages of a cleaner, but doing the job of a fireman." He contends that this "clearly and emphatically alleged" that his cleaner's pay was discriminatory.[52] According to Cante, if the ALJ had compared Cante's cleaner's pay to what firemen were paid, the ALJ would have to have concluded that each paycheck Cante received after July 1 was an actionable event. Therefore, since he received a cleaner's paycheck within 30 days of September 11, 2006, he filed his complaint within the limitations period.[53]

Cante's second argument seems to center around his contention that after the demotion and right up to the time he filed his complaint on September 11, Baker continued to exhibit hostility by trying to force him to change unions and by not changing his decision to demote Cante. This continuing intentional discrimination, Cante argues, means that each paycheck issued during that time constitutes an actionable event.[54]

Except for the portion of his argument that Baker evinced discriminatory animus by trying to force him to change unions, Cante did not make these arguments to the ALJ.[55] Under our well established precedent, we will not consider an argument that a party raises for the first time on appeal.[56] Furthermore, Cante cannot defeat a motion for summary judgment with mere allegations.[57] Thus, even if Cante had made these arguments below, he has offered no evidence, as he must, that creates an issue of fact that the lower paychecks were anything other than the direct result of the July 1 demotion.

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[52] Nov. 28 Letter to OSHA at 9.

[53] Cante Brief at 8-9

[54] Cante Br. at 12-15. Cante does not challenge the ALJ's conclusion that equitable estoppel does not toll the limitations period here.

[55] We note that Cante requested that the ALJ allow him more time to plead facts showing discriminatory intent if the ALJ found that his July 2 response to the motion to dismiss was deficient. July 2 Cante Resp. to Mot. to Dis. at 8 n.6. On appeal, however, Cante does not argue that the ALJ erred in not allowing him additional discovery time.

[56] *Rollins v. Am. Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 4 n.11 (ARB Apr. 3, 2007 (corrected)).

[57] *See Webb v. Carolina Power & Light Co.*, No. 1993-ERA-042, slip op. at 4-6 (Sec'y July 14, 1995).

Therefore, according to our precedent noted earlier, as a matter of law the lower paychecks that Cante received less than 30 days before he filed his complaint are not separate, discrete discriminatory acts that triggered a new limitations period. We note that *Ledbetter* does not specifically control the outcome here. We apply *Ledbetter* only to the extent that it is consistent with our precedent that the limitations period begins to run when the complainant has final, definitive, and unequivocal knowledge of a discrete adverse act rather than when the adverse consequences are felt, e.g., reduced pay.

The Lilly Ledbetter Fair Pay Act

The parties also dispute the status of the *Ledbetter* precedent. On January 29, 2009, after the ALJ issued the R. D. & O., Congress passed and the President signed the Lilly Ledbetter Fair Pay Act of 2009.[58] The Act abrogates the *Ledbetter* holding by modifying the definition of "unlawful employment practice" to include paychecks received as a consequence of qualifying discrimination. Following the passage of the Ledbetter Act, Cante wrote to the Board requesting that we remand this matter to the ALJ in light of the Act. But this matter arises under the environmental whistleblower statutes. The Ledbetter Act applies only to claims brought under Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973.[59] Therefore, the Ledbetter Act does not affect the disposition of this case.

CONCLUSION

Accordingly, Cante's complaint is **DENIED** because no genuine issue of fact exists as to whether the paychecks that NYCDOE issued to him after his demotion on July 1, 2006, constitute actionable discrimination and that, therefore, whether his September 11, 2006 was timely filed.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

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58 Pub. L. 111-2, 123 Stat. 5 (Jan. 29, 2009).

59 *Id.*