



In the Matter of:

DOUGLAS EVANS,

ARB CASE NO. 08-059

COMPLAINANT,

ALJ CASE NO. 2008-CAA-003

v.

DATE: July 31, 2012

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Richard R. Renner, Esq.; Kohn, Kohn, & Colapinto, LLP; Washington, District of
Columbia**

For the Respondent:

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

For the Assistant Secretary of Labor for Occupational Safety and Health, as Amicus Curiae:

**M. Patricia Smith, Esq.; William C. Lesser, Esq.; Megan Guenther, Esq.; Melissa A.
Murphy, Esq.; United States Department of Labor, Washington, District of Columbia**

**BEFORE: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown, Deputy
Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; Luis A.
Corchado, Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals
Judge, presiding en banc. Judge Corchado has filed a concurring opinion. Judge Brown
has filed an opinion concurring in part and dissenting in part.**

DECISION AND ORDER OF REMAND

Douglas Evans filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his former employer, the United States Environmental Protection Agency (EPA), retaliated against him in violation of various employee protection provisions, including the whistleblower 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); and the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9(i) (Thomson/West 2003)(collectively, the "Environmental Acts").¹ On March 11, 2008, an Administrative Law Judge (ALJ) dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim under the Environmental Acts.

On petition for review, the Administrative Review Board (ARB or Board) issued a Final Decision and Order (F. D. & O.) on April 30, 2010, affirming the ALJ's decision and dismissing the complaint. Evans appealed to the United States Court of Appeals for the Ninth Circuit. On July 11, 2011, on motion of the Secretary of Labor, the court of appeals remanded Evans' case to us to allow reconsideration of our decision in light of the Board's intervening ruling in *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042 (ARB May 25, 2011). For the following reasons, we remand the case to the ALJ for further proceedings.

BACKGROUND

EPA employed Evans as an Environmental Protection Specialist in its Radiation and Indoor Environments Laboratory (R&IE) in Las Vegas, Nevada. In 2004, he wrote a letter to then-EPA Administrator Michael O. Leavitt, accusing EPA of forcing employees to participate in emergency response duties for which they had no experience, and expressing concerns that management had assigned hazardous duty responsibilities that were previously not part of the employees' job descriptions.

¹ Regulations implementing these provisions are found at 29 C.F.R. Part 24 (2011). Evans filed his original complaint under a previous version of these regulations, which were amended and recodified in 2007. Our application of the current version of those regulations does not affect the outcome of this case. Evans also cited the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (Thomson/West 2003) and Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (Thomson Reuters 2009). The ARB has concluded in previous cases that the federal government has not waived sovereign immunity under these statutes. 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 v. Dep't of Veterans Affairs*, ARB No. 99-071, ALJ No. 1999-ERA-011, slip op. at 13-22 (ARB May 30, 2003) (sovereign immunity not waived under the ERA). This opinion addresses only the remaining provisions Evans cited (CAA, CERCLA, and SDWA).

In May 2006, EPA accused Evans of making threats of violence at work and suspended him.² On May 26, 2006, Evans submitted to OSHA a document titled “Complaint of Retaliation Against Whistleblower Under 29 CFR Part 24” (OSHA Complaint). In that document, he alleged as follows:

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.^[3]

Evans sought relief that included reinstatement, back pay, expungement of any disciplinary action in Evans’ employment records, as well as compensatory damages for emotional distress.⁴

On July 19, 2006, Evans received notice of his proposed removal for inappropriate conduct and failure to follow supervisory instructions. After Evans responded to the notice, his employer reduced the discipline to a one-week suspension with pay and an involuntary transfer.⁵ Following the employment action, Evans filed numerous amended complaints with OSHA.⁶ 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.”⁷ These supplemental complaints are not in the record before us.

After investigating Evans’ allegations, OSHA dismissed his complaint on November 21, 2007. OSHA dismissed Evans’ TSCA and ERA claims on grounds of sovereign immunity, and

² Complainant’s April 24, 2008 Brief (Complainant’s Brief) at 2.

³ OSHA Complaint at 1-2.

⁴ *Id.* at 3.

⁵ Secretary’s Findings at 2.

⁶ *Id.*

⁷ Petition for Review at 2; *see also* Secretary’s Findings at 2. According to OSHA, Evans “filed several amendments to his original complaint. In each amendment, [Evans] allege[d] at least one adverse action that occurred within 30 days of filing the amendment.” Secretary’s Findings at 2; *see also* Complainant’s Supplemental Brief at 2 (Evans contends that after he filed his OSHA complaint, “management suspended [him], required him to participate in EAP counseling, and then transferred him to work in a space dominated by those hostile to his concerns.”).

held that he “failed to engage in protected activity under the CAA, CERCLA, and SDWA because his July 8, 2004 letter to Mr. Leavitt failed to address any public safety or environmental concerns.”⁸

On December 17, 2007, through his legal counsel, Evans requested a hearing before an ALJ and filed a document entitled “Complainant’s Objection, Request For Hearing, And Complaint of Retaliation Against Whistleblower With Waiver Of Time Constraints.” On January 9, 2008, the ALJ held a telephone conference with the parties to “determine the pre-hearing schedule and trial.”⁹ During the telephone conference, the parties waived various time restrictions and agreed to engage in discovery “should Complainant’s complaint survive the motion to dismiss Employer intend[ed] to file.”¹⁰

On January 25, 2008, EPA filed a Motion to Dismiss¹¹ Evans’ “original and supplemental complaints” under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim under the Environmental Acts. EPA argued that Evans’ complaint did not “contain sufficient factual matter to suggest that he engaged in protected activity within the purview of the organic environmental statutes.”¹² In support of the Motion, EPA referenced Evans’ letter to Leavitt describing what Evans contends were violations of various environmental and nuclear safety laws EPA committed at R&IE. Evans opposed the motion and attached declarations from three of his R&IE co-workers.¹³ Evans argued that his complaint, as written, was sufficient to withstand the Motion to Dismiss, but that, should the ALJ consider it deficient, Evans should be allowed leave to amend.¹⁴ In addition, Evans contended that because the Motion to Dismiss was “founded on factual allegations,” a “review of the standards for summary decision [was] appropriate.”¹⁵

The ALJ cancelled the administrative hearing on February 26, 2008, and on March 11, 2008, issued a Decision and Order Dismissing Complaint (D. & O.). The ALJ concluded that Evans “fail[ed] to state a claim upon which relief can be granted” because his complaint and

⁸ Secretary’s Findings at 2.

⁹ See Notice of Trial (dated Jan. 11, 2008) at 1.

¹⁰ *Id.*

¹¹ The document EPA filed 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.”

¹² Motion to Dismiss at 5.

¹³ See Complainant Douglas Evans’ Memorandum in Opposition to Motion to Dismiss (Evans’ Memo. in Opposition), Declarations of Max Davis, Dennis Farmer, and Flo DeLuna.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 5.

letter to the EPA Administrator did not contain information indicating that he “engaged in an activity protected by the Environmental Acts.”¹⁶ The ALJ held that allowing Evans further discovery or amendments to his OSHA submissions was unnecessary because “it is not a defect in the Complaint that warrants dismissal, but the absence of Complainant’s participation in any protected activity under the Environmental Acts.”¹⁷

Evans petitioned the ARB for review. On April 30, 2010, the Board issued a Final Decision and Order affirming the ALJ. The Board held that Evans’ complaint failed to state a claim for relief under the legal precedent established in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The Board also held, in the alternative, that EPA was entitled to summary decision, and that the ALJ did not err in denying Evans further discovery to respond to the Motion to Dismiss. On August 18, 2010, the Board denied Evans’ motion for reconsideration of the Final Decision.

Evans appealed to the United States Court of Appeals for the Ninth Circuit. While the case was before the court, the Secretary of Labor, as Respondent, filed a Status Report and Unopposed Motion for Remand (Secretary’s Motion), requesting that the case be remanded to the Board to consider, in light of the Board’s recent ruling in *Sylvester v. Parexel Int’l, LLC*, ARB No. 07-123, ALJ No. 2007-SOX-039, -042 (ARB May 25, 2011), “whether administrative whistleblower complaints filed with [OSHA] may be dismissed for failure to state a claim under Rule 12 of the Federal Rules of Civil Procedure, particularly under the heightened pleading standards set forth in [*Twombly*] and [*Iqbal*].”¹⁸

The Court of Appeals granted the Secretary’s Motion in an Order, issued July 11, 2011, which in its entirety states: “Respondent’s unopposed motion to remand this petition for review to the Administrative Review Board of the Department of Labor is granted. All other pending motions are denied as moot. This order served on the agency shall act as and for the mandate of this court.” The case is now before the Board. Evans, EPA, and the Assistant Secretary for OSHA filed briefs. The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the statutes at issue here.¹⁹ The ARB reviews the ALJ’s legal conclusions de novo.²⁰

¹⁶ D. & O. at 5.

¹⁷ *Id.* at 3.

¹⁸ Secretary’s Motion at 1-2.

¹⁹ 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).

²⁰ *Kaufman v. United States Env’tl. Prot. Agency*, ARB No. 10-018, ALJ No. 2002-CAA-022, slip op. at 2 (ARB Nov. 30, 2011).

DISCUSSION

A. Facial Challenges to a Complaint Must Occur in a Manner Consistent with Informal Administrative Procedures

As we noted, the ALJ dismissed Evans' case pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Rule 12(b)(6) allows a party to move for dismissal of a case for "failure to state a claim upon which relief can be granted." In applying Rule 12(b)(6), the ALJ relied on case law applying that rule to federal court pleadings and practice. However, as we ruled in *Sylvester*, federal litigation materially differs from administrative whistleblower litigation within the Department of Labor.²¹ These differences require a different legal standard for stating a claim.

1. Administrative whistleblower complaints filed with OSHA are informal documents that may not fully comprise the facts supporting the complainant's claims

To initiate an adjudicatory proceeding in federal district court, the Federal Rules of Civil Procedure require a plaintiff to submit to the court a "short and plain statement of" (1) the grounds for jurisdiction, (2) entitlement to a claim, and (3) a demand for relief.²² In 2007 and 2009, the Supreme Court interpreted Rule 8 to require that plaintiffs allege in their complaints "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"²³ Under this standard, a complaint filed in federal district court 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."²⁴

Unlike in federal court, there is no pleading requirement for whistleblower complaints investigated by OSHA or litigated within the Office of Administrative Law Judges (OALJ). The administrative filing requirements for OSHA complaints under the Environmental Acts are quite simple, and the regulations state as follows:

§ 24.103 *Filing of retaliation complaint.*

(a) Who may file. An employee who believes that he or she has been retaliated against by an employer in violation of any of the statutes listed in 24.100(a) may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation.

²¹ See *Sylvester*, ARB No. 07-123, slip op. at 12-13.

²² Fed. R. Civ. P. 8(a).

²³ *Iqbal*, 556 U.S. at 678, citing *Twombly*, 550 U.S. at 570.

²⁴ *Iqbal*, 556 U.S. at 678, citing *Twombly*, 550 U.S. at 556.

(b) Nature of filing. No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If a complainant is not able to file the complaint in English, the complaint may be filed in any language.^[25]

Administrative complaints filed with DOL are informal documents that initiate an investigation into allegations of unlawful retaliation in violation of, in this case, the Environmental Acts.²⁶ In fact, the complaint filed with OSHA, the investigative arm of the whistleblower complaint process, is often filed by a complainant acting without the assistance of counsel.

The OSHA regulations expressly allow for investigatory complaints to evolve into complaints containing a prima facie claim of discrimination. When OSHA receives a complaint in its investigating office, the regulations require the agency to notify the respondent of the filing by providing the respondent a copy of the complaint.²⁷ The respondent has 20 days to submit a “written statement and any affidavits or documents substantiating its position.”²⁸ On receipt of a complaint filed under the Environmental Acts, OSHA investigates to determine whether the allegations set out in the complaint meet the prima facie requirements for a claim.²⁹ In making this assessment, OSHA can supplement the complaint with additional information, including interviews with the complainant, to determine whether the complaint alleges facts that demonstrate a prima facie showing of a violation.³⁰

²⁵ 29 C.F.R. § 24.103. When Evans initiated his retaliation claim, the subsection governing the “nature of filing” read as follows: “Form of complaint. No 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.” 29 C.F.R. § 24.3(c) (2005).

²⁶ Under the Environmental Acts, a complaint is initiated with OSHA under 29 C.F.R. § 24.103. The OALJ’s general rules of procedure define a complaint as “any document initiating an adjudicatory proceeding, whether designated a complaint, appeal, or an order for proceeding or otherwise.” 29 C.F.R. § 18.2(d).

²⁷ 29 C.F.R. § 24.104(a).

²⁸ 29 C.F.R. § 24.104(b).

²⁹ 29 C.F.R. § 24.104(e).

³⁰ See 29 C.F.R. § 24.104(e)(2) (“The complaint, *supplemented as appropriate by interviews of the complainant*, must allege the existence of facts and evidence to make out a prima facie showing . . .”) (emphasis added). The prima facie showing required for OSHA complaints is the “existence of facts and evidence” that demonstrate: “(i) the employee engaged in a protected activity; (ii) the respondent knew or suspected that the employee engaged in the protected activity; (iii) The employee suffered an adverse action; and (iv) The circumstances were sufficient to raise the inference that the protected activity was a motivating factor in the adverse action.” *Id.* This showing is met “if the

Under the Part 24 regulations, after OSHA considers the relevant information collected in the investigation, the agency must issue “written findings as to whether or not there is reasonable cause to believe that the respondent has retaliated against the complainant” in violation of the ERA or six environmental laws.³¹ Where OSHA concludes that there is reasonable cause to believe a violation has occurred, the agency “shall accompany the findings with an order providing relief to the complainant.”³² If OSHA determines that no violation has occurred, the agency notifies the parties of its findings. OSHA must send a copy of the “original complaint” and the “findings and order” to the OALJ.³³ After OSHA issues its findings, the parties of record may file objections and request a hearing with the OALJ.³⁴

Unlike federal court, the objection and request for hearing triggers the OALJ adjudicatory process. As we previously noted, the regulations mandate that OSHA shall provide the OALJ with a copy of the original complaint and the Secretary’s findings; there is no regulatory requirement that any additional, supplementary information collected during the administrative investigation be sent to the OALJ.³⁵ Thus the file the designated ALJ relied on may *not* necessarily contain the full articulation of the complainant’s claim. Consequently, an ALJ should not act on a Rule 12 facial challenge until it is clear that the complainant has filed a document that articulates the claims presented to the OALJ for hearing following OSHA’s findings.³⁶

Historically, notwithstanding the differences we have mentioned, the ARB and ALJs relied on Rule 12 of the Federal Rules of Civil Procedure for the authority to resolve motions to

complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence sufficient to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity and that the protected activity was a motivating factor in the adverse action.” 29 C.F.R. § 24.104(e)(3).

³¹ 29 C.F.R. § 24.105(a).

³² 29 C.F.R. § 24.105(a)(1).

³³ 29 C.F.R. § 24.105(b).

³⁴ 29 C.F.R. §§ 24.105(a)(2) & (b); 29 C.F.R. § 24.106.

³⁵ Under 29 C.F.R. § 24.105(b), the Secretary is only required to send to the OALJ a copy of the “original complaint” and the “findings and order.”

³⁶ In requesting a hearing, Evans captioned his document in part as a “Complaint of Retaliation Against Whistleblower” (filed with OALJ Dec. 17, 2007). When the ALJ refers to the complaint in this case, however, it is unclear whether the ALJ is referring to Evans’ OSHA complaint filed in May 2006, or the “Complaint of Retaliation” that Evans filed in December 2007 with the ALJ when he filed his objection and requested a hearing. *See* D. & O. at 4 (quoting Evans’ three allegations of protected activity set out in his OSHA complaint at para. 3 and in the complaint and request for hearing filed with the OALJ at para. 5).

dismiss for failure to state a claim. The rationale for doing so was driven by 29 C.F.R. § 18.1. That regulation requires the ALJ to follow the federal rules “in any situation not provided for or controlled by [the OALJ] rules, or by any statute, executive order or regulation.”³⁷ We examined this policy in *Sylvester*, and held that “Rule 12 motions challenging the sufficiency of the pleadings are highly disfavored by the SOX regulations and highly impractical under the Office of Administrative Law Judge (OALJ) rules.”³⁸ We observed that the *Twombly* and *Iqbal* decisions involved cases in which the filing requirements were different from the procedures governing SOX claims, and that applying those cases would require a complainant to submit the equivalent of a federal court complaint when he initiates contact with OSHA.³⁹ We refrained from adopting those federal pleading standards, deeming them inappropriate given the nature of the administrative whistleblower complaint process, even where the complainant files a detailed complaint as was done in *Sylvester*. Because the complaint filed in *Sylvester* was very explicit, we had no need to articulate the legal standard for analyzing the sufficiency of complaints that are filed with the OALJ. We now address that issue.

2. *Administrative whistleblower complaints that provide “fair notice” of the alleged protected activity and adverse action can withstand a motion to dismiss for failure to state a claim*

For several reasons, we find that administrative whistleblower complainants that give “fair notice” of the protected activity and adverse action can withstand a motion to dismiss for failure to state a claim. First, the absence in the regulations of a “complaint” requirement or even minimum requirements that the complainant delineate his or her claims speaks against requiring an overly burdensome standard. This silence in the regulations further emphasizes the informal nature of whistleblower litigation with the OALJ. Nevertheless we recognize that, once a whistleblower case goes to the OALJ for an evidentiary hearing before an ALJ, just as in federal court, an opposing party has a right to “fair notice” of the charges against it.

“Fair notice” alone was the standard for many years in federal court (for Rule 8 pleadings) before the Supreme Court decided *Twombly* and *Iqbal*. After *Twombly* and *Iqbal*, more than 60 years after Fed. R. Civ. P. 8 was adopted, the federal legal standard became fair notice with the showing of “plausibility.” We find that, in deciding a Fed. R. Civ. P. 12(b)(6) facial challenge, fair notice is the proper legal standard for any complaint filed by the complainant or required by the ALJ in administrative whistleblower proceedings before the DOL. More specifically, a sufficient statement of the claims need only provide (1) some facts about the protected activity, showing some “relatedness” to the laws and regulations of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) a general assertion of causation and (4) a description of the relief that is sought.

³⁷ 29 C.F.R. § 18.1(a).

³⁸ *Sylvester*, ARB No. 07-123, slip op. at 13.

³⁹ *Id.* at 12-13.

3. *Motions to dismiss differ from motions for summary decision*

The Assistant Secretary argues that 29 C.F.R. § 18.40, the regulation governing summary decision, is the exclusive rule for raising facial challenges to a complaint.⁴⁰ We do not agree. Rule 18.40 pertains to the long-recognized practice that is similar to motions for summary judgment in federal court litigation. There are material differences between a motion to dismiss a complaint based on a facial challenge at the initial stages of litigation and a motion for summary decision challenging the evidentiary basis, motions often filed after discovery has occurred.⁴¹ First, by definition, a facial challenge to a complaint focuses *solely* on the allegations in the complaint, its amendments, and the legal arguments the parties raised - not whether evidence exists to support such allegations. Second, the ALJ must assume the truth of the facts asserted in the complaint and draw all reasonable inferences in favor of the non-moving party.⁴²

Generally, in reviewing whether to dismiss a complaint for failure to state a claim, the ALJ should not consider new evidence submitted by the moving party (i.e., evidence that was *not* before OSHA at the investigatory phase) unless he or she converts the motion to one for summary decision and allows the non-movant an opportunity to respond. In essence, unlike a motion for summary decision filed after discovery, a facial challenge to a complaint points to a missing essential element (no protected activity or adverse action) or a legal bar to the claim (e.g., sovereign immunity, lack of coverage over the respondent, the statute of limitations). A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the complaint, not the merits of the case.⁴³

In federal district court, where a “pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e)

⁴⁰ Brief of the Assistant Secretary of Labor for Occupational Safety and Health as Amicus Curiae at 17-21.

⁴¹ A fully litigated whistleblower complaint before an ALJ typically involves at least three distinct phases of litigation: (1) articulating the claim as set out in the complaint (the “claim perfection”); (2) gathering evidence during discovery; and (3) holding an evidentiary hearing on the merits (“merits hearing”). ALJs must treat facial challenges to complaints (e.g., motions to dismiss) in the “claim perfection phase” differently from a motion for summary decision filed during or after the discovery phase. A motion for summary decision after discovery focuses on the lack of evidence to support the asserted claims.

⁴² *Neuer v. Bessellieu*, ARB No. 07-036, ALJ No. 2006-SOX-132, slip op. at 4 (ARB Aug. 31, 2009); see, e.g., *Lewis v. Synagro Techs., Inc.*, ARB No. 02-072, ALJ No. 2002-CAA-012, -14; slip op. at 8 (ARB Feb. 27, 2004).

⁴³ See *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990).

before responding.”⁴⁴ Along those lines, where a complaint OSHA forwarded to the OALJ fails to provide sufficient factual allegations to give the respondent fair notice of the nature of the complaint, the ALJ is obligated to permit the complainant an opportunity to provide those sufficient facts either in writing or orally prior to ruling on the motion to dismiss the complaint. Given the nature of administrative whistleblower complaints, the complainant is typically best suited to provide that information without the need for discovery since the circumstances giving rise to the OSHA complaint in most cases involves the complainant’s personal experiences.⁴⁵

Accordingly, to survive a motion to dismiss, Evans’ complaint must be reviewed to determine whether it provides fair notice of his claim by encompassing: (1) some facts about the protected activity and alleging that the facts relate to the laws and regulations of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) an assertion of causation and (4) a description of the relief that is sought.

B. The ALJ Erred by Denying Evans Leave to Amend His Complaint

In responding to EPA’s Motion, Evans argued that the ALJ should grant him leave to amend his May 26 complaint if the ALJ considered that document to be deficient.⁴⁶ The ALJ rejected this argument, and in doing so he committed reversible error.

A court is required to “grant leave to amend freely ‘when justice so requires.’”⁴⁷ The Supreme Court has held that, “[i]n the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure, undue prejudice to the opposing party by virtue of the allowance of the amendment, etc. – the leave sought should, as the rule requires be freely given.”⁴⁸ “Where it appears that a complaint may be saved by the allegation of additional facts, the complaint should not be dismissed without leave to amend.”⁴⁹ The purpose of such leave is “to facilitate decision on the merits, rather than

⁴⁴ *Swierkeiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

⁴⁵ Most whistleblower statutes DOL administers require a showing that complainant had a *reasonable belief* that the conduct complained of to his or her employer constituted a violation of law. *See, e.g., Sylvester*, ARB No. 07-123, slip op. at 14 (SOX); *Kemp v. Volunteers of Am. of Pa., Inc.*, ARB No. 00-069, ALJ No. 2000-CAA-006, slip op. at 4, 6 (ARB Dec. 18, 2000) (CAA); *Melendez v. Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 27-28 (ARB July 14, 2000) (ERA); *Oliver v. Hydro-Vac Servs.*, 1991-SWD-001, slip op. at 9-13 (Sec’y Nov. 1, 1995) (under the Solid Waste Disposal Act).

⁴⁶ Evans’ Memo. in Opposition at 2, citing 29 C.F.R. § 18.5(e) (“Leave is appropriate where ‘determination of [the] controversy on the merits will be facilitated.’”).

⁴⁷ *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1223 (9th Cir. 2007), citing *Foman v. Davis*, 371 U.S. 178, 182 (1962).

⁴⁸ *Foman*, 371 U.S. at 182 (internal quotations omitted).

⁴⁹ *Angelov v. Wilshire Bancorp, Inc.*, 331 Fed.Appx. 471, 472, (9th Cir. 2009).

on the pleadings or technicalities.”⁵⁰ “Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.”⁵¹

Given the informal nature of an investigatory complaint filed with OSHA, and the absence of a regulatory requirement that supplemental information be forwarded to the OALJ on the filing of objections and request for hearing under 29 C.F.R. § 24.105(b), it is reasonable and prudent to expect ALJs to provide a complainant an opportunity to amend the complaint with additional factual information – including that taken from supplementary information or documents that the complainant provided to OSHA during the investigatory phase of the complaint. Prior to ruling on a motion to dismiss, the ALJ, having broad discretion to ascertain the claims contained in the complaint, has discretion to conduct an informal pre-hearing conference, request written submissions, or require prehearing statements to determine the nature of a complainant’s claim(s).⁵² The ALJ should not dismiss a complaint for failure to state a claim until he or she has allowed the complainant a sufficient opportunity to amend or supplement the claim(s) contained in the complaint.

The need for an ALJ to liberally provide a whistleblower complainant an opportunity to amend his or her complaint is made clear in this case. The EPA moved to dismiss Evans’ complaint on January 25, 2008, about two weeks after the ALJ’s pre-trial teleconference and Notice of Trial, which set the hearing date. The ALJ cancelled the hearing on February 26, 2008, and a few days later, on March 11, 2008, dismissed Evans’ complaint largely due to his alleged failure to assert sufficient, plausible factual allegations that show his own actions constituted protected activity. The ALJ did not provide Evans with an opportunity to amend his complaint pursuant to 29 C.F.R. § 18.5(e), which permits the ALJ to grant leave to amend “if and whenever determination of a controversy on the merits will be facilitated thereby.” The ALJ’s failure to permit Evans an opportunity to amend his complaint certainly contravenes § 18.5(e), which expressly permits complainants to amend “once as a matter of right.”

Under the administrative adjudicatory process, Evans could only, and did, file a response to EPA’s Motion to Dismiss.⁵³ Indeed, both Evans’ OSHA complaint at paragraph 3 and his objection and request for a hearing at paragraph 5 contain the identically-worded allegations of protected activity. The ALJ erred in failing to give Evans an opportunity to amend his

⁵⁰ *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

⁵¹ *Contreras v. Toyota Motor Sales U.S.A. Inc.*, 2012 WL 1997802 at 1 (9th Cir. 2012).

⁵² *See, e.g.*, 29 C.F.R. § 18.8.

⁵³ *See* Evans Memo. in Opposition (filed Feb. 11, 2008); *see also* 29 C.F.R. § 18.6(b) (“Within ten (10) days after a motion is served . . . any party to the proceeding may file an answer in support of or in opposition to the motion.”).

complaint, the wording of which was left essentially unchanged since he filed his OSHA complaint in May 2006.⁵⁴

The ALJ denied Evans leave to amend because “it is not a defect in the complaint that warrants dismissal, but the absence of Complainant’s participation in any protected activity under the Environmental Acts.”⁵⁵ But this assessment appears to be a finding regarding evidentiary assertions that have yet to be litigated. Although a judge may conclude that there are legal obstacles that preclude the curing of a complaint, such a conclusion should not be based upon a prediction regarding the information a complainant might provide about the facts related to alleged acts of retaliation.

The ALJ also indicates that he reviewed the record in this case and found “no evidence to show that Complainant reasonably believed the EPA’s actions posed any threat to the environment or the general public.”⁵⁶ But Evans was not required to provide evidence to OSHA establishing the reasonableness of his belief of a violation to initiate an investigation into his claim. Without allowing Evans leave to amend, it was premature to rule on whether he would have added more information that demonstrated how he engaged in protected activity.

As we have emphasized above, the assessment of facial challenges to whistleblower complaints must be conducted in a manner consistent with informal administrative procedures. An ALJ should review a response to a motion to dismiss a complaint to determine whether the opportunity to amend was sought by the nonmoving party. We therefore conclude that, based on the record before us, the ALJ abused his discretion by refusing to grant Evans leave to amend his complaint.

⁵⁴ There is no indication why Evans failed to provide more factual allegations to support his whistleblower claims – in particular his claim of protected activity - when, in accordance with 29 C.F.R. § 24.106, he filed his objection, request for hearing and “Complaint of Retaliation” on December 17, 2007. Indeed, the regulations do not provide for the submission of additional facts with the filing of a request for a hearing under 29 C.F.R. § 24.106. Evans states that in addition to the initial OSHA complaint that he filed in May 2006, he also filed numerous amended complaints with OSHA but these amended complaints were not in the file forwarded to the OALJ when Evans requested his hearing. As a general matter, the ALJ should have given Evans an opportunity to amend his complaint with additional factual allegations to support his claims; the ALJ’s obligation to provide an opportunity to amend is underscored in this case in particular since Evans states that he filed five amended complaints (*see supra* at 3; Petition for Review at 2), and since OSHA’s findings state that Evans filed “several amendments” that were not part of the record sent to the OALJ. These amended OSHA complaints might contain the factual allegations he needs to withstand dismissal of his complaint for failure to state a claim.

⁵⁵ D. & O. at 3.

⁵⁶ *Id.* at 5.

C. Evans' May 26, 2006 OSHA Complaint Constitutes Protected Activity

The CAA prohibits retaliation against any employee who has “commenced a proceeding under this chapter. . . .”⁵⁷ CERCLA protects any employee who has “instituted any proceeding under this chapter”⁵⁸ And the SDWA prohibits retaliation against an employee who has “commenced a proceeding under this subchapter”⁵⁹ The filing of a retaliation claim with OSHA constitutes commencing or instituting a “proceeding” under the whistleblower statutes.⁶⁰

On May 1, 2006, EPA placed Evans on paid administrative leave. He filed his initial OSHA complaint on May 26, 2006. In that submission, he stated that “Complainant Doug Evans alleges violations of the employee protection provisions of the laws enforced through 29 CFR 24. These laws, listed at 29 CFR 24.1(a), include the . . . Safe Drinking Water Act . . . Clean Air Act . . . and the Comprehensive Environmental Response, Compensation, and Liability Act”⁶¹ He also alleged that he raised “compliance issues with management about the environmental risks of having employees participate in emergency response (ER) work without sufficient training.”⁶²

Based on these facts, we conclude that the allegations in his May 26, 2006 complaint sufficiently demonstrate that Evans filed a whistleblower complaint under the Environmental Acts. In doing so, he commenced a proceeding under those acts, which constitutes protected activity.⁶³

Evans contends that after he filed his OSHA complaint, “management suspended [him], required him to participate in EAP counseling, and then transferred him to work in a space dominated by those hostile to his concerns.”⁶⁴ On November 20, 2006, Evans requested a one-year leave of absence. EPA denied leave beyond May 2007 and discharged Evans when he

⁵⁷ 42 U.S.C.A. § 7622(a).

⁵⁸ 42 U.S.C.A. § 9610(a).

⁵⁹ 42 U.S.C.A. § 300j-9(i)(1).

⁶⁰ See, e.g., *Bobreski v. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 11 (ARB June 24, 2011).

⁶¹ Complaint at 1. The laws that were listed in 29 C.F.R. § 24.1 when Evans filed his initial claim with OSHA are now contained in 29 C.F.R. § 24.100(a).

⁶² OSHA Complaint at 2.

⁶³ We note that, according to OSHA, “Complainant engaged in protected activity under the CAA, CERCLA, and SDWA by filing his original complaint and amendments” Secretary’s Findings at 2.

⁶⁴ Complainant’s Supplemental Brief at 2.

failed to return to work. Evans claims that most of the allegedly adverse actions EPA took occurred as a proximate cause of his participation in Department of Labor proceedings beginning with the filing of his initial OSHA complaint on May 26, 2006.⁶⁵ Thus, even if Evans' 2004 letter to the EPA Administrator is unprotected under the Environmental Acts, Evans may still be able to establish in a hearing on the merits that EPA retaliated against him for contacting OSHA in May 2006.

We again note that Evans' letter to the EPA Administrator and his May 26, 2006 filing with OSHA may not constitute the entirety of his complaint of retaliation. Evans may also have engaged in protected activity when he filed amendments to his complaint after his initial suspension.⁶⁶ Because the amendments are not in the record before us, we make no ruling on whether they constitute protected activity.

D. The Issue of Summary Decision Was Not Properly Before the Board

In dismissing Evans' complaint, the Board held that EPA was entitled to summary decision because Evans "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."⁶⁷ But the ALJ rejected the idea of conducting a summary decision analysis.⁶⁸ And EPA evinced no intent in its Motion to Dismiss to present more than a facial challenge to the documents Evans presented to OSHA.

As there was no motion for summary decision before the Board, it was error to treat the Motion to Dismiss as a motion for summary decision. We therefore conclude that EPA was not entitled to summary decision in this case because that issue was not properly before the Board when it issued its F. D. & O.

CONCLUSION

The ALJ erred by granting EPA's Motion to Dismiss Evans' complaint. Accordingly, the Board **VACATES** the April 30, 2010 Final Decision and Order in its entirety, **REVERSES** the

⁶⁵ *Id.* at 2, 16.

⁶⁶ *See, e.g.*, Complainant's Rebuttal Brief at 2-3 (EPA "fails to recognize that most of the complaints Evans made in this case were subsequent to his original complaint. In his supplemental complaints, Evans specifically identifies his participation in prior proceedings as additional protected activity that provoked subsequent adverse actions, leading to his ultimate termination.").

⁶⁷ F. D. & O. at 11.

⁶⁸ D. & O. at 3, n.1 ("since dismissal is proper here without resort to any factual allegations, summary decision standards are irrelevant.").

ALJ's D. & O., and **REMANDS** the case to the ALJ for further proceedings consistent with this opinion.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

Luis A. Corchado, Administrative Appeals Judge, concurring:

I concur with the majority opinion but write separately to explain briefly two areas of disagreement. First, I disagree with the majority's conclusion that the Administrative Law Judge (ALJ) erred by failing to allow an amendment before ruling on the motion to dismiss. Given the procedural posture of this case, I believe that the ALJ had the discretion to allow amendments before or after ruling on the motion to dismiss, similar to the federal court practice under Rule 15 of the Federal Rules of Civil Procedure. Second, after years of litigating the facial validity of the complaint in this matter, I believe that we should have indicated whether the May 2006 complaint meets the "fair notice" standard we announce in this case. I find that the May 2006 complaint fails to meet this standard. I briefly elaborate on each point below.

ALJ Discretion

The majority ruled that the ALJ erred in not allowing Evans to amend his complaint *before* ruling on the motion to dismiss. I agree with the majority and its reasons for the general caution against automatically accepting OSHA complaints as a "complaint" for the hearing process in the Office of Administrative Law Judges (OALJ). However, that is not what occurred in this case, and it seems we should address this case as presented to us.⁶⁹

⁶⁹ In fact, the majority's caution may be unnecessary. I have seen cases where ALJs have provided parties with an opportunity to submit a new complaint or amend the OSHA complaint after receiving the case from the Chief Judge of the OALJ. See, by way of example only, *Johnson v. Wellpoint, Inc.*, ALJ No. 2010-SOX-038, 2011WL764714, *2 (Feb. 25, 2011)(ALJ issued an "Order Granting Complainant Opportunity to Correct Deficiencies in Pleadings Prior to Final Ruling on Respondent's Motion to Dismiss Pursuant to FRCP, Rule 12(b)(6)"). Also, in a case we recently reviewed, *Matthews v. Ametek, Inc.*, ARB No. 11-036, ALJ No. 2009-SOX-026 (ARB May 31, 2012), the ALJ record indicated that the ALJ's prehearing order (dated March 9, 2009) required the

In this case, Evans was represented by legal counsel and was given sufficient opportunity to affirmatively pursue amending the complaint before the ALJ ruled on the motion to dismiss. On January 9, 2008, the ALJ held a telephone conference where the parties (through counsel) had a full opportunity to discuss the procedural posture of the case and, in fact, discussed the expected motion to dismiss. *See* Pretrial Order dated Jan. 11, 2008, pp. 1-2. The ALJ set deadlines for filing the anticipated motion to dismiss, the response and reply pursuant to the “agreement” of the parties. *Id.* When the motion to dismiss was filed, nothing prevented Evans from filing a motion for leave to amend his complaint. Instead, Evans responded to the motion and certainly argued that he would like an opportunity to amend his complaint if it was deficient, but he did not ask the ALJ to delay ruling on the motion to dismiss. Given this procedural history, the ALJ was well within his discretion to accept the OSHA complaint as Evans’ complaint for the OALJ administrative hearing process and rule on the motion to dismiss.⁷⁰

Even though Evans never asked the ALJ to delay his ruling on the motion to dismiss, the majority finds fault with the ALJ’s discretionary decision to rule on the motion to dismiss. The majority opinion appears to announce a double-stacked mandate for ALJs considering a pending motion to dismiss. In Part A of its Discussion, the majority mandates that “where a complaint OSHA forwarded to the OALJ fails to provide sufficient factual allegations to give the respondent fair notice of the nature of the complaint, the ALJ is *obligated* to permit the complainant an opportunity to provide those sufficient facts either in writing or orally prior to ruling on the motion to dismiss the complaint.” (Emphasis added). *See* Majority Opinion at 10-11. In Part B, the majority more succinctly states that “the ALJ *should not* dismiss a complaint for failure to state a claim until he or she has allowed the complainant a sufficient opportunity to

complainant to file a “complaint” alleging the nature of his protected activity, among other requirements.

⁷⁰ I see as unproductive the debate in this case focusing on whether, technically speaking, Evans filed a “complaint.” I say this because an ALJ trying to manage a case can require the complainant to provide the ALJ with a complaint, which the complainant can do many ways (designating the OSHA complaint as a complaint, drafting a new complaint, perhaps filling out a preprinted OALJ complaint form, etc.). *See* footnote 69 (*Matthews* case). Neither the Complainant, nor the Solicitor nor anyone else in this case cites a statute or rule prohibiting such a practice. Consequently, where such practice occurs, the ALJ process reaches the question reached in this case: what rules apply when a respondent files a motion to dismiss such complaint or equivalent document on the grounds that the claims are deficient as stated. For decades, the ALJs have permitted facial challenges to whistleblower complaints under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Despite arguments to the contrary, I believe we would cause procedural carnage if we (1) disregarded the ALJs’ discretion to require a complaint or some equivalent, (2) rejected the concept of a facial challenge to a complainant’s claims, and (3) collapsed the ALJs’ Rule 12(b)(6) practice into the summary decision practice provided in 29 C.F.R. § 18.40. For years, 29 C.F.R. § 18.40 has been regarded as the equivalent of the federal court’s summary judgment practice. Anyone who has litigated long enough knows that facial challenges are substantially different from motions for summary decision, a point well made in the majority decision. In the end, just as complainants have a right to assert and pursue valid whistleblower claims, respondents have a right to seek dismissal of invalid claims before expending substantial time and money on discovery and litigation.

amend or supplement the claim(s) contained in the complaint.” (Emphasis added.) *Id.* at 12. These mandates together appear to provide complainants with a right to amend their complaints at least once before a motion to dismiss is decided.

To be clear, I agree that it makes sense for an ALJ to notify a complainant, in writing or orally, that he or she may either respond to a pending motion to dismiss or file an amended complaint with new facts. The complainant could also file a response to the motion to dismiss combined with an alternative request for leave if the complaint is found deficient. I agree that a complainant generally should be permitted to amend his or her complaint at least once. I disagree with the majority’s finding that the ALJ erred in deciding to rule on the motion to dismiss first.

The ALJ’s error, in my view, occurred in failing to grant leave to amend the complaint before completely dismissing the case. For many years, the federal courts have permitted amendments to occur before or after ruling on motions to dismiss.⁷¹ Likewise, ALJs presiding over informal OSHA whistleblower proceedings can dismiss a complaint, retain jurisdiction of the case for a certain number of days and grant the complainant an opportunity to file an amended complaint. If the complainant files no amended complaint, the case may be dismissed. The majority’s opinion does not speak against this practice. In some cases, ALJs may prefer this option because it allows the ALJ to more fully explain in writing the deficiencies of a complaint, if any exist.⁷² The point is that ALJs should be permitted discretion to decide how to handle a motion to dismiss so long as they do not dismiss the entire case before the complainant has had at least one reasonable opportunity to provide an amended complaint, which provides more facts.

Applying the “Fair Notice” Standard

As to my second reason for concurring, I believe that we should have indicated whether the May 2006 complaint meets the fair notice standard we announce in this opinion. Evans’ allegations very generally asserted that untrained individuals would be expected to engage in emergency procedures that could be environmentally dangerous. In his OSHA complaint, Evans asserted that his protected activity included “raising compliance issues” but he did not flesh out the regulatory concern. Even putting aside the speculative nature of the allegations, Evans provided insufficient facts about what activities his co-workers might be expected to do and why Evans believed that such acts would violate one or more of the environmental laws.

⁷¹ An example of this practice is the court’s order in *Brown v. Rumsfeld*, 211 F.R.D. 601, 606 (N.D. Cal. 2002)(court granted motion to dismiss for failure to state a claim but also granted the plaintiff 30 days to amend the complaint). See also *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981)(court discussed the liberal federal court practice and stated that “[i]nstances abound in which appellate courts on review have required that leave to amend be granted after dismissal or entry of judgment”).

⁷² I do not understand the majority’s opinion as encouraging more orders, sua sponte, to show cause to prevent dismissal. Such orders have inherent limitations that, in my view, make them less effective than addressing a motion to dismiss. See *Saporito v. Publix Super Mkts.*, ARB No. 10-073, 2010-CPS-001, slip op. at 7, n.28 (ARB Mar. 28, 2012).

Consequently, the complaint fails to provide fair notice of the suspected environmental law violations. Not much is required, nor is the test “plausibility” as thoroughly explained in the majority decision. But, to provide fair notice of the alleged protected disclosures, I believe more facts are required than Evans’ one sentence general statement that co-workers might engage in environmentally hazardous conduct. I reserve elaboration of this point for another day.

LUIS A. CORCHADO
Administrative Appeals Judge

E. Cooper Brown, Deputy Chief Administrative Appeals Judge, concurring in part and dissenting in part:

I dissent from the majority’s ruling on the primary issue before the Board in this case, *i.e.* the applicability of Rule 12(b)(6) and Rule 8(a) of the Federal Rules of Civil Procedure to an administrative whistleblower complaint filed with OSHA under the three environmental acts upon which Evans’ claim for relief relies. This and the question of whether Evans’ OSHA complaint itself constituted whistleblower protected activity are the issues that are presented by this appeal for resolution. For those looking to the Board’s decision for possible precedential value, all else discussed is but dicta.⁷³ And while I concur in the order of remand, I do so for reasons differing from those of my colleagues.

⁷³ The ALJ’s March 11, 2008 Decision and Order Dismissing Complaint, from which Mr. Evans appealed, dismissed his OSHA complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim of protected activity based upon the allegations contained in the complaint and, secondarily, because the ALJ did not consider Evans’ filing of the OSHA complaint to be protected activity. The ALJ’s dismissal was “based on the purely legal argument that Complainant’s actions do not constitute protected activity under the Environmental Acts.” ALJ D&O, at 3 n.1. Following the ARB’s affirmation of the ALJ’s decision, the Ninth Circuit on appeal remanded this case to the ARB in response to the Solicitor of Labor’s unopposed motion to remand wherein the Solicitor, on behalf of the Secretary of Labor, requested that the Court “remand this case to the ARB so that it can consider the sufficiency of Petitioner’s claims in light of its new precedent [in *Sylvester*].” Secretary of Labor’s Status Report and Unopposed Motion for Remand (June 10, 2011). Before the Ninth Circuit, the Solicitor argued: “Now that the ARB has concluded in *Sylvester* that OSHA complaints should not be evaluated under the *Twombly/Iqbal* standard, the Board should be afforded the opportunity to consider whether the new approach to pleading standards reflected in *Sylvester* should be applied to whistleblower complaints filed with OSHA under the Environmental Acts.” *Id.* Upon remand, the Board’s October 11, 2011 briefing order directed the parties to address the question of “whether administrative whistleblower complaints filed with [OSHA] may be dismissed for failure to state a claim under Rule 12 of the Federal Rules of Civil Procedure, particularly under the heightened pleading standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009).” Consistent with that directive, both Complainant and Respondent, and the Solicitor on behalf of the Assistant Secretary for OSHA, focused on the question of the applicability of Fed. R. Civ. P. Rule 12(b)(6) and the federal pleading standard enunciated in *Twombly* and *Iqbal* to Evans’ OSHA complaint.

In my concurrence and dissent in *Sylvester v. Parexel Int'l*, ARB No. 07-123, 2007-SOX-039 (ARB, May 25, 2011), I expressed the view that neither Fed. R. Civ. P. Rule 12(b)(6) nor federal court pleading requirements are applicable to SOX whistleblower complaints. Nothing that has been argued by the parties in the instant case nor expressed in the majority's decision dissuades me from reaching the same conclusion with respect to complaints filed under the environmental whistleblower acts upon which Mr. Evans' claim of retaliation rests. In reaching this conclusion, I am mindful of the majority's point that the dismissal of whistleblower complaints pursuant to Fed. R. Civ. P. 12(b)(6) has been a longstanding practice endorsed by the ARB. However, as Justice Souter stated in his concurring opinion in *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 342 (2000), the policy respecting precedent in statutory interpretation "does not demand that recognized error be compounded indefinitely."

The Administrative Review Board's jurisdiction and authority is limited by the Secretary of Labor's Order establishing the ARB as well as by statute and regulation. Section 5 of Secretary Order 1-2010, 75 Fed. Reg. 3924 (January 15, 2010), delegates to the ARB the Secretary's authority for rendering final agency decisions following administrative review of ALJ decisions issued pursuant to the laws listed in the Secretary's Order. In affording the ARB this authority, express limits are placed upon the scope of the ARB's jurisdiction, including a mandate that the ARB adhere to the provisions of regulations adopted in implementation of the whistleblower laws over which it has jurisdiction.⁷⁴ Notwithstanding, my colleagues disregard the plain language of the regulations implementing the environmental whistleblower laws under which Evans' claim arises as well as those governing practice and procedure before the Office of Administrative Law Judges, and in dicta that cites neither statutory nor regulatory authority prescribe new procedures by which ALJs are now to resolve motions seeking dismissal of whistleblower retaliation complaints for failure to state a claim for relief.

The majority cites the last sentence of 29 C.F.R. § 18.1(a) as the legal basis for resorting to Fed. R. Civ. P. 12(b)(6) when presented with a motion to dismiss for failure of a whistleblower complaint to state a claim for relief. That sentence provides: "The Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation *not provided for or controlled by these rules, or by any statute, executive order or regulation.*" (Emphasis added). Ignored, however, is the penultimate sentence of 29 C.F.R. § 18.1(a), which provides that where the OALJ's rules (29 C.F.R. Part 18) are silent or inconsistent with rules of special applicability, resort is not to the Federal Rules of Civil Procedure but to the rules of special applicability: "To the extent that these rules may be inconsistent with a rule of special application as provided by statute, executive order, or regulation, *the latter is controlling.*" (Emphasis added).

The rules of special applicability to Evans' whistleblower claim are found at 29 C.F.R. Part 24. Under the environmental whistleblower regulations, the only mention of a "complaint"

⁷⁴ Section 5 of Secretary Order 1-2010 provides: "The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions."

is the complaint filed with OSHA pursuant to which an investigation of the complainant's claim is initiated. *See* 29 CFR §§ 24.103, 24.104(a).⁷⁵ However, the complaint filed with OSHA, for which no pleadings requirements are imposed,⁷⁶ "is not a formal pleading setting forth legal causes of action. Rather it is an informal complaint filed . . . for the purpose of initiating an investigation on behalf of the Secretary of Labor." *Richter v. Baldwin Assocs.*, 1984-ERA-009, slip op. at 6 (Sec'y, Mar. 12, 1986). *See Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, ALJ No. 1988-ERA-033, slip op. at 17 n.27 (ARB, Nov. 10, 1997). Consequently, the Secretary of Labor has held, "complainant's failure to precisely set forth in her complaint all elements which establish a violation is not a valid basis for dismissal." *Monteer v. Casey's Gen. Store*, 1988-SWD-001, slip op. at 3 (Sec'y, Feb. 27, 1991). *Accord Richter*, 1984-ERA-009; *Nunn v. Duke Power Co.*, 1984-ERA-027 (Sec'y, July 30, 1987).

Under the Federal Rules of Civil Procedure, it is the complaint that commences a civil action in federal court. *See* Fed. R. Civ. P. Rule 3. There is no comparable document before an ALJ in an environmental whistleblower action. Instead, 29 C.F.R. Part 24 provides for the initiation of *de novo* whistleblower proceedings before an ALJ by the filing with OALJ of objections and a request for a hearing where a party is dissatisfied with the results of OSHA's investigation. *See* 29 C.F.R. §§ 24.106(a), 24.107(b). The filing of such objections and request for hearing constitutes the initiation of the adjudicatory proceedings before an ALJ. *See* 29 C.F.R. § 18.2(d).

⁷⁵ Consistent with the statutory provisions found in the CAA (42 U.S.C.A. § 7622(b)(1)) and the SDWA (42 U.S.C.A. § 300j-9(i)(2)(A)), the implementing regulations for the environmental whistleblower protection acts identify a "complaint" as the document initiating investigation. Under the statutory provisions of CERCLA, there is no reference to an initiating complaint. An employee claiming retaliation in violation of CERCLA need only "apply to the Secretary of Labor for a review of such firing or alleged discrimination" in order to initiate an investigation. 42 U.S.C.A. § 9610(b).

⁷⁶ 29 C.F.R. § 24.103(b) not only provides that "[n]o particular form of complaint is required," it provides that a complaint "may be filed orally or in writing." At the time Evans filed his complaint the applicable provision in 29 C.F.R. Part 24 (i.e., 29 C.F.R. § 24.3(c)(2005)) provided that "a complaint must be in writing." In practice, however, the "in writing" requirement was construed by the ARB to allow for the filing of oral complaints. *See, e.g., Roberts v. Rivas Env'tl. Consultants, Inc.*, ARB No. 97-026, ALJ No. 1996-CER-001, at 4 n.6 (ARB, Sept. 17, 1997) (complainant's oral statement to an OSHA investigator, and the subsequent preparation of an internal memorandum by that investigator summarizing the oral complaint, satisfies the "in writing" requirement of CERCLA, 42 U.S.C.A. § 9610(b), and the Department's accompanying regulations in 29 C.F.R. Part 24); *Dartey v. Zack Co. of Chicago*, No. 1982-ERA-002, 1983 WL 189787, at *3 n.1 (Sec'y, Apr. 25, 1983) (adopting administrative law judge's findings that complainant's filing of a complaint to the wrong DOL office did not render the filing invalid and that the agency's memorandum of the complaint satisfied the "in writing" requirement of the ERA and the Department's accompanying regulations in 29 C.F.R. Part 24). The ARB has similarly recognized oral communications to OSHA as sufficient to constitute a complaint under other whistleblower protection provisions such as the Surface Transportation Assistance Act. *See, e.g., Klosterman v. Davies*, ARB No. 08-035, 2007-STA-019 (ARB, Sept. 30, 2010); *Harrison v. Roadway Express*, ARB No. 00-048, 1999-STA-037 (ARB, Dec. 31, 2002).

The applicability of Rule 12(b)(6) is premised by its express language upon the existence of a *pleadings* complaint:⁷⁷

Every defense to a claim for relief *in any pleading* must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion . . . (6) failure to state a claim upon which relief can be granted.

Fed. R. Civ. P. 12(b) (emphasis added). However, unlike civil proceedings in federal court, there is no “pleadings complaint” before an ALJ where the claim presented involves charges of violation of the environmental whistleblower protection statutes. Consequently, there is nothing before the ALJ to which Rule 12(b)(6) of the Federal Rules of Civil Procedure applies. Concomitantly, there is nothing before the ALJ to which the pleading standards of Fed. R. Civ. P. Rule 8(a) applies. Stated otherwise, because there is no pleadings document before an ALJ in an environmental whistleblower case, the provision of 29 C.F.R. § 18.1(a) prescribing application of the Federal Rules of Civil Procedure “in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation” provides no basis for invoking Fed. R. Civ. P. Rule 12(b)(6).

Seemingly recognizing the significant distinctions between complaints filed with OSHA and complaints filed in federal court, my colleagues nevertheless insist upon manifesting, without statutory or regulatory foundation, a “pleadings complaint” in whistleblower cases to which the federal Rule 12(b)(6) motion to dismiss for failure to state a claim can then be applied. How the majority arrives at this conclusion, and for what reason, I do not fully understand. As the Solicitor of Labor has explained in the amicus brief submitted on behalf of the Assistant Secretary for OSHA, rejection of the applicability of Rule 12(b)(6) to proceedings under the environmental whistleblower protection statutes does not strip ALJ’s of the authority to dismiss a whistleblower action that fails to state a claim for relief. Nevertheless, the majority dictates that where a federal Rule 12(b)(6) motion to dismiss for failure to state a claim for relief is filed, the ALJ is to afford the complainant the opportunity to submit what in essence is a “pleadings complaint” (essentially the amendment of the investigatory complaint filed with OSHA) to which Rule 12(b)(6) can then be applied.

Having conjured from thin air a “pleadings complaint,” the majority then asks the question: “What pleadings standard should be applied?” To which the answer is offered: As in federal court prior to *Twombly/Iqbal*, the pleadings should afford the respondent “fair notice” of the claim against it. This “fair notice” standard, the majority holds, is met where the whistleblower “pleadings complaint” provides: “(1) some facts about the protected activity, showing some ‘relatedness’ to the laws and regulations of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) a general assertion of causation and (4) a description of the relief that is sought.” *Supra*, at 9. In effect, the majority imposes upon the whistleblower

⁷⁷ Fed. R. Civ. P. Rule 7(a) identifies the complaint as a “pleadings” document; the pleading contents of which are prescribed by Fed. R. Civ. P. Rule 8(a).

complainant the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure, i.e., “(1) a short and plain statement of the grounds for the court’s jurisdiction . . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought”

Imposing the foregoing “fair notice” standard not only inflicts an increased pleadings burden upon the whistleblower complainant where no pleading burden is otherwise required, it disregards ARB jurisprudence first enunciated more than 35 years ago on how the requirement of notice to the respondent is met in whistleblower cases. In *Richter*, 1984-ERA-009, the Secretary of Labor noted that the development of the elements that establish a violation of a whistleblower protection act “usually occurs during the administrative process” prior to litigation before an ALJ. As a result, the Secretary concluded, “It is during this process that the employer is apprised of a complainant’s specific complaint and the statute which may have been violated.” Consistent with *Richter*, in *Monteer*, 1988-SWD-001, the Secretary held that “the preliminary findings of [Wage and Hour] afforded Respondent ample notice of the allegations against and it, and thus, adequate opportunity to prepare for the case presented at hearing.” See also, *Flenar v. H. K. Cupp*, 1990-STA-042 (Sec’y, Apr. 9, 1991) (Where the complainant filed his complaint orally, by telephone, the Secretary held that “Respondent had ample notice of all the allegations by virtue of the Investigator’s summary of the complaint.”).⁷⁸

I find the majority’s approach unsustainable. Not only is it without statutory or regulatory foundation, it is premised upon a need for “fair notice” to the opposition that the Secretary of Labor has held is met long before the claim is presented to an ALJ for hearing. I am of the firm opinion, as previously expressed, that neither Fed. R. Civ. P. Rule 12(b)(6) nor the federal court pleading requirements under Fed. R. Civ. P. Rule 8(a) are applicable to environmental whistleblower complaints filed with OSHA. The invention of a substitute “pleadings complaint” for the ALJ’s consideration does not alter my opinion that federal Rule 12(b)(6) and pleadings standards do not apply to motions to dismiss for failure to state a claim in environmental whistleblower cases such as that which Evans has filed.⁷⁹

⁷⁸ Current practice before OSHA assures that a respondent is fully apprised of an employee’s claim without the necessity of imposing pleading requirements on a complainant through the filing of a new or amended complaint once litigation ensues before an ALJ. OSHA’s *Whistleblower Investigations Manual* (published Sept. 20, 2011) provides for the disclosure to respondent of all relevant information and evidence in order to assure that the opposing party is “provided the opportunity to fully respond.” *Manual* at p. 2-14. Upon conclusion of OSHA’s investigation, a determination letter (“Secretary’s Findings”) is issued to all parties that informs them of the outcome of OSHA’s investigation, documents the factual findings as well as OSHA’s analysis of the elements of any violation, and conveys any order or preliminary order. *Manual* at pp. 4-2, 4-6, 5-4, 5-6, 5-9. See http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf.

⁷⁹ Indeed, given their virtually identical statutory and regulatory procedures, I am of the opinion that Rule 12(b)(6) and federal pleading standards do not apply to any of the other whistleblower protection statutes that are implemented by OSHA.

Rejection of Rule 12(b)(6)'s applicability to whistleblower claims does not, however, leave an ALJ without authority to dismiss a whistleblower action that fails to state a claim for relief. As the Solicitor notes in the amicus brief on behalf of the Assistant Secretary for OSHA, 29 C.F.R. § 18.40, governing summary decisions, remains available to summarily dismiss a whistleblower claim prior to hearing on the merits, either as a matter of law or where the claim lacks evidentiary support. Section 18.40 affords a party the opportunity to move "with or without supporting affidavits" for summary disposition of "all or any part of the proceeding." Clearly contemplated is the situation where the legal efficacy of the claim is challenged as well as the situation where the challenge is to the complainant's evidentiary support for his claim. If a motion for summary disposition pursuant to section 18.40 raises purely legal issues, the ALJ may rule on the motion as a matter of law. If, on the other hand, a motion seeking summary disposition draws into question factual matters – raised by way of attached affidavits and evidence submitted in support of the moving party's motion, or raised by the responding party through affidavits and evidence submitted in opposition – 29 C.F.R. § 18.40, in conjunction with § 18.41, obligates the ALJ to take the submitted evidence into consideration in ruling upon the motion.

Thus where, as in the instant case, the ALJ is presented with a motion to dismiss for failure to state a claim of whistleblower protected activity, error on the part of the ALJ is not that the ALJ failed to permit the complainant to file a new or amended complaint. Instead, the non-moving party should be afforded the opportunity 29 C.F.R. § 18.40 requires of allowing him to supplement the record before the ALJ with such relevant evidence, documentary or otherwise, as the non-moving party considers necessary in order to defend against the motion to dismiss.⁸⁰ The ALJ's failure in the instant case to permit Evans the opportunity of presenting such evidence constitutes, in my estimation, reversible error. I would thus remand in order to afford Evans the opportunity of providing such evidence.

The second issue before the Board in this case is the propriety of the ALJ's rejection of Evans' filing of his OSHA complaint as whistleblower protected activity. This issue was raised by Evans on appeal but not addressed by the ARB in its August 30, 2010 Decision and Order. Nevertheless, it remains a valid issue on appeal requiring resolution.

In rejecting Evans' OSHA filing as protected activity, the ALJ relied upon ARB case authority that distinguishes between complaints about violations of environmental requirements and complaints about occupational safety and health.⁸¹ The former have been held to constitute

⁸⁰ As the Secretary held in *Moravec v. HC & M Transp.*, 1990-STA-044 (Sec'y, Jan. 6, 1992), failure to allege a specific claim in the complaint filed with OSHA does not preclude presenting evidence of the claim before the ALJ. *Accord Flenar*, 1990-STA-042 (ALJ erred by limiting determination of causation to pleadings contained in administrative complaint); *Chase v. Buncombe Cnty.*, 1985-SWD-004 (Sec'y, Nov. 3, 1986) (Secretary "not bound by the legal theories of any party in determining whether a violation of the SWDA has occurred," but will look at "the information in the record" in ruling upon the employer's motion to dismiss for failure to state a claim.).

⁸¹ *I.e.*, *Tucker v. Morrison & Knudson*, ARB No. 96-043, ALJ No. 1994-CER-001 (ARB, Feb. 28, 1997); *Aurich v. Consolidated Edison of N.Y.*, 1986-CAA-002 (Sec'y, Apr. 23, 1987).

protected activity. The latter have not. However, the case authority cited by the ALJ addresses the question of whether an employee's complaint to his or her employer or to a governmental entity for which whistleblower protection is claimed is protected activity. In order to gain whistleblower protection, such complaints must "touch on the concerns for the environment and public health and safety that are addressed by those statutes." *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 11 (ARB, July 14, 2000) (citations omitted). This case authority does not, however, address whether an OSHA complaint itself constitutes protected activity.

In order to gain the whistleblower protection that the CAA, CERCLA, and the SDWA affords, it is only necessary, as the majority notes, that the filing with OSHA "commence a proceeding" within the meaning of the three statutes.⁸² *Brobeski v. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB, June 24, 2011). See, *Smith v. ESICORP, Inc.*, 1993-ERA-016 (Sec'y, Mar. 13, 1996); *Bryant v. EBASCO Servs.*, 1988-ERA-031 (Sec'y, April 21, 1994). Indeed, in *Post v. Hensel Phelps Constr. Co.*, 1994-CAA-013 (Sec'y, Aug. 9, 1995), cited by the ALJ as a basis for disallowing Evan's OSHA filing as protected activity, the Secretary held that the complainant's complaint to OSHA under the CAA, CERCLA, and the SWDA "was a protected activity even if it concerned solely occupational safety and health." (Emphasis added).

Notwithstanding that I am in agreement with the majority that a complaint filed with OSHA may constitute whistleblower protected activity, I do not agree that the ARB can at this juncture in the proceedings hold that Evans' complaint to OSHA constituted protected activity based on the record that is presently before the Board. The majority concludes "that the allegations in his May 26, 2006 complaint sufficiently demonstrate that Evans filed a whistleblower complaint under the Environmental Acts." *Supra* at 14. For the reasons I have stated for rejecting the applicability of Rule 12(b)(6) to whistleblower proceedings, I cannot support the notion that allegations contained in the complaint filed with OSHA are determinative of whether Evans' OSHA complaint constitutes protected activity. I consider the majority's basis for concluding that Evans initiated a proceeding within the meaning of the CAA, CERCLA, and the SWDA tenuous at best. Consequently, and even though I am inclined to believe that Evans' OSHA filing is whistleblower protected activity, I am not prepared to hold that it is necessarily the *allegations* of an OSHA complaint that are determinative of whether a proceeding under the environmental acts has been initiated that constitutes whistleblower protected activity. That determination, in my estimation, should in this case be first made by the ALJ after considering any and all relevant information that Evans may provide.

⁸² The CAA prohibits retaliation against any employee who has "commenced a proceeding under this chapter" (42 U.S.C.A. § 7622(a)). CERCLA protects any employee who has "instituted any proceeding under this chapter" (42 U.S.C.A. § 9610(a)). And the SDWA prohibits retaliation against an employee who has "commenced a proceeding under this subchapter" (42 U.S.C.A. §300j-9(i)(1)).

Finally, there is the question of whether Respondent is entitled to summary decision pursuant to the Board's prior decision in this case. The majority rejects the prior grant of summary decision on the grounds that because there was no motion for summary decision before the Board, the issue is not properly before us. My reason for rejecting EPA's entitlement to summary is slightly different.

As I stated in my dissenting opinion in the Board's April 30, 2010 Decision and Order in this case, I reject the notion that the ARB can on appeal transform an ALJ's disposition that focused exclusively on whether the complainant stated a claim for relief as a matter of law into a summary judgment ruling where evidentiary matters not addressed in the first instance by the ALJ are potentially involved. In the instant case, the ALJ expressly rejected an evaluation of EPA's motion to dismiss pursuant to summary judgment standards. *See* ALJ D. & O., slip op at 3 n.1. For the Board to assert a summary judgment standard that was expressly rejected by the ALJ is an unwarranted usurpation of the ALJ's authority accomplished in disregard of the Board's limited appellate jurisdiction. Moreover, 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 in the instant case where 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. Thus, not because there was no motion for summary judgment before the Board, but because the ALJ did not dispose of Evans' claim on summary judgment grounds, I am of the opinion that EPA's entitlement to summary judgment is not properly before the Board at this time.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge