U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

AMIEL GROSS,

COMPLAINANT,

v.

SAINT-GOBAIN CORP. et al.,

RESPONDENTS.

ARB CASE NO. 2022-0005

ALJ CASE NO. 2021-SDW-00001

DATE: April 18, 2022

Appearances:

For the Complainant:
Jeanne M. Christensen, Esq. and John S. Crain, Esq.; *Wigdor LLP*; New York, New York

For the Respondent:
Sarah E. Bouchard, Esq. and Brandon J. Brigham, Esq.; *Morgan, Lewis & Bockus LLP*; Philadelphia, Pennsylvania

Before: Thomas H. Burrell, Randel K. Johnson, and Stephen M. Godek, *Administrative Appeals Judges; Judge Burrell, concurring in part and dissenting in part*

DECISION AND ORDER OF REMAND

PER CURIAM. This case arises under Safe Drinking Water Act (SDWA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and their implementing regulations.[1] Complainant Amiel Gross filed a

[1] 42 U.S.C. § 300j-9(i) (1994); 42 U.S.C. § 9610 (1972); 29 C.F.R. Part 24 (2018).

whistleblower complaint against Saint-Gobain Corp. et al. (Respondents) for alleged retaliation. The ALJ issued an Order Granting Respondents' Motion to Dismiss (Order). Complainant appealed the ALJ's order. We affirm in part, and reverse and remand in part.

BACKGROUND

Complainant was hired to work for Respondents as in-house litigation counsel in 2014. Complainant asserts that, in 2019 and 2020, he raised public health concerns to Respondents regarding potential chemical contamination of drinking water with perfluorooctanoic acid. On October 19, 2020, he was fired. In the months that followed, the parties engaged in communication regarding Complainant's company cell phone, laptop, and hard drive. [2]

On April 6, 2021, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA). After filing the complaint, his counsel publicized it. In response, Respondents issued media statements that Complainant was fired after an investigation for violating its policies, which includes its harassment prevention policy. On April 21, 2021, OSHA dismissed the complaint as untimely.

On April 29, 2021, Complainant requested a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Law Judges (OALJ). Respondents filed a motion to dismiss on July 9, 2021, contending the complaint was untimely filed and failed to state a claim upon which relief could be granted.

The ALJ analyzed Complainant's seven allegations of retaliation, dating from October 2019 until April 2021. The ALJ determined five of these claims were facially untimely, while two were timely. Complainant contended all claims were timely based on the continuing violation doctrine. However, the ALJ determined each allegation of retaliation represented a discrete act. The ALJ concluded that the continuing violation doctrine did not apply and that the five facially untimely allegations were time-barred by the 30-day statute of limitations.[3]

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[2] Complaint failed to return his laptop hard-drive until he received assurances from Respondents that his personal family data would be appropriately safeguarded. As a result of these communications, Complainant returned the hard-drive by November 14, 2020, and he told Saint-Gobain he did not duplicate or disseminate any confidential information. Order at 4-5.

[3] Order at 5-8. These claims include: (1) the failure to promote in October 2019; (2) Complainant's firing on October 19, 2020; (3) a November 10, 2020 letter, in which Respondents reminded Complainant of his professional obligations and addressed the possibility of reporting him to state bars, disciplinary boards, and law enforcement authorities for not returning the company's hard drive and possibly saving confidential

The first timely claim is an email dated March 8, 2021, between the parties' attorneys. Complaint contends this email, by itself, constitutes an act of retaliation, characterizing it as threatening and malicious. The ALJ considered this email in the larger context of prior communications between the parties. The ALJ determined it was a professional, routine follow-up request regarding the status of settlement negotiations. The ALJ determined the email was a discrete, non-harassing incident that neither threatened action nor requested that Complainant refrain from action. Rather, the ALJ determined it was merely a request for a conversation. The ALJ concluded that, giving Complainant all reasonable inferences, considered alone, this email is not an adverse action and does not support liability for unlawful retaliation. In sum, the ALJ concluded Complainant failed to state a claim upon which relief could be granted because the email was not an adverse action.[4]

The second timely claim is a set of alleged defamatory statements Respondent made to the media in April 2021. The ALJ determined the statements were not adverse actions, but simple factual statements about the circumstances surrounding Complainant's termination. The ALJ noted that Complainant acknowledged that Respondents investigated him for subordination. In addition, the ALJ opined that, since it was undisputed that Complainant's counsel publicized the OSHA complaint to media outlets, Respondents' defense in a public forum could not be used to fabricate an adverse action. The ALJ concluded Complainant failed to state a claim upon which relief could be granted because the statements did not constitute adverse actions.[5]

The ALJ opined that she did not reach the substance of Complainant's allegations but concluded only that no act of discrimination occurred within thirty days prior to the filing of his complaint.

Complainant filed a timely appeal with the Board. Both parties filed briefs.

JURISDICTION AND STANDARD OF REVIEW

files; (4) communications in December 2020 and January 2021; and (5) a February 6, 2021 letter accusing Complainant of saving company files. Complainant does not appeal the ALJ's determination on these claims.

[4] *Id.* at 8-13.

[5] *Id.* at 13-14.

The Secretary of Labor has delegated to the Board the authority to issue final agency decisions under the SDWA and CERCLA as amended.[6] The Board reviews orders dismissing complaints de novo.[7]

DISCUSSION

To prevail on a whistleblower complaint under the Acts, a complainant must establish by a preponderance of the evidence "that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint."[8] If a complainant makes this showing, "relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity."[9]

A complainant who alleges unlawful retaliation under the SWDA may file a complaint "within 30 days after such violation occurs."[10] The CERCLA applies the same timeline.[11] The limitation period begins to run "on the date that a complainant receives final, definitive and unequivocal notice of a discrete adverse employment action."[12]

A party may move to dismiss a complaint for failure to state a claim upon which relief can be granted or for timeliness.[13] In considering a motion to dismiss, an ALJ must accept the factual allegations in the complaint as true and draw all

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6 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

7 *Boyd v. EPA*, ARB No. 2010-0082, ALJ No. 2009-SDW-00005, slip op. at 2-3 (ARB Dec. 21, 2011) (citing *High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 1998-0075, ALJ No. 1996-CAA-00008, slip op. at 3 (ARB Mar. 13, 2001)); *Lorenzetti v. Worldpay, Inc.*, ARB No. 2020-0055, ALJ No. 2020-SOX-00012, slip op. at 2 (ARB Aug. 24, 2021).

8 29 C.F.R. § 24.109(b)(2).

9 *Id.*

10 42 U.S.C. § 300j-9(i)(2)(A).

11 42 U.S.C. § 9610(b); 29 C.F.R. § 24.103(d).

12 *Schlagel v. Dow Corning Corp.*, ARB No. 2002-0092, ALJ No. 2001-CER-00001, slip op. at 8 (ARB Apr. 30, 2004).

13 29 C.F.R. § 18.70(c).

reasonable inferences in the complainant's favor.[14] Such motions should be granted cautiously.[15] The Board uses the "fair notice" requirement.[16] Under this standard,

> 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.[17]

The Board has also held that a complaint "should be able to state a claim upon which relief can be granted without unwarranted presumptions and pass muster when subjected to the scrutiny applied to any other complaint."[18]

1. Conversion to a Motion for Summary Judgment

On appeal, Complainant contends the ALJ improperly converted Respondents' motion to dismiss into a motion for summary judgment without giving the parties a chance to engage in discovery. Complainant further contends the ALJ erred in considering evidence outside of the complaint without converting Respondents' motion to dismiss to a motion for summary judgment and permitting discovery. Complainant asserts that he was not given the opportunity to gather and submit evidence that could have been relevant despite requesting the chance to conduct discovery. Complainant further contends the evidence Respondents submitted was not of the undisputable, legally operative kind that courts will sometimes allow as integral to a complaint.

In *Evans v. U.S. Environmental Protection Agency*, the Board discussed the difference between a motion to dismiss and a motion for summary judgment.[19] The Board opined that a motion to dismiss is based on a facial challenge at the initial stages of litigation, which "focuses *solely* on the allegations in the complaint, its amendments, and the legal arguments . . . not whether evidence exists to support such allegations."[20] The Board further opined that "[g]enerally, in reviewing

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[14] *Gallas v. The Med. Ctr. Of Aurora*, ARB Nos. 2015-0076, 2016-0012, ALJ Nos. 2015-ACA-00005, 2015-SOX-00013, slip op. at 2 (ARB Apr. 28, 2017).

[15] *Boyd*, ARB No. 2010-0082, slip op. at 3.

[16] *Evans v. U.S. EPA*, ARB No. 2008-0059, ALJ No 2008-CAA-00003, slip op. at 11 (ARB July 31, 2012).

[17] *Id.*

[18] *Moody v. Nat'l W. Life Ins. Co.*, ARB No. 2020-0014, ALJ No. 2019-SOX-00031, slip op. at 11 (ARB Mar. 31, 2021).

[19] *Evans*, ARB No. 2008-0059, slip op. at 10-11.

[20] *Id.*

whether to dismiss a complaint for failure to state a claim, the ALJ should not consider new evidence submitted by the moving party. . .unless he or she converts the motion to one for summary decision and allows the non-movant an opportunity to respond."[21]

However, the Third Circuit, in whose jurisdiction this case arises, has held that "a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document."[22] Otherwise, "a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied."[23]

We agree with the ALJ in concluding that this email is not an adverse action and does not support liability for unlawful retaliation. The March 8, 2021 email is central to Complainant's claim and he expressly relies on it when asserting it constitutes an adverse employment action. Thus, we conclude that the ALJ properly considered the March 8, 2021 email, and was not required to convert Respondents' motion to dismiss into a motion for summary judgment.

2. March 8, 2021 email

On appeal, Complainant contends the ALJ erred in determining that the March 8, 2021 email did not constitute an adverse employment action. Specifically, he contends his entitlement to all reasonable inferences means the email must be taken as a threat. He further contends the ALJ should have considered the context of the email as it recapitulated a threat from Respondents' prior communications to report him to professional discipline boards and law enforcement. He further alleges the declaration Respondents wanted him to sign contained an illegal gag provision and the communications were an attempt to steamroll, intimidate, and silence him.

The March 8, 2021 email from Respondents' counsel, Sarah Bouchard, states, "Good morning and I hope you had a good weekend. I am following up on the Declaration as well as Mr. Complainant' position on a transition plan and payment. Is there a good time to discuss today?"[24]

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[21] *Id.*

[22] *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

[23] *Id.*

[24] Resp. Motion to Dismiss, EX J.

There is a significant disparity between Complainant's argument that the email was threatening and what the email states.[25] The Third Circuit has held that "[w]here there is a disparity between a written instrument annexed to a pleading and an allegation in the pleading based thereon, the written instrument will control."[26] Thus, here, the email controls.

We agree with the ALJ that the email contains no threat of action by Respondents or request that Complainant refrain from any action. Rather, as the ALJ opined, the email is an innocuous, professional follow-up request to continue settlement conversations, and the language is not hostile. In addition, we also agree with the ALJ that the email represents a discrete act.

Further, even considering the email in the context of Respondents' prior emails, we find that the email does not amount to an adverse action. While prior communications addressed the possibility of reporting Complainant to disciplinary boards, Respondents ultimately took no action. In *Remp v. Alcon Labs., Inc.*, the Third Circuit analyzed a discriminatory retaliation claim under Title VII regarding a situation in which an employer threatened to file a lawsuit against Remp and report her to the department responsible for internal discipline, but ultimately did not. The Third Circuit concluded Remp failed to show the "hollow threats amounted to 'more than . . . trivial inconvenience[s],' or could have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[27] Similarly, here, Respondents' prior emails amount to a "hollow threat" and do not constitute an adverse action.

Thus, the email does not amount to an adverse action either on its face or in the context of Respondents' prior communications. Therefore, we affirm the ALJ's determination that the March 8, 2021 email was not an adverse action, and Complainant failed to state a claim upon which relief could be granted.

3. April 2021 Media Statements

On appeal, Complainant contends the ALJ improperly determined Respondents' statement to the media was not retaliatory. Specifically, Complainant contends whether he violated the policy is a question of fact, and that the ALJ improperly drew inferences in Respondents' favor. Complainant asserts that he was entitled to the inference that the statement was defamatory. He argues defamatory statements are viewed from the average person, who would likely assume sexual or discriminatory harassment. He further asserts that Respondents later told three U.S. district court judges he was fired for other reasons. In addition, he contends

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[25] Complainant's Brief (Comp. Br.) at 20.

[26] *ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 n.8 (3d Cir. 1994).

[27] *Remp v. Alcon Labs., Inc.*, 701 Fed. Appx. 103, 108 (3d Cir. 2017).

the ALJ made a *sub silentio* holding on causation by determining his public statements causally necessitated a response. He further contends the ALJ's order assumes his prior activities could not have contributed to Respondents' defamation. He contends the implications of the ALJ's order could allow for employers to make any public response regardless of its verity.

Respondents' statements to the media include:

> Mr. Complainant was separated from the company following an investigation for violating company policies, including our harassment prevention policy, among others.
>
> Despite access to multiple ethics hotlines and numerous opportunities to raise concerns directly to incoming CEO Mark Rayfield and other senior leaders, Mr. Complainant did not do so.[28]

We conclude that the ALJ erroneously found that the Respondents' statements were proper and did not constitute an adverse action. Of course, a finding of an adverse action alone has no legal import unless that adverse action was motivated by an improper basis protected by the statute; hence our discussion also touches on this latter issue.

The ALJ notes, and we do not disagree, that the Respondents had a right to respond to the media allegations, as referenced in footnotes 13 and 14 of the Order, generated by Complainant.[29] However, that right, of course, cannot be a shield behind which the Respondents, or any employer, can state whatever it decides is appropriate, whether as a matter of substance or a media or litigation strategy. To find otherwise would be to empower an employer to create, carte blanch, very significant problems for a whistleblower, which could improperly deter whistleblowers from pursuing their rights.[30] Hence, a balance must be struck.

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[28] Order at 13.

[29] *Id.*

[30] Although it has not been held under the SDWA or CERCLA statutes, it has been commonly held under other whistleblower statutes that "[u]nder the 'detrimental effect' test, an employment action is adverse if it is reasonably likely to deter employees from making protected disclosures." *Allen v. Stewart Enterprises, Inc.*, ARB No. 2006-0081, ALJ Nos. 2004-SOX-00060, -00061, -00062, slip op. at 15 (ARB July 27, 2006) (citing *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000) (An adverse action is one "reasonably likely to deter employees from engaging in protected activity")). *See Burlington N. Ry. Co. v. White*, 548 U.S. 53, 68 (2006). The Court noted,

> The anti-retaliation provision seeks to prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346. It does so by prohibiting employer actions that are

In this case, the Respondent issued to the media a statement that "Mr. Complainant was separated from the company following an investigation for violating company policies, including our harassment prevention policy, among others."[31] The statement also notes a failure to use the ethics hotlines and other opportunities to raise concerns with the CEO and other senior leaders.[32] The ALJ noted the company's right to respond to the media allegations made by the Complainant and found that the response, based on the record, would not deter employees from proceeding with a whistleblower complaint and was therefore not an adverse action under the law: "Any assertion that the statements would deter a reasonable employee from engaging in protected activity is pure and patent guesswork, not a reasonable inference."[33]

We simply, and strongly, disagree. In today's workplace, the word "harassment" is a vessel into which many meanings can be poured, but surely it is reasonable to infer that it could be read to imply sexual, racial, or otherwise discriminatory harassment. It is also reasonable to infer that possible future employers considering the Complainant for employment might find this media response through a simple Internet search, which is routinely done in screening candidates, and that such a search would deter an employer from hiring the candidate tarred with this description—particularly in a world in which many candidates have respectable credentials and employers are looking for "red flags" to shrink the candidate pool. While we think this is a matter of being cognizant of the realities of today's workplace,[34] it is certainly a reasonable inference which we must

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likely to deter victims of discrimination from complaining to the Equal Employment Opportunity Commission, the courts, and their employers.

See also id. at 77 ("Under the majority's test, however, employer conduct that causes harm to an employee is permitted so long as the employer conduct is not so severe as to dissuade a reasonable employee from making or supporting a charge of discrimination.") (Alito, J., concurring opinion); *Powers v. Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union (PACE)*, ARB No. 2004-0111, ALJ No. 2004-AIR-00019, slip. op at 13 n.24 (ARB Aug. 31, 2007) (applying the *Burlington Northern Ry. Co.* standard to cases arising under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Sarbanes-Oxley Act, and Environmental Acts). We apply this test here.

[31] Order at 13.

[32] *Id.*

[33] *Id.*

[34] Some things are plainly obvious. *See Burlington N. Ry. Co.*, 548 U.S. at 73. ("[I]t needs no argument to show that the fear of economic retaliation might often induce aggrieved employees to quietly accept substandard conditions") (quoting *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)).

make in favor of the Complainant.[35] In any event, Complainant should have been given the opportunity to submit testimony, depositions, or other evidence to establish that the media statements could have an adverse impact on his career and his ability to find future work.

Of course, a finding that Respondent's conduct constituted adverse action, as noted above, is only one element of Complainant's claim. He must also show that the adverse action was motivated by conduct protected by the statute.[36] We recognize the ALJ's concerns about timeliness and that Complainant's arguments with regard to the events that led to the press release on the part of the Respondents might be an "end run" around the statute of limitations. However, we also recognize that if in fact Complainant could show that the contents of the press release were intentionally shaped in such a way to punish him for his claimed protected conduct, that a plausible claim may arise. In this regard, we note that the Respondent is a large company with an undoubtedly sophisticated HR staff which would likely have understood the connotations of the word "harassment' in today's working environment and how that could impact an employee's job candidacy when posted on the Internet. Of course, had Complainant in fact been guilty of harassment, as either normally defined or is legally defined, the company would have an explanation for its use of that term. However, the only mention on this point is in Respondents' brief, which notes:

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[35] *See Howze v. Virginia Polytechnic*, 901 F.Supp. 1091, 1097-98 (1995) (Finding that a negative report in a professor's personnel file was an actionable adverse employment action which includes "actions that would adversely affect one's professional reputation or ability to gain future employment . . .." The court found that this allegation was therefore sufficient for the plaintiff to survive the defendants' motion to dismiss.). While this case was decided prior to *Burlington Northern Ry. Co.*, a leading employment treatise notes, in citing this case and others, that "[b]ased upon the standard articulated by the Supreme Court in *Burlington Northern Ry. Co.*, these actions likely will continue to be deemed adverse actions sufficient to support a retaliation claim under [Title VII]." *See Linderman and Grossman*, 4th edition, Volume 1, p. 1028 (2007). Finally, it seems reasonably to infer that allegations of "harassment," in the context of today's workplace—and the Supreme Court cautioned in *Burlington Northern Ry. Co.* that "context" was important to consider—are not the type of trivial complaints or "ordinary tribulations" of which the Court was concerned in cautioning against an overly expansive definition of adverse impact. *See Burlington Northern Ry. Co.*, 548 U.S. at 68. In any event, we are not reaching final conclusions with regard to the context of this case but rather remanding the case back to the ALJ for further examination.

[36] *See Wright v. R.R. Comm'n of Texas*, ARB No. 2019-0011, ALJ No. 2015-SDW-00001, slip op. at 3 (ARB May 22, 2019) (*To prevail on a whistleblower complaint,* a complainant must establish by a preponderance of the evidence "that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint."); *Onysko v. State of Utah, Dept. of Envtl. Quality*, ARB No. 2011-0023, ALJ No. 2009-SDW-00004, slip op. at 10 (ARB Jan. 23, 2013) ("A 'motivating factor' is 'conduct [that is] . . . a 'substantial factor' in causing an adverse action.").

> In October 2020, Saint-Gobain investigated allegations that Mr. Complainant violated Saint-Gobain's Code of Conduct and blatantly and repeatedly acted in an insubordinate manner to his female manager. Compl. ¶¶ 128-32. Following the conclusion of that investigation, Saint-Gobain determined that Mr. Complainant violated a "'harassment prevention policy, among others.'" Objections at 12. As a result, the Company informed him on October 19, 2020, that it would terminate his employment effective November 1, 2020.[37]

From this is it impossible to say whether the company's use of the word "harassment" in the press release was based on some odd interpretation of the concept of insubordination[38] or a separate incident. In any event, Complainant should be allowed to pursue discovery to determine why the press release was shaped in the manner it was and in the motivations behind it. Those actions could very well be based on what actually happened or, on the other hand, been driven to shape a certain set of circumstances to paint Complainant in the worst possible light in light of his alleged protected conduct. We of course make no judgment as to those issues.

We therefore remand the case to the ALJ for proceedings consistent with the above to reexamine the impact of the discussed language in the press release, and its possible motivation. We do note that there is no issue with regard to timeliness with regard to the press release.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's Order in part, **VACATE** in part, and **REMAND** the case for further proceedings consistent with this opinion.

SO ORDERED.

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[37] Resp. Br. at 2.

[38] It is hard to envision circumstances where "insubordination" could encapsulate "harassment" except in the most extreme circumstances where an employee was screaming at a superior, throwing objects, following the superior to his or her car in a menacing way, etc. The record reflects no indication of such conduct.

Judge Thomas H. Burrell, Concurring in Part and Dissenting in Part:

This case arises under the employee protection provisions of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-9(i), and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9610, as well as the Department's implementing regulations at 29 C.F.R. Part 24.

1. The ALJ Did Not Err in Failing to Convert the Motion to Dismiss

Saint-Gobain moved to dismiss Gross's complaint pursuant to the Rules of Practice and Procedure for Administrative Hearings before the OALJ.[39] I concur with the majority that the ALJ did not err in failing to convert the motion to dismiss into a motion for summary judgment because of the inclusion of exhibits cited in the motion.[40]

2. Complainant Failed to Plead a Claim upon Which Relief May Be Granted

To prevail on a claim under SDWA or CERCLA, Complainant must prove, by a preponderance of the evidence, that (1) he engaged in protected activity, (2) he suffered an adverse employment action, and (3) the protected activity caused or was a motivating factor in the adverse employment action.[41] At the motion to dismiss stage, a complainant is not required to show a prima facie case of retaliation covering each element necessary to their claim.[42] Pleading rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted."[43] Nonetheless, "'naked assertions' of wrongdoing" are generally insufficient to state a claim for relief.[44] A complainant's "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true."[45]

The SDWA prohibits an employer from discharging or otherwise discriminating against an employee "with respect to his compensation, terms, conditions, or privileges of employment" based on the employee's protected activity.[46] CERCLA provides that no employer "shall fire or in any other way

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39 29 C.F.R. § 18.70(c).

40 *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993); *Wright v. Associated Ins. Cos., Inc.*, 29 F.3d 1244, 1248 (7th Cir.1994).

41 29 C.F.R. § 24.109(b)(2).

42 *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002).

43 *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 10 (2014) (per curiam).

44 *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (citation omitted).

45 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).

46 42 U.S.C. § 300j-9(i)(1).

discriminate against, or cause to be fired or discriminated against, any employee" based on the employee's protected activity.[47] The implementing regulations for these environmental regulations further provide that no employer "may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in this section. . . . It is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against any employee."[48]

The ARB has interpreted these provisions broadly. To state a claim for relief under SDWA's or CERCLA's anti-retaliation provision, a successful complainant must show an employer's action is "more than trivial," is "materially adverse" so as to "dissuad[e] a reasonable worker" from engaging in protected activity.[49] Obvious sources include termination, demotion, lost vacation pay, as well as lesser forms of discrimination and intimidation rising above the level of triviality such that the employer's action would deter a reasonable employee from engaging in protected activity.[50]

The ALJ held that Complainant had failed to make out a claim upon which relief may be granted because the March 8 e-mail and the April 2021 press release were not adverse actions as a matter of law.[51]

A. Respondent's March 8 E-mail Was Not an Adverse Action

On appeal, Complainant asserts that the ALJ erred in concluding that the March 8 e-mail was not an adverse action. The e-mail provides:

> Good morning and I hope you had a good weekend. I am following up on the Declaration as well as Mr. Gross' position on

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47 42 U.S.C. § 9610(a).

48 29 C.F.R. §§ 24.102(a)-(b).

49 *Zavaleta v. Alaska Airlines, Inc.*, ARB No. 2015-0080, ALJ No. 2015-AIR-00016, slip op. at 11 (ARB May 8, 2017). The question is whether the action(s) is "materially adverse," or "that is, 'harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.'" *Powers v. Paper, Allied-Indus., Chem. & Energy Workers Int'l Union*, ARB No. 2004-0111, ALJ No. 2004-AIR-00019, slip op. at 13 (ARB Aug. 31, 2007) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006)).

50 *Burlington Northern*, 548 U.S. at 68.

51 D. & O. at 10-11, 13.

> a transition plan and payment. Is there a good time to discuss today?[52]

Complainant characterizes the e-mail as threatening and malicious.[53] Complainant claims that the March 8 e-mail attaches to Respondent's ongoing request that Complainant sign a declaration concerning Complainant's employment with Saint-Gobain and post-termination conduct regarding his company laptop and cell phone.[54]

The ALJ concluded that Complainant's claim that the March 8 e-mail was an adverse action was meritless.[55] Both the majority and I agree that the ALJ did not err. The March 8 e-mail is part of everyday discussion between counsel involved in adversarial litigation. It cannot sustain a claim of retaliation.

B. Respondent's April 2021 Media Release Was Not an Adverse Action

The majority and I differ as to the ALJ's evaluation of the April 2021 media release. Sometime in or about April 2021, Gross submitted his whistleblower retaliation complaint to a news outlet to generate attention to his claim. In response, the Respondent issued its own press release in April 2021, which includes the following statements:

> Mr. Gross was separated from the company following an investigation for violating company policies, including our harassment prevention policy, among others.
>
> Despite access to multiple ethics hotlines and numerous opportunities to raise concerns directly to incoming CEO Mark Rayfield and other senior leaders, Mr. Gross did not do so.[56]

Complainant characterizes Saint-Gobain's statement as defamatory. Complainant continues: "Saint-Gobain misleadingly suggests that Mr. Gross failed to avail himself of an "ethics hotline," when it knows that the purported "hotline" number goes directly to the Head of Business Compliance[,…] who orchestrated the firing of Mr. Gross on October 19, 2020."[57] Complainant continues: "the public would generally understand this media statement to mean that Mr. Gross had

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52 *Id.* at 9-10.

53 *Id.* at 9.

54 *Id.* at 7, 10.

55 *Id.* at 9.

56 *Id.* at 13.

57 Comp. Br. at 8.

committed an ethical violation incompatible with his employment duties, and that most readers would have taken it to mean that he had violated a policy against sexual harassment."[58]

I agree with the ALJ that Gross has not pled any action on the part of Saint-Gobain that materially affects his terms, conditions, or privileges or employment. His complaint does not identify threatening or retaliatory conduct rising to the level of material required by *Burlington Northern* and ARB precedent. "Materially adverse actions usually involve 'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'"[59] To be material, the consequences cannot consist of "petty slights and minor annoyances."[60] Not every remark that makes the Complainant unhappy is an adverse action.[61]

Complainant's theory of adverse action stacks inference upon inference; it requires the factfinder to interpret the employer's media statements as implicitly characterizing Complainant as having engaged in sexual harassment which then could result in an unfavorable outcome in the unknown future by an unknown employer. As the ALJ correctly concluded, it is full of "wild speculation." The ALJ stated as follows:

> Complainant argues Saint-Gobain's statements to the media were designed to harm his reputation because "[t]he average reader will think that harassment means sexual harassment." . .. This is nothing more than wild speculation. The statement makes no mention of sexual harassment or any other criminal conduct. Again, Complainant is entitled to reasonable inferences, not acceptance of his base conjecture. Complainant contends these statements falsely imply that he "did something he should not have done or failed to do something he should have." . . . Again, though, the statements make no mention of misconduct. They state in a reasonable and non-hostile manner the circumstances surrounding Complainant's termination. Any assertion that these statements would deter a reasonable employee from engaging in protected activity is pure and patent guesswork, not a

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58 Comp. Br. at 13.

59 *Spector v. District of Columbia*, No. 1:17-cv-1884, 2020 WL 977983, at *11 (D.D.C. Feb. 28, 2020) (*quoting Burlington Indus. Inc., v. Ellerth*, 524 U.S. 742, 761 (1998)).

60 *Taylor v. Solis*, 571 F.3d 1313, 1321 (D.C. Cir. 2009) (internal quotations and citations omitted).

61 *Xuan Huynh v. U.S. Dep't of Transp*., 794 F.3d 952, 959 (8th Cir. 2015).

> reasonable inference.[62]

The ALJ continued:

> In short, bare assertions and conclusory allegations that Complainant suffered an adverse action are insufficient. Complainant must present plausible grounds to infer that these statements were adverse. He has not done so. Instead, this allegation represents nothing more than a desperate attempt to rescue an untimely filing.[63]

The ALJ observed that Complainant is the party who first publicized the complaint consisting of allegations of retaliation and wrongful conduct to the media, long after the statute of limitations expired. Respondent responded providing its version of his separation from the company.[64]

Respectfully, I dissent from the majority's position that the April 2021 media release requires remand and discovery. I would affirm the ALJ and conclude that the press release is of a similar nature as the March 8 e-mail. Complainant's claim of an adverse action fails under the SDWA or CERCLA, and therefore he has not pled a claim upon which relief may be granted.[65]

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62 D. & O. at 13.

63 *Id.* at 14.

64 *Trant v. Oklahoma*, No. 10–555–C, 2012 WL 6690358 (W.D. Okla. Dec. 21, 2012) ("Responding to media inquiries prompted by the actions of Plaintiff's own attorney is not retaliatory or malicious behavior, despite the assertions of Plaintiff."), *aff'd in part, rev'd in part*, 754 F.3d 1158 (10th Cir. 2014).

65 *Cf. Staggers v. Becerra*, No. ELH-21-0231, 2021 WL 5989212 (D. Md Dec. 17, 2021) (collecting cases where tribunal found pleadings insufficient to constitute an adverse action under *Burlington Northern*). The majority notes the need for discovery to probe what motivated, or the circumstances behind, the media statement, but this likely goes to the motivating factor or causation element. Such discovery would not change the evaluation of the April 2021 text, which is the alleged adverse action.