



In the Matter of:

DOUGLAS EVANS,

ARB CASE NO. 08-059

COMPLAINANT,

ALJ CASE NO. 2008-CAA-003

v.

DATE: April 30, 2010

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard R. Renner, Esq., *Tate & Renner*, Dover, Ohio

For the Respondent:

**Paul M. Winick, Esq., *United States Environmental Protection Agency*,
Washington, District of Columbia**

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown,
Deputy Chief Administrative Appeals Judge, and Wayne C. Beyer, *Administrative
Appeals Judge*; Judge Brown dissenting.**

FINAL DECISION AND ORDER

Douglas Evans filed a complaint alleging that his former employer, the United States Environmental Protection Agency (EPA), retaliated against him in violation of the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (Thomson/West 2003); Comprehensive Environmental Response, Compensation, and

Liability Act (CERCLA), 42 U.S.C.A. § 9610 (Thomson/West 2005); Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (Thomson/West 2003); Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9(i) (Thomson/West 2003); and Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (Thomson Reuters 2009). For the following reasons, we dismiss the complaint.

BACKGROUND

The EPA employed Evans as an Environmental Specialist in its Radiation and Indoor Environments Laboratory (R&IE). On May 26, 2006, he filed a four-page complaint¹ with the Occupational Safety and Health Administration (OSHA). In this complaint, Evans stated that he engaged in activities the CAA, CERCLA, ERA, SDWA, and TSCA protect when he informed EPA management and “appropriate enforcement authorities” about the “environmental risks of having employees participate in emergency response (ER) work without sufficient training.”² He also stated that he wrote a letter to the EPA Administrator describing these risks, and that the letter “provoked a spiral of harassment and animosity” against him.³

OSHA investigated and denied the complaint on November 21, 2007. Evans requested a hearing before an ALJ. Prior to any hearing, EPA filed a Motion to Dismiss the complaint (Motion).⁴ It argued that Evans’ complaint failed to state a claim for relief because it did not “contain sufficient factual matter to suggest that he engaged in protected activity within the purview of the organic environmental statutes.”⁵ Evans responded by submitting a Memorandum in Opposition and declarations from three of his co-workers at R&IE. According to Evans, his complaint, as written, was sufficient to

¹ In his Petition for Review, Evans states that he “filed supplemental complaints with OSHA on September 19 and October 29, 2006, and on June 15, August 5 and September 29, 2007.” Petition for Review at 2. He did not argue before the ALJ that these supplemental complaints contain a description of his alleged protected activity.

² Evans’ May 26, 2006 Complaint (Complaint) at 2.

³ *Id.*

⁴ The document filed by EPA is captioned “U.S. Environmental Protection Agency’s Motion to Dismiss Complainant’s Original and Supplemental Complaints Or, In the Alternative, To Dismiss Complainant’s Original Complaint and To Restrict Discovery to Matters Occurring Post-May 2006.”

⁵ Motion at 5.

withstand the Motion. Evans also stated that, because the Motion was “founded on factual allegations,” a “review of the standards for summary decision [was] appropriate.”⁶

The ALJ issued a Decision and Order Dismissing Complaint (D. & O.) on March 11, 2008. The ALJ concluded that Evans “fail[ed] to state a claim upon which relief can be granted” because his complaint and letter to the EPA Administrator did not contain information indicating that he “engaged in an activity protected by the Environmental Acts.”⁷ Evans appealed the ALJ’s decision to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the statutes at issue here.⁸ We review recommended decisions granting motions to dismiss and summary decision de novo.⁹

The rules governing hearings in whistleblower cases contain no specific provisions for dismissing complaints for failure to state a claim upon which relief may be granted.¹⁰ It is therefore appropriate to apply Fed. R. Civ. P. 12(b)(6), the Federal Rule of Civil Procedure governing motions to dismiss for failure to state such claims.¹¹ Under Fed. R. Civ. P. 12(b)(6), all reasonable inferences are made in the non-moving party’s

⁶ Complainant Douglas Evans’ Memorandum in Opposition to Motion to Dismiss (Memorandum in Opposition) at 5.

⁷ D. & O. at 5.

⁸ Secretary’s Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 24.110(a).

⁹ *King v. BP Prod. N. Am., Inc.*, ARB No. 05-149, ALJ No. 2005-CAA-005, slip op. at 4 (ARB July 22, 2008); *Seetharaman v. Stone & Webster, Inc.*, ARB No. 06-024, ALJ No. 2003-CAA-004, slip op. at 3 (ARB Aug. 31, 2007).

¹⁰ *See* 29 C.F.R. Part 18 (2009).

¹¹ 29 C.F.R. § 18.1(a); *see, e.g., High v. Lockheed Martin Energy Sys.*, ARB No. 98-075, ALJ No. 1996-CAA-008, slip op. at 1, 6 (ARB Mar. 13, 2001), (applying 12(b)(6) standard to complaint brought under the CAA, CERCLA, ERA, SDWA, and TSCA.).

favor.¹² The burden is on the complainant to frame a complaint with “enough facts to state a claim to relief that is plausible on its face.”¹³

When the parties submit evidence outside the pleadings, the Board reviews a motion to dismiss as a request for summary decision pursuant to 29 C.F.R. Part 18.40.¹⁴ 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. Summary decision is appropriate “if the pleadings, affidavits, material obtained by discovery, 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.”¹⁵

DISCUSSION

1. The Legal Standards

In enacting the TSCA, Congress found that human beings and the environment are exposed to a large number of chemical substances and mixtures whose manufacture, processing, distribution in commerce, use, or disposal may present an unreasonable risk of injury to health or the environment.¹⁶ The purpose of the TSCA is to regulate chemical substances and mixtures that present such risks and to take action against imminent hazards.¹⁷

Congress passed the ERA in 1974 as part of its continuing effort to regulate the production, use and control of nuclear energy. An employee protection provision was added in 1978 to protect employees who assist or participate in any proceeding to administer or enforce the requirements of the ERA or the Atomic Energy Act of 1954.¹⁸

¹² *Fullington v. AVSEC Servs, L.L.C.*, ARB No. 04-019, ALJ No. 2003-AIR-030, slip op. at 5 (ARB Oct. 26, 2005).

¹³ *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2006).

¹⁴ *See Erickson v. U.S. Env'tl. Prot. Agency*, ARB No. 99-095, ALJ No. 1999-CAA-002, slip op. at 3 n.3 (ARB July 31, 2001).

¹⁵ 29 C.F.R. § 18.40(d).

¹⁶ 15 U.S.C.A. § 2601(a).

¹⁷ 15 U.S.C.A. § 2601(b)(2). *See Rollins Env'tl. Servs., Inc. v. Parish of St. James*, 775 F.2d 627, 632-33 (5th Cir. 1985).

¹⁸ *Pastor v. Veterans Affairs Med. Cent.*, ARB No. 99-071, ALJ No. 1999-ERA-011, slip op. at 8-9 (ARB May 30, 2003).

The Federal Government has not waived sovereign immunity under the ERA or TSCA. We therefore have jurisdiction over Evans' complaint to the extent it alleges violations of the CAA, SDWA, and CERCLA (the environmental acts).¹⁹

Congress passed the CAA to protect the public health by controlling air pollution.²⁰ It passed the SDWA "to assure that water supply systems serving the public meet minimum national standards for protection of public health" and "to assure safe drinking water supplies, protect especially valuable aquifers, and protect drinking water from contamination by the underground injection of waste."²¹ And the purposes of CERCLA are the "prompt cleanup of hazardous waste sites and the imposition of all cleanup costs on the responsible party."²²

The whistleblower protection provisions of the environmental acts prohibit employers from discriminating against employees who have participated in activities that further the purposes of those acts or relate to their administration and enforcement.²³ To prevail on a whistleblower complaint, a complainant must establish by a preponderance of the evidence that he engaged in protected activity, that the respondent was aware of the protected activity, that he suffered unfavorable personnel action, and that the protected activity was the reason for the unfavorable personnel action.²⁴

¹⁹ See *Erickson v. U. S. Env'tl. Prot. Agency*, ARB Nos. 03-002, -003, -004, -064; ALJ Nos. 1999-CAA-002, 2001-CAA-008, -013, 2002-CAA-003, -018, slip op. at 12-13 (ARB May 31, 2006) (holding that the Department of Justice has determined that the federal government has waived sovereign immunity under the CAA, SDWA, and CERCLA but not the TSCA); *Pastor*, ARB No. 99-071, slip op. at 13-22 (sovereign immunity not waived under the ERA).

²⁰ 42 U.S.C.A. § 7401(b)(1); *Natural Res. Def. Council, Inc. v. U.S. Env'tl. Prot. Agency*, 725 F.2d 761, 764 (D.C. Cir. 1984).

²¹ H.R. Rep. No. 93-1185 (1974), as reprinted in 1974 U.S.C.C.A.N. 6454; see also *United States v. Mass. Water Res. Auth.*, 256 F.3d 36, 38 (1st Cir. 2001) ("In 1974, Congress . . . passed the Safe Drinking Water Act . . . with the basic goal of protecting the purity of the drinking water provided by the nation's public water systems.").

²² *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 2000-CAA-020, 2001-CAA-009, -011, slip op. at 10 (ARB June 30, 2004), citing *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990).

²³ See, e.g., *Evans v. Baby-Tenda*, ARB No. 03-001, ALJ No. 2001-CAA-004, slip op. at 4 (ARB July 30, 2004).

²⁴ See, e.g., *Cante v. New York City Dep't of Educ.*, ARB No. 08-012, ALJ No. 2007-CAA-004, slip op. at 4-5 (ARB July 31, 2009) (citing the environmental statutes). Cf. 29

To be protected under the whistleblower protection provisions of the environmental acts, an employee's protected activity must be "grounded in conditions constituting reasonably perceived violations of the environmental acts."²⁵ Therefore, Evans' complaint must allege facts to show that he apprised EPA or the "appropriate enforcement authorities" he refers to in his complaint of a violation of the CAA (such as the potential emission of a pollutant into the ambient air), SDWA (the contamination of drinking water), or CERCLA (the cleanup of hazardous waste sites). Any complaints about purely occupational hazards are not protected under the employee protection provisions of the whistleblower acts.²⁶

2. Evans' Complaint Fails to State a Claim for Relief under the CAA, CERCLA, or SDWA.

As indicated above, we apply the Federal Rule of Civil Procedure governing motions to dismiss for failure to state a claim. In *Ashcroft v. Iqbal*,²⁷ the Supreme Court clarified the pleading requirements a complaint must satisfy to survive a motion to dismiss. The court noted that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."²⁸

Evans' complaint accuses EPA of discriminating against him, but such an accusation is a legal conclusion. His complaint must indicate that he apprised EPA or another enforcement authority of conduct by EPA that could constitute a violation of the CAA, CERCLA, or SDWA. The ALJ concluded that Evans' complaint failed to state a claim upon which relief could be granted, and we agree.

Evans' complaint states that:

Complainant engaged in protected activity. Evans' protected activities include, but are not limited to, raising

C.F.R. § 24.104(d)(1) (2009) (requiring that a complainant prove that his protected activity was a motivating factor in the unfavorable personnel action).

²⁵ *Minard v. Nerco Delamar Co.*, 1992-SWD-001, slip op. at 5 (Sec'y Jan. 25, 1994).

²⁶ See, e.g., *McKoy v. North Fork Servs. Joint Venture*, ARB No. 04-176, ALJ No. 2004-CAA-002, slip op. at 6 (ARB Apr. 30, 2007); *Tucker v. Morrison & Knudson*, No. 1994-CER-001, slip op. at 5. (ARB Feb. 28, 1997).

²⁷ 556 U.S. ___, 129 S. Ct. 1937 (2009).

²⁸ *Id.* at 1949.

compliance issues with management about the environmental risks of having employees participate in emergency response (ER) work without sufficient training. Evans contacted appropriate enforcement authorities to report violations. Complainant wrote a letter to the EPA Administrator in 2004 that provoked a spiral of harassment and animosity. Evans continued to collect evidence of violations and retaliation. During relevant times, respondent knew of complainant's protected activity.^[29]

The letter to the EPA Administrator is Evans' interpretation of the conditions R&IE imposed upon its employees during their participation in Emergency Response training:

Selected older employees whom had 25 to 42 years of service and any kind of medical condition were deliberately targeted and harassed.... The obvious point of this whole charade was to harass people out of their job, not to serve any recognizable government interest.... [The R&IE Director] has told his managers to question every employee as to "how old they are," do they plan on "retiring" or when are they going to "retire" and do they have any medical problems that prohibit the use of a "respirator." These badgering, harassing tactics are totally uncalled for and highly illegal.^[30]

The ALJ properly interpreted Evans' complaint in light of the letter,³¹ and correctly concluded that the complaint and letter fail to state a claim for relief under the environmental acts.

Evans claimed that some R&IE employees were unfit to participate in the ER training.³² His letter to the EPA Administrator discusses his concerns that certain R&IE employees had been harassed because of their age and medical condition.³³ Evans also described his concern about the physical requirements of the training and changes in

²⁹ Complaint at 1-2.

³⁰ July 7, 2004 Letter to EPA Administrator Michael O. Leavitt at 3-7.

³¹ See, e.g., *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) ("on a motion to dismiss, a court may consider documents attached to the complaint as an exhibit or incorporated in it by reference") and cases cited therein.

³² July 7, 2004 Letter to EPA Administrator Michael O. Leavitt at 2-4.

³³ *Id.* at 2-7.

R&IE employees' working conditions.³⁴ But, as indicated above, such complaints involving purely occupational hazards are not protected under the employee protection provisions of the whistleblower acts.

Neither the complaint nor the letter indicates how any actions taken by EPA would lead to CAA, CERCLA or SDWA violations. These documents indicate that Evans' concerns related to personnel decisions made by EPA. Providing information to management or other enforcement authorities about questionable personnel decisions, standing alone, does not constitute protected activity under whistleblower protection provisions such as those contained in the environmental acts.³⁵

Evans argues before us that “[t]he ALJ erred in requiring [him], at the pleading level, to specify the protected activity with particularity.”³⁶ He contends that he was not required to describe how his alleged protected activity related to the environmental acts because the regulations governing his complaint indicate that “[n]o particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation.”³⁷

We disagree with Evans' contention that his complaint contains enough information to survive dismissal for failure to state a claim. As we have noted in previous cases, although a complaint “does not need detailed factual allegations, it still must provide factual allegations that indicate the grounds for the complaint.”³⁸ A

³⁴ See, e.g., *id.* at 4 (co-worker required to “pass a respirator breathing test” and “carry 75 pounds of radiation detection equipment”); 5 (co-worker “assigned hard manual physical labor which included lifting heavy & bulky cases”).

³⁵ Cf. *Harvey v. Home Depot, U.S.A., Inc.*, ARB Nos. 04-114, 115; ALJ Nos. 2004-SOX-020, -036, slip op. at 5 (ARB June 2, 2006) (Providing information to management about questionable personnel actions was not protected under the Sarbanes-Oxley Act).

³⁶ Complainant Douglas Evans' Brief at 1.

³⁷ See 29 C.F.R. § 24.3(c) (2005) which, since Evans filed his complaint, has been amended and recodified at 29 C.F.R. § 24.103(b). The amendments and recodification do not affect the outcome of this case. The amended regulations require that “[t]he complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows: (i) The employee engaged in a protected activity; (ii) The respondent knew or suspected, actually or constructively, that the employee engaged in the protected activity; (iii) The employee suffered an unfavorable personnel action; and (iv) The circumstances were sufficient to raise the inference that the protected activity was a motivating factor in the unfavorable action.” 29 C.F.R. § 24.104(d)(2).

³⁸ *Powers v. PACE*, ARB No. 04-111, ALJ No. 2004-AIR-019, slip op. at 9 (ARB Aug. 31, 2007), citing *Twombly*, 127 S. Ct. at 1964-65.

complaint “must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.”³⁹

It is therefore not enough that Evans simply state in his complaint that he “engaged in protected activity.” He must present a factual allegation indicating that the activity could qualify for protection under the environmental acts. The allegation he provided in his complaint, quoted above in full, was his concern that ER training could lead to “environmental risks.” But this allegation does not indicate how the training could lead to CAA, CERCLA ,or SDWA violations, or how the resulting risks would lead to such violations.

We have considered Evans’ letter to the EPA Administrator as part of the complaint, but that document describes the physical requirements of the ER training and changes in R&IE employees’ working conditions. It does not provide information indicating that Evans engaged in activity protected by the environmental acts.

We therefore conclude that Evans’ complaint fails to state a claim for relief under the CAA, SDWA, or CERCLA .

3. EPA is Entitled to Summary Decision.

EPA attached a copy of Evans’ letter to the EPA Administrator to its Motion. In response to the Motion, Evans submitted declarations from three of his co-workers. Evans also argued that a “review of the standards for summary decision is appropriate”⁴⁰ for analysis of the Motion.

As indicated above, when the parties submit evidence outside the pleadings, the Board reviews a motion to dismiss as a request for summary decision.⁴¹ We will therefore consider whether Evans, in responding to the Motion, has set forth specific facts showing that there is a genuine issue of fact as to whether he engaged in activity protected by the environmental acts.

We have examined Evans’ complaint, his letter to the EPA Administrator, his Memorandum in Opposition, and the declarations to determine how his alleged protected activities relate to the environmental acts. In these documents, Evans does not set forth

³⁹ *High v. Lockheed Martin Energy Sys.*, ARB No. 97-109, ALJ No. 1997-CAA-003, slip op. at 4-5 (ARB Nov. 13, 1997), quoting *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434 (6th Cir. 1988).

⁴⁰ Memorandum in Opposition at 5.

⁴¹ 29 C.F.R. § 18.40; *see Erickson*, ARB No. 99-095, slip op. at 3 n.3.

specific facts indicating that he communicated a concern to EPA related to the administration or enforcement of the environmental acts.

In conjunction with his Memorandum in Opposition, Evans submitted declarations from three of his R&IE co-workers. In the first declaration, Max Davis stated that “Doug was concerned that he and the other employees did not have the training necessary to properly handle the types of hazards that could be involved in an emergency, including radiological and toxic chemical hazards.”⁴²

In the second declaration, Dennis Farmer declared that “Doug was concerned that coercing lab workers (like himself) or even office workers to participate posed a real danger to the environment” because “ER incidents can involve radiological, biological, explosive and toxic hazards, and employees who did not volunteer for such assignments would pose a danger to the success of any incident response.”⁴³

Finally, Flo Deluna stated in her declaration that “Doug was concerned that the emergency response plan was poorly run.... Management did not have a plan to assure us that the dangers would be tested so we would know what hazards we were facing in emergency response planning.... By using mandatory participation, management was using people who were not willingly accepting the known risks.”⁴⁴

To the extent that these employees state that Evans was concerned about ERA or TSCA violations, we again note that the Federal Government has not waived sovereign immunity under those statutes. But accepting the facts presented in the declarations, complaint, and letter as true, Evans has not shown that he apprised EPA or any other enforcement authority about violations of the environmental acts.

Evans’ co-workers describe his concerns about ER training being “inadequate” and “poorly designed.”⁴⁵ These concerns do not constitute protected activity because they convey only a vague notion that EPA’s conduct *might* negatively affect the

⁴² Declaration of Max Davis, ¶ 4.

⁴³ Declaration of Dennis Farmer, ¶ 4.

⁴⁴ Declaration of Flo Deluna, ¶ 3.

⁴⁵ See, e.g., Declaration of Max Davis, ¶ 4.

environment.⁴⁶ As we have noted in previous cases, complaints based on numerous assumptions and speculation are not protected.⁴⁷

More importantly, the declarations do not indicate that Evans communicated concerns to EPA that were related to the CAA, CERCLA, or SDWA. The declarations describe Evans' concerns about working conditions at R&IE. But they do not set forth specific facts indicating that Evans communicated a concern to R&IE or the EPA Administrator related to the administration or enforcement of the environmental acts.

The declarations are evidence that Evans was concerned about a personnel practice involving preparation for emergency situations. And the letter to the EPA Administrator describes some of the physical requirements of the ER training. But, as we have already stated, complaints about occupational hazards and personnel decisions are not protected under the employee protection provisions of the whistleblower acts.

The record indicates that Evans was concerned about matters that *could* theoretically arise during an emergency. But such concerns about potential violations that could occur based upon possible contingent events are not protected by the environmental acts.⁴⁸

None of the documents Evans submitted indicate that he informed EPA or any other authority that R&IE's ER training would result in violations of the environmental acts. He has therefore failed to present sufficient evidence to create a genuine issue of material fact that he engaged in protected activity, an essential element of his claim. Accordingly, EPA is entitled to summary decision.

4. Evans Did Not Require Discovery to Defeat EPA's Motion.

Evans argued in his Memorandum in Opposition that, "[s]ince respondent's motion is founded on factual allegations, a brief review of the standards for summary decision is appropriate. They make clear that addressing this [sic] factual issues requires a full opportunity for discovery before determining if there is a basis to make

⁴⁶ *Gain v. Las Vegas Metro. Police Dep't*, ARB No. 03-108, ALJ No. 2002-SWD-004, slip op. at 3 n.3 (ARB June 30, 2004); *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 1995-CAA-012, slip op. at 2 (ARB Apr. 8, 1997).

⁴⁷ *See, e.g., Crosby v. Hughes Aircraft Co.*, No. 1985-TSC-002, slip op. at 27-28 (Sec'y Aug. 17, 1993).

⁴⁸ *See, e.g., Saporito v. Central Locating Servs., Ltd.*, ARB No. 05-004, ALJ No. 2004-CAA-013 slip op. at 6 (ARB Feb. 28, 2006) (a complaint that is based on numerous assumptions and speculation is not reasonably grounded in perceived violations of several statutes, including the environmental acts).

inferences.”⁴⁹ The ALJ concluded that he should dismiss Evans’ complaint without requiring EPA to submit to such discovery. We concur.

The ALJ has broad discretion in determining the scope of discovery.⁵⁰ Accordingly, an ALJ’s evidentiary rulings will be reversed only when proven to be arbitrary or an abuse of discretion.⁵¹

The ALJ accepted the facts as Evans alleged them in his complaint and response to the Motion. The facts relating to Evans’ protected activity were within his knowledge and control. Additional discovery was therefore unnecessary to counter EPA’s claim that Evans did not engage in protected activity.⁵² Therefore, the ALJ did not abuse his discretion by refusing to grant Evans’ request for discovery prior to dismissing his complaint.

CONCLUSION

Evans failed to present a complaint upon which relief can be granted under the environmental acts. He also failed to adduce evidence that he engaged in protected activity, an essential element of his case, and on that basis, his entire claim must fail. Accordingly, we **GRANT** EPA’s Motion to Dismiss and **DENY** the complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN, Deputy Chief Administrative Appeals Judge, dissenting:

The primary issue before the Board on appeal is whether the Administrative Law Judge committed reversible error in dismissing Complainant Evans’ complaint for failure

⁴⁹ Memorandum in Opposition at 5.

⁵⁰ 29 C.F.R. §§ 18.13, 18.14, 18.15, 18.29.

⁵¹ *Friday*, slip op. at 4; *High v. Lockheed Martin Energy Sys.*, ARB No. 03-026, ALJ No. 1996-CAA-9, slip op. at 4 (ARB Sept. 29, 2004).

⁵² *See, e.g., Johnson v. Oak Ridge Operations Office*, ARB No. 97-057, ALJ Nos. 1995-CAA-020, -021, -022, slip op. at 12-13 (ARB Sept. 30, 1999).

to adequately allege that he engaged in protected activity within the purview of the employee protection provisions of the several Acts pursuant to which this complaint is filed. For the reasons hereafter discussed, I respectfully dissent from the majority's conclusion that Complainant's allegations of protected activity are inadequate. Nor do I agree that the EPA is immune from whistleblower suit under the Energy Reorganization Act of 1974, as amended. I am of the opinion that the ALJ's dismissal was in error, and that the Decision and Order Dismissing Complaint herein appealed should be reversed and this matter remanded to the Office of Administrative Law Judges (OALJ). I thus respectfully dissent from the majority decision in this matter.

The complaint in the instant case was filed charging unlawful retaliation in violation of the employee whistleblower protection provisions of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5821 (West 2003), the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998), and the Clean Air Act (CAA), 42 U.S.C. § 7622 (West 2003), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9610 (West 2005), and the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i) (West 2006) (the latter three hereinafter collectively referred to as the "Environmental Acts").

Both the complaint initially filed by Evans with OSHA and his subsequently filed complaint with OALJ asserted the same allegations of protected activity:

Complainant engaged in protected activity. Evans' protected activities include, but are not limited to, raising compliance issues with management about the environmental risks of having employees participate in emergency response (ER) work without sufficient training. Evans contacted appropriate enforcement authorities to report violations. Complainant wrote a letter to the EPA administrator in 2004 that provoked a spiral of harassment and animosity. Evans continued to collect evidence of violations and retaliation. During relevant times, respondent knew of complainant's protected activity.

In retaliation for having engaged in the foregoing activities, Evans alleged that his employer, Respondent Environmental Protection Agency (EPA),⁵³ discriminated against him, subjected him to a hostile work environment, and ultimately discharged him from employment in September of 2007.⁵⁴

The summary of Complainant's allegations found in the Decision and Order of Dismissal herein appealed suggests that the ALJ recognized Evans' complaint as

⁵³ Complainant Evans was employed at EPA's Radiation and Indoor Environments National Laboratory, Las Vegas, Nevada (hereinafter referred to as "EPA" or "Las Vegas Laboratory").

⁵⁴ In supplemental complaints filed with OSHA, Evans also alleged retaliation because of the filing of his initial OSHA complaint.

involving allegations of retaliation for having brought to the attention of his employer concerns about environmental risks:

Complainant alleged that Respondent subjected him to a hostile work environment and ultimately terminated his employment in retaliation for alerting management regarding the environmental risks of requiring employees to participate in Respondent's emergency response plan without sufficient training, and filing a whistleblower retaliation complaint with OSHA.

D&O, pg. 1.

The ALJ obviously recognized (and EPA does not dispute) that Evans' raising of his concerns with management is a recognized form of protected activity. *See* 29 CFR § 24.102(b)(3); *Passaic Valley Sewerage Commissioners v. U.S. Dept. of Labor*, 992 F.2d 474, 478-480 (3rd Cir. 1993). Nevertheless, the ALJ dismissed Evans' complaint for having failed to state a claim for which relief could be granted. More specifically, the presiding ALJ dismissed Evans' complaint for having failed to adequately allege that he engaged in protected activity within the purview of the employee protection provisions of the CAA, CERCLA and the SDWA.⁵⁵ Citing Federal Rule of Civil Procedure 12(b)(6), the ALJ held that Complainant's allegations of protected activity were too vague or unrelated to the public safety and environmental concerns of the Environmental Acts to warrant federal whistleblower protection:

As to his first two allegations of protected activity, Complainant does not specify to whom he raised compliance issues, what environmental risks were involved, or the nature of the alleged violations. . . . To survive a 12(b)(6) motion to dismiss, factual allegations must be enough to raise a right to relief above the speculative effort. [citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1959 (2007)]. Based on such vague allegations, I cannot find that Complainant has engaged in protected activity to warrant federal whistleblower protection without any evidence of this activity. A more detailed account of this activity is necessary to form a basis beyond mere speculation upon which to designate it as protected activity to warrant whistleblower protection.

Nor does the remaining allegation of protected activity, the 2004 letter to the EPA administrator, constitute protected activity. In order to be protected, Complainant's letter must have reported safety and health

⁵⁵ While the Decision and Order of Dismissal does not explicitly so state, it appears that the ALJ acquiesced in OSHA's determination that the federal government has not waived sovereign immunity under either the ERA or TSCA. However, since the issue of the federal government's waiver of immunity from suit under the two statutes does not appear to have been argued at the trial level nor raised as an issue on appeal, only the adequacy of Complainant's allegations under the three Environmental Acts is considered to be appropriately before the Board for resolution.

concerns that the Environmental Acts address. [citation omitted]. At no point in his letter does Complainant report any public safety or environmental concerns. Rather, Complainant's letter addresses his concerns with EPA management's treatment of its employees, in particular allegations of age discrimination. While such allegations may have merit, they are not concerns that the Environmental Acts address, thus this is not the appropriate forum in which Complainant should seek a remedy.

D&O, at pg. 4.

As noted, the ALJ held Evans' allegations of protected activity based upon his having raised concerns about the environmental risks of inadequately trained employees participating in emergency response work too vague to overcome a Rule 12(b)(6) motion, citing and relying upon *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007). However, the ALJ's requirement of specificity imposes upon a claimant seeking whistleblower protection under the Environmental Acts a heightened pleading standard that has been expressly rejected by the Supreme Court in employment discrimination cases. See *Swierkeiwicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992 (2002) (involving a claim of employment discrimination under both Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et seq., and the Age Discrimination in Employment Act of 1967, 29 USC § 621 et seq.)

In *Swierkeiwicz* the Supreme Court rejected the Second Circuit's imposition of a heightened pleading standard that had required the plaintiff to plead a prima facie case of discrimination under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), in order to survive the employer's 12(b)(6) motion to dismiss. In doing so, the Court explained that "the prima facie case under *McDonnell Douglas* is an evidentiary standard, not a pleading requirement." *Swierkeiwicz*, 534 U.S. at 510. "Furthermore, imposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" 534 U.S. at 512 (citation omitted).

While *Bell Atlantic v. Twombly* retired the "no-set-of-facts" test first articulated in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957),⁵⁶ neither the Supreme Court's

⁵⁶ The *Bell Atlantic* Court addressed the following statement from *Conley* construing Rule 8: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. The Court rejected the literal reading of this passage (which, the Court noted, has been followed for almost 50 years, albeit with considerable controversy), explaining that when the passage is properly understood within the context of the *Conley* opinion, "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts

decision in *Bell Atlantic* nor subsequent Supreme Court decisions⁵⁷ depart from *Swierkeiwicz's* rejection of a heightened pleading requirement in order to overcome a FRCP 12(b)(6) motion to dismiss in employment discrimination cases. *Bell Atlantic* reaffirmed the long-standing law of pleading that, “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” 550 U.S. at 555. In *Ashcroft v. Iqbal*, 556 U.S. ____ , 129 S.Ct. 1937 (2009), the Supreme Court reaffirmed this long-held understanding of the pleading requirements of Rule 8(a)(2). Therein the Court reiterated what it had sought to clarify in *Bell Atlantic*: that while a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, the notice pleading standard of Rule 8(a)(2) demands more than legal conclusions couched as factual allegations. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Ashcroft*, 129 S.Ct. at 1949 (quoting *Bell Atlantic*, 550 U.S. at 555).

As the Court in *Ashcroft* went on to explain: “Two working principles underlie our decision in [*Bell Atlantic*]. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief [based upon the facts alleged] survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that required the reviewing court to draw on its judicial experience and common sense.” *Ashcroft*, 129 S.Ct. at 1949-1950 (citations omitted).

Consistent with the Court’s analysis in *Bell Atlantic*, as explicated by *Ashcroft*, our analysis of whether dismissal of the instant complaint pursuant to Rule 12(b)(6) was in accordance with law necessarily begins “by identifying the allegations in the complaint that are not entitled to the assumption of truth.” *Ashcroft*, 129 S.Ct. at 1951. Readily identifiable in this regard is Evans’ initial allegation that he “engaged in protected activity.” Standing alone, this bald assertion is, in the words of the Court in *Bell Atlantic*, nothing more than a “formulaic recitation” of a legal element of a whistleblower retaliation complaint. As such, on a motion to dismiss we are not bound to accept the truth of this allegation. However, Evans alleged more than the single conclusory legal assertion that he “engaged in protected activity”. He also asserted factual allegations. Thus, the factual allegations of Evans’ complaint must next be considered “to determine if they plausibly suggest an entitlement to relief.” *Ashcroft*, 129 S.Ct. at 1951.

consistent with the allegations in the complaint. . . . *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s survival.” *Bell Atlantic*, 550 U.S. at 563.

⁵⁷ *Ashcroft v. Iqbal*, 556 U.S. ____ , 129 S.Ct. 1937 (2009); *Erickson v. Pardus*, 551 U.S. 89, 129 S.Ct. 2197 (2007).

As the ALJ recognized, and as previously noted herein, Evans' factual allegations do not only focus upon his 2004 letter of complaint to EPA's administrator. He alleged that his protected activities also included: (1) "raising compliance issues with management about the environmental risks of having employees participate in emergency response (ER) work without sufficient training", (2) "contact[ing] appropriate enforcement authorities to report violations", and (3) "continued [collection of] evidence of violations and retaliation." In ruling upon the Rule 12(b)(6) motion to dismiss, we are obligated (as was the ALJ) to accept these factual allegations as true. *Erickson, supra*, 551 U.S. at 94 (citing *Bell Atlantic*, 550 U.S. at 555-556). Nevertheless, to survive the motion to dismiss, these factual allegations must be sufficient to "state a claim to relief that is plausible on its face. . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 129 S.Ct. at 1949 (quoting *Bell Atlantic*, 550 U.S. at 556, 570). Accordingly, in order for Evans' complaint to survive the instant motion to dismiss, the foregoing factual allegations must contain sufficient factual content upon which to draw a "reasonable inference" that Evans engaged in activities protected by the whistleblower protection provisions of the Environmental Acts pursuant to which he asserts his claim against EPA.

As the majority notes, Congress passed the Clean Air Act (CAA) to protect the public health by controlling air pollution.⁵⁸ It passed the Safe Drinking Water Act (SDWA) in order to assure the safety of public drinking water supplies.⁵⁹ The purposes of CERCLA include the cleanup of toxic and hazardous wastes and the protection of public health and the environment by facilitating cleanup of environmental contamination.⁶⁰

Accordingly, and as the ALJ correctly noted, to fall within the protection of the whistleblower provisions of one or more of the foregoing Acts, Evans' protected activity as alleged in the complaint must relate to the environmental, health or safety concerns the Environmental Acts address -- thereby assuring the "facial plausibility" of his claim as required by *Ashcroft* and *Bell Atlantic*. An employee's protected activity must be "grounded in conditions constituting reasonably perceived violations of the environmental acts", including the expression of "concerns that constitute reasonably perceived threats to environmental safety." *Erickson v. EPA*, ARB Nos. 04-024/025 (Oct. 31, 2006); *Minard v. Nerco Delamar Co.*, 1992-SWD-1, slip op. at 5 (Sec'y, Jan. 25, 1994).

⁵⁸ See footnote 20, *supra*.

⁵⁹ See footnote 21, *supra*.

⁶⁰ See footnote 22, *supra*. See also, *U.S. v Bestfoods*, 524 U.S. 51 (1998); *In re Jensen*, 995 F.2d 925 (9th Cir. 1993).

Before the ALJ, as well as before the Board on appeal, Respondent focuses primarily on Evans' allegation of having written a letter of complaint to the EPA administrator in 2004, a copy of which the EPA attached to its motion to dismiss. Nevertheless, the 2004 letter cannot be viewed as the exclusive basis upon which the determination is to be made of whether the allegations of Evans' complaint "plausibly suggest entitlement to relief." Certainly if one were to consider Evans' claim of protected activity as consisting of only his 2004 letter, one would be hard-pressed to disagree with the ALJ's conclusion that the concerns raised through that letter are not concerns the Environmental Acts address. However, within the overall context of Evans' allegations of whistleblower protected activity, the assertions of environmental concern that are contained in the letter, limited as they are, add credence to Evan's claim of having engaged in protected whistleblower activity.⁶¹

We thus turn to Evans' factual allegations of protected activity, in particular his allegation that he raised with management his concern about the environmental risks of insufficiently trained employees participating in the employer's emergency response program. EPA argues that Evans' concerns have no relationship to reasonably perceived violations of the Environmental Acts or to reasonably perceived threats to environmental safety. Nevertheless, in its memorandum before the ALJ in support of its motion to dismiss the EPA readily acknowledges the interrelationship of the Las Vegas Laboratory's emergency response program to environmental health and safety concerns. The Laboratory's program,⁶² which EPA characterized as an emergency response program "aimed at maximizing effectiveness" should the Lab, which has "specific expertise in radiological contamination," . . . "find itself in the midst of a local or national emergency warranting timely response to best protect the environment." Timely implementation of the Lab's program, the EPA states, "enhances the likelihood of minimizing environmental degradation and the accompanying adverse health consequences to humans and the public." EPA Memorandum in Support of Motion to Dismiss (EPA Memo), pp. 10 and 11. As EPA explained in conclusion, the Las Vegas Laboratory's emergency response program swings into operation "once an event has occurred occasioning the potential for environmental injury . . ." whereupon it "is aimed at quantifying [the environmental degradation], containing it, and minimizing its deleterious consequences." EPA Memo, Pg. 13.

⁶¹ On appeal Evans points out that the July 8, 2004 letter to EPA's administrator made reference to concerns expressed by several employees at a meeting the previous year with management about being forced to participate in Emergency Response duties for which they had no experience and concerns that management was exceeding its authority in unilaterally altering position descriptions to include hazardous duty responsibilities in the Emergency Response program previously not part of the employees' job descriptions.

⁶² EPA notes that the Las Vegas Lab's program is outlined in the National Response Plan, the National Contingency Plan, the Agency Continuity Plan and the Federal Radiological Response Plan, and that "emergency response is an integral aspect, and always has been, of the Las Vegas Laboratory's mission". EPA Memo, pg. 9, fnt 4. *See also*, <http://epa.gov/rie>.

Before the ALJ, as well as on appeal before the Board, EPA argues that there exists no nexus between Evans' alleged protected activity and environmental risk or degradation, as it concedes would be the case if the issue of concern involved "for example . . . toxic waste dumping, noxious air or water emissions, or the release of radiation. . . ." Thus, EPA submits, "unless the alleged misconduct of which a putative whistleblower complains can be said to have the potential for compromising either environmental preservation or the pursuit of those committing environmental crimes, such whistleblower has not engaged in protected conduct within the contemplation of the whistleblower provisions of the environmental statutes." EPA Memo, pg. 13. However, in asserting this conclusion EPA's argument complete ignores the nature of the emergency response program that it has described. That program is clearly not an internal operation whose impact is only felt by the Lab's immediate employees. Rather, by EPA's own admission the Lab's program has potentially far-ranging and significant environmental health and safety implications.⁶³ Out of concern that the emergency response program would prove unable to meet its mandate because of the manner in which training of personnel for that program was being conducted, Evans reasonably called into question the ability of the Lab's emergency response program to address the environmental risks for which the program had been established.

Notwithstanding EPA's protestations as to the legal sufficiency of Evans' allegations of protected activity, it is clear from EPA's own assessment of Evans' complaint that the allegations contained therein nevertheless provided EPA with "fair notice of what the . . . claim is and the grounds upon which it rests" consistent with the requirement of FRCP 8(a)(2). *Bell Atlantic*, 550 U.S. at 555. In its memorandum filed with the ALJ the EPA readily acknowledged that Evans' allegation of protected activity was, in effect, that Evans "[took] exception to management's personnel practices regarding the development and operation of an internal EPA program designed to more effectively confine environmental radioactive contamination" in the event of its release due to an event or activity "for which the Agency was not responsible." EPA Memorandum, pg. 14.

The pertinent Department of Labor regulations governing the requirements for pleading a claim of unlawful retaliation impose certain minimal requirements upon a party seeking whistleblower protection. 29 CFR § 24.103(b) prescribe "no particular form of complaint", only that "a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations." Citing an extensive line of Secretarial authority ranging as far back as 1986, in *Ruud v. Westinghouse Hanford Co.*, 88-ERA-33 (ARB, Nov. 10, 1997), at fnnt 27, the ARB pointed out that, consistent with the minimal requirements the pleading regulation imposes, "complaints are informal filings which need not set forth all legal causes of action or allege all elements of a discrimination case and . . . the fact finder is

⁶³ Consequently, the concerns Evans raises about the Lab's emergency response program are not occupational safety and health concerns exclusively reserved to resolution pursuant to Section 11 of the Occupational and Safety Health Act, 29 USC § 651-678 (1988).

not bound by the legal theories of any party in determining whether discrimination has occurred but must review the record in its entirety for purposes of the determination.”

The Department’s regulations governing the requirements for pleading a claim of whistleblower protection from unlawful retaliation, and the explanation provided in *Ruud* as to the minimal pleadings required, are clearly consistent with the Supreme Court’s pronouncement in *Swierkeiwicz* of the minimal pleading requirements necessary to overcome a Rule 12(b)(6) motion to dismiss in employment discrimination cases. Consequently, I consider Evans’ allegations of whistleblower protected activity facially plausible, and thus would vacate the Decision and Order of Dismissal herein appealed and remand the case to OALJ for further proceedings consistent herewith.⁶⁴ To do otherwise is, in my estimation, to countenance a return to the code pleading of old that was conspicuously abolished when the Federal Rules of Civil Procedure were adopted in 1938. *See*, Cook, Statements of Fact in Pleading Under the Codes, 21 Colum. L. Rev. 416 (1921); and Clark, The Complaint in Code Pleading, Yale L. J. 259 (1925-1926). *See also*, *Thomson v. Washington*, 362 F.3d 969, 970 (7th Cir. 2004 (Posner, J.)) (“The federal rules replace fact pleading with notice pleading.”). This is a step that I am not prepared to take nor find that the law requires.

In closing, I also reject the notion that on appeal the Board, an agency appellate body, can somehow magically transform the ALJ’s Rule 12(b)(6) disposition into a ruling as a matter of summary judgment. Granted EPA presented Evans’ 2004 letter in support of its motion to dismiss. However, as EPA argued before the ALJ in support of maintaining the Rule 12(b)(6) standard for disposing of its motion to dismiss, presentation of the letter merely presented the purely legal question of whether that letter qualified as protected activity. EPA’s Reply Memorandum, pg. 8.

The fact that the ALJ expressly rejected in the Decision and Order of Dismissal an evaluation of EPA’s motion to dismiss pursuant to summary judgment standards cannot be ignored, nor should it be. D&O, pg. 3 n.1.⁶⁵ For the Board to now assert a summary judgment standard that was expressly rejected by the ALJ is not only prove an unwarranted usurpation of the ALJ’s authority accomplished in disregard of the Board’s

⁶⁴ While not expressly discussed in the body of this decision, the conclusion reached nevertheless applies as well to the ALJ’s rejection of Evans’ supplemental allegation of having engaged in protected activity through the filing of his original retaliation complaint with OSHA. Of course, in reviewing the sufficiency of the allegations for purposes of Rule 12(b)(6) consideration, the issue before us, as it was before the ALJ initially, was not whether Evans will ultimately prevail on his claim but whether he is entitled to offer evidence to support the merits of that claim. *Swierkeiwicz*, *supra*, 534 U.S. at 511.

⁶⁵ In rejecting Evans’ argument for pursuing discovery prior to a ruling on EPA’s motion to dismiss the Decision and Order states: “[S]ince dismissal is proper here without resort to any factual allegations, summary decision standards are irrelevant. Instead, dismissal is based on the purely legal argument that Complainant’s actions do not constitute protected activity under the Environmental Acts.” D&O, pg. 3 n.1.

limited appellate jurisdiction. To substitute on appeal a summary judgment standard in lieu of that by which the parties addressed the issues before the ALJ surely raises due process issues, particularly inasmuch as the ALJ's pre-trial order expressly provided that "all motions of a dispositive nature (*e.g.* motions for summary judgment . . .)" were to be filed subsequent to the EPA's motion to dismiss and *after* the deadline set for the completion of all discovery. The pre-trial order, issued upon the filing of Evans' complaint, provided "pursuant to the parties' agreement on January 9, 2008", for the filing by EPA of its present motion to dismiss by January 25, 2008; provided that all discovery was to be completed "no later than May 9, 2008"; and further provided that "all motions of a dispositive nature (*e.g.* motions for summary judgment . . .) must be filed on or before May 21, 2008."⁶⁶

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

⁶⁶ The due process consequences of the Board converting the instant proceedings from a limited review of the legal sufficiency of Evans' pleadings to a determination based on summary judgment standards are further exacerbated by the fact that, as record before us indicates, during the period allowed by the pre-trial order for pursuing discovery the EPA not only refused to respond to Evans' discovery requests but filed a motion seeking a protective order pending resolution of its Rule 12(b)(6) motion.