In the Matter of:

DOUGLAS EVANS,	**ARB CASE NO. 08-059**
COMPLAINANT,	**ALJ CASE NO. 2008-CAA-003**
v.	**DATE: August 18, 2010**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Richard R. Renner, Esq., *Kohn, Kohn & Colapinto*, Washington, District of Columbia

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.

ORDER DENYING RECONSIDERATION

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)[1]; Comprehensive

[1] 42 U.S.C.A. § 7622 (Thomson/West 2003).

Environmental Response, Compensation, and Liability Act (CERCLA)[2]; Energy Reorganization Act (ERA)[3]; Safe Drinking Water Act (SDWA),[4] and Toxic Substances Control Act (TSCA).[5] OSHA investigated and denied the complaint. Evans requested a hearing before an Administrative Law Judge (ALJ). Prior to any hearing, EPA filed a Motion to Dismiss the complaint. 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."[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 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 Administrative Review Board (ARB).

On April 30, 2010, we issued a Final Decision and Order (F. D. & O.) granting EPA's Motion to Dismiss and denying the complaint. We held that Evans failed to present a complaint upon which relief could be granted under the CAA, SDWA, and CERCLA (the environmental acts).[8] We also held that Evans failed to adduce evidence that he engaged in protected activity, and on that basis, EPA was entitled to summary decision on the complaint.[9]

On May 10, 2010, Evans filed a Motion for Reconsideration of the F. D. & O. The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued.[10] Moving for reconsideration of a final administrative decision is analogous to petitioning

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2 42 U.S.C.A. § 9610 (Thomson/West 2005).

3 42 U.S.C.A. § 5851 (Thomson/West 2003).

4 42 U.S.C.A. § 300j-9(i) (Thomson/West 2003).

5 15 U.S.C.A. § 2622 (Thomson Reuters 2009).

6 EPA's Motion to Dismiss at 5.

7 D. & O. at 5.

8 We did not have jurisdiction over Evans' ERA and TSCA claims because the Federal Government has not waived sovereign immunity under those statutes. *See* F. D. & O. at 4-5 and cases cited therein.

9 *Id*. at 9-11.

10 *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007).

for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure. Rule 40 expressly requires that any petition for rehearing "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . . ."[11] In considering a motion for reconsideration, the ARB has applied a four-part test to determine whether the movant has demonstrated:

> (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.[12]

Evans has not demonstrated that any of the provisions of this four-part test apply. In moving for reconsideration, he presents no new matters of law or fact. Instead, he repeats his previous arguments that (1) his complaint describes his participation in activities protected by the environmental acts, and (2) such a description is not even necessary to survive a motion to dismiss.[13] We considered, but rejected, these arguments when we held that Evans was required to "present a factual allegation indicating that [his alleged protected] activity could qualify for protection under the environmental acts."[14]

Evans argues that our ruling "effectively imposes civil action pleading rules on the protected activity itself."[15] We disagree. Citing prior case law, we held that his complaint "must contain either direct or inferential allegations respecting all the material elements [of a whistleblower claim] to sustain a recovery under some viable legal theory."[16] This ruling is consistent with the current regulations governing whistleblower

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11 Fed. R. App. P. 40(a)(2).

12 *Getman v. Southwest Secs., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 1-2 (ARB Mar. 7, 2006).

13 Complainant's Motion for Reconsideration at 3-5, 7-9.

14 F. D. & O. at 8.

15 Complainant's Motion for Reconsideration at 9.

16 F. D. & O. at 8, citing *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, 436 (6th Cir. 1988)).

complaints brought under the environmental acts, which require complainants to "allege the existence of facts and evidence to make a prima facie showing" of the elements of a retaliation claim.[17]

Accordingly, Evans' Motion for Reconsideration is **DENIED.**

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

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

For the reasons set forth in my dissent to the Final Decision and Order issued in this case on April 30, 2010, as further buttressed by the Seventh Circuit's recent decision in *Swanson v. Citibank*, __ F.3d __ , 2010 WL 2977297 (July 30, 2010), I would grant Evans' Motion for Reconsideration.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

[17] *See* 29 C.F.R. § 24.104(d)(2) ("The 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.").