In the Matter of:

MICHAEL E. BOYD,	**ARB CASE NO. 10-082**
COMPLAINANT	**ALJ CASE NO. 2009-SDW-005**
v.	**DATE: December 21, 2011**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

RESPONDENT

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Michael E. Boyd, *pro se*, Soquel, California

***For the Respondent*:**
Paul Winick, Esq.; *United States Environmental Protection Agency*, Washington, District of Columbia

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge;* and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Michael Boyd filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the United States

Environmental Protection Agency (EPA) violated the employee protection provisions of the environmental protection laws.[1]

BACKGROUND

The EPA issues Technical Assistance Grants (TAG) to fund community participation in decision making during the clean up of Superfund sites. In this case, the EPA issued a grant to the Community First Coalition (CFC) to act as the community liaison during the clean up of the Hunters Point Naval Shipyard site in the San Francisco, California community of Bay View Hunters Point. CFC contracted with complainant and his business associate (doing business as Environmental Mitigation Unlimited or EMU) to be the technical advisor under the grant. The EMU-CFC contract provided that EMU was to provide technical advisory services to the coalition and assist in the review and analysis of environmental remediation activities at the Superfund site. CFC issued a letter of intent to terminate the contract on July 5, 2005, citing EMU's failure to file reports as required by the contract. The termination was effective as of August 8, 2005.

On April 20, 2009, Boyd filed a complaint under the Department of Labor's Occupational Health and Safety Act, contending that the EPA violated the environmental protection statutes because it did not adequately investigate Boyd's complaints under Title VI of the Civil Rights Act of 1964, 40 C.F.R. § 7.130(b)(2)(ii), as retaliation for disclosing the presence of hazardous material in numerous under privileged communities. The regional administrator denied the claim as it was untimely. Boyd requested a hearing before an Administrative Law Judge (ALJ). In an opposition to the Respondent's second motion to dismiss submitted on September 14, 2009, Boyd raised the issue that the Respondent terminated his contract because he distributed information regarding the alleged presence of asbestos dust in the Bay View Hunters Point community.

In her recommended decision, the ALJ found that the "Respondent's failure to timely investigate Title VI complaints against a third party is outside the scope of the actions for which the whistleblower provisions provide a remedy." Decision at 7. In addition, the ALJ rejected Boyd's contention that the termination of his contract violated the whistleblower protection statutes as the claim was not timely filed. Thus, the ALJ dismissed the complaint.

DISCUSSION

In summarily affirming the dismissal of Boyd's complaint, we limit our comments to the most critical points. The granting of a motion to dismiss is a legal conclusion that we review de

[1] These acts include the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 1995); the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A § 9610 (West 1995); the Federal Water Pollution Control Act/Clean Water Act (FWPCA/CWA), 33 U.S.C.A. § 1367 (West 2001); the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300(j)-9(i) (West 1991); the Solid Waste Disposal Act (SWDA), 42 U.S.C.A. § 6971 (West 1995); and the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998).

novo. *High v. Lockheed Martin Energy Sys., Inc*., ARB No. 98-075, ALJ No. 1996-CAA-008, slip op. at 3 (ARB Mar. 13, 2001)(dismissal on the pleadings is a decision as a matter of law). Such motions should be granted cautiously.

Pursuant to 29 C.F.R. § 18.40(d), the ALJ may issue summary decision if the pleadings, affidavits, and other evidence, or "matters officially noticed," show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *See generally Flor v. United States Dep't of Energy,* No. 1993-TSC-001, slip op. at 10 (Sec'y Dec. 9, 1994), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 158 (1st Cir. 1998).

Initially, we agree with the ALJ's finding of untimeliness as to Boyd's complaint that CFC retaliated against him in violation of the environmental protection statutes when it terminated his contract. Under the environmental whistleblower statutes, a claim must be filed within thirty days from the date of a discrete adverse action. *See Jenkins v. EPA*, ARB No. 98-146, ALJ No. 1988-SWD-002 (ARB Feb. 28, 2003).[2] CFC terminated Boyd's contract in 2005, but he did not file a complaint alleging whistleblower protection until April 2009, and thus the claim was not timely. In addition, we agree with the ALJ's reasons for dismissing Boyd's claim based on an alleged failure to investigate his Title VI complaint. The Respondent's alleged failure to timely investigate a Title VI complaint against a third party is outside the scope of our ability to provide a remedy. Consequently, Boyd's allegation in this regard fails to state a claim on which relief can be granted.

Accordingly, we **AFFIRM** the ALJ's Order Granting Respondent's Motions to Dismiss and For Summary Decision, Denying Complainant's Motion to Dismiss Respondent's Motions, and Recommending that Complainant's Complaint Be Dismissed, and we **DENY** Boyd's complaint.[3]

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

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[2] The record reflects no circumstances that would justify equitable tolling of the statute of limitations.

[3] Boyd is free to pursue any other relief for which he may be qualified.