UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

KATHY J. SYLVESTER and THERESA NEUSCHAFER,	**ARB Case No. 07-123**
Complainants,	OALJ Case Nos. 2007-SOX-39, 42
against,	
PAREXEL INTERNATIONAL LLC,	
Respondent.	

BRIEF OF AMICUS CURIAE DOUGLAS EVANS

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I. INTRODUCTION

A focus on the remedial purpose of SOX leads naturally to an accepting attitude toward filing complaints so that claims can be decided on their merits.

Douglas Evans has an environmental whistleblower case against the U.S. Environmental Protection Agency (EPA).[1] Mr. Evans worked for the EPA's Radiation and Indoor Environments Lab in Las Vegas from November, 1989, to September 14, 2007. He raised concerns about management decisions to compel employees to participate in emergency response work for which they were not trained. Mr. Evans embarrassed his managers by raising this issue directly with the EPA Administrator. In retaliation for coming forward with these concerns, Mr. Evans' managers concocted a false charge against him, falsely claiming that he threatened to use violence. After Mr. Evans filed an OSHA complaint against this retaliation, the EPA fired him. He then amended his OSHA complaint to allege that his termination was in retaliation for his initial OSHA complaint.

On April 30, 2010, this Board issued a Final Decision and Order dismissing Mr. Evans' complaint. *Evans v. United States Environmental Protection Agency*, ARB No. 08-059, ALJ No. 2008-CAA-3, Final Decision and Order (ARB Apr. 30, 2010). Mr. Evans sought reconsideration, and the Solicitor of Labor filed an amicus brief supporting that motion. On August 18, 2010, this Board issued an Order Denying Reconsideration. Mr. Evans is now the petitioner in *Evans v. Solis*, Ninth Circuit Case No. No. 10-73044. On December 28, 2010, the Ninth Circuit granted the Department of Labor's unopposed motion for a stay. That stay awaits this Board's decision in this case. The stay expires on April 11, 2011. Mr. Evans thereby has a direct stake in the outcome of this case.

[1] Complainants' counsel has invited Mr. Evans to submit this amicus brief.

II. INTERPRETATION OF SOX MUST BE GUIDED BY ITS REMEDIAL PURPOSE.

A. SOX is a remedial law, broadly construed to accomplish its remedial goals.

The Sarbanes-Oxley Act ("SOX") Section 806, 18 U.S.C.A. § 1514A, protects employees who provide information relating to a violation of any other rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders. In its whistleblower protection provision, SOX prohibits a publicly traded company and its officers from discharging an employee for providing information to a supervisory authority about conduct that the employee "reasonably believes" constitutes a violation of federal laws against mail fraud, wire fraud, bank fraud, securities fraud, any SEC rule or regulation, or any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1) (2009). Actions brought pursuant to SOX are governed by the legal burdens set forth under AIR 21, 49 U.S.C.A. § 42121. 18 U.S.C.A. § 1514A(b)(2)(C); *Collins v. Beazer Homes*, 334 F.Supp. 2d 1365. 1374 (N.D. Ga. 2004); *Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008).

SOX's legislative history reflects that "the law was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market." *Carnero v. Boston Scientific Corporation*, 433 F.3d 1, 13 (1st Cir. 2005) (citing Senator Leahy's comments at 149 Cong. Rec. S1725-01, S1725, 2003 WL 193278 (Jan. 29, 2003)). *See also*, *Mahony v. Keyspan Corporation*, 2007 U.S. Dist. LEXIS 22042, *13-14 (March 12, 2007 E.D.N.Y.) ("Given that SOX is a statute designed to promote corporate ethics by protecting whistleblowers from retaliation, it is reasonable to construe the statute broadly."). In *Day v. Staples, Inc*., 555 F.3d 42, 52 (1st Cir. 2009), the Court said:

> Congress passed this protection in response to:

> [A] culture, supported by law, that discourage[s] employees from reporting fraudulent behavior not only to the proper authorities . . . but even internally. This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity.
>
> S. Rep. No. 107-146, at 5 (2002). Section 1514A was enacted to remedy this problem. The § 1514A whistleblower provision thus serves to "encourage and protect [employees] who report fraudulent activity that can damage innocent investors in publicly traded companies." *Id*. At 19.

B. Other whistleblower protections are construed in light of the remedial purpose of their principal statute.

The ARB has recognized that a whistleblower protection statute "should be liberally interpreted to protect victims of discrimination and to further its underlying purpose of encouraging employees to report perceived . . . violations without fear of retaliation." *Fields v. Florida Power Corp*., USDOL/OALJ Reporter (HTML) ARB No. 97-070 , ALJ No. 96-ERA-22 (ARB Mar. 13, 1998) at 10 (decision under the Energy Reorganization Act, 42 U.S.C. § 5851, citing *English v. General Elec. Co*., 496 U.S. 72 (1990) and *Bechtel Constr. Co. v. Secretary of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws")). When interpreting a case under the employee protections, there is a need for "broad construction" of the statutes in order to effectuate their purposes. *DeFord v. Secretary of Labor*, 700 F.2d 281,286 (6th Cir. 1983). "Narrow" or "hypertechnical" interpretations to these laws, are to be avoided as undermining Congressional purposes. *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985).

III. OSHA COMPLAINTS ARE NOT COURT PLEADINGS AND NO PARTICULAR FORM IS REQUIRED.

A. OSHA complaints serve to initiate an investigation, not to give legal notice of a due process proceeding.

Whereas a complaint filed in federal court is intended to give notice of a claim so that the defendant may mount a defense, a whistleblower complaint filed with OSHA is intended to enlist the assistance of a federal agency to investigate the complainant's allegations. Once a complaint is filed, OSHA conducts an investigation. 29 C.F.R. § 1980.104(a). The Department's regulations do not limit the complainant to the allegations contained in the four corners of the complaint. Rather, the regulations explicitly contemplate that OSHA will proceed based on the complaint "supplemented as appropriate through interviews of the complainant . . .." 29 C.F.R. § 1980.104(b)(2). The OSHA investigation is not a due process proceeding. The ALJ hearing provides the parties with full due process protections, not the OSHA investigation.

The whistleblower complaint, as contemplated by federal statutes and regulations, is intended to provide a whistleblower with a simple means to initiate an investigation. Such complaints are not a mechanism for commencing litigation. The SOX statute, 18 U.S.C. § 1514A(b)(1)(A), provides for the process to start as follows: "A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by-- (A) filing a complaint with the Secretary of Labor . . .."

The environmental laws require that such complaints be filed within 30 days. 29 C.F.R. § 24.103(d). Complaints are often filed by parties who cannot retain legal counsel. Parties might not understand how to plead elements of a legal claim. The short period of time in which to file a complaint with OSHA further supports the conclusion that whistleblower complaints are merely intended to launch an investigative process.

B. DOL regulations specify that no particular form is required for initial complaints.

To make a valid administrative complaint, a complainant must simply meet the statutory requirements and request relief. *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008). The *Holowecki* decision makes clear that in administrative actions, not even notice pleading is required. Unlike federal court, a complaint to an administrative agency need not provide notice of the allegations supporting each element of a claim.

The rule at issue here, 29 C.F.R. § 1980.103(b), provides as follows:

> (b) Nature of Filing. 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 violations.

This rule requires that the complaint be in writing, and encourages complainants to describe the adverse actions alleged to violate the law. The rule does not require specificity of pleading for the alleged protected activity. It is inappropriate and contrary to the purpose of the law to borrow a standard of pleading from the civil rules when DOL has its own rule rejecting any form.

In *Holowecki,* the Supreme Court explained that, in addition to the information required by relevant regulations (an allegation and the name of the charged party), if a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee. The proper test, according to the Court, is "whether the filing, taken as a whole, should be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights." At the beginning of the opinion, the Court explained that determination of the validity of a complaint will require examination of the statute and regulation governing such cases. The Court later added:

> It is true that under this permissive standard a wide range of documents might be classified as charges. ***
>
> The system must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes. It thus is consistent with the purposes of the Act that a charge can be a form, easy to complete, or an informal document, easy to draft.

Not only is it permissible under the regulations to file a complaint that lacks a "full statement" of the relevant acts and omissions, the ARB has also permitted oral complaints. *See*, *e.g*., *Roberts v. Rivas Envtl. Consultants*, 96-CER-1, 1997 WL 578330, at *3 n.6 (ARB Sept. 17, 1997) (oral statement to OSHA investigator, and the investigator's internal memorandum summarizing the oral complaint, satisfied the "in writing" requirement of 29 C.F.R. Part 24); *Dartey v. Zack Co*., No. 82-ERA-2, 1983 WL 189787, at *3 n.1 (Sec'y of Labor Apr. 25, 1983) (adopting ALJ's findings that complainant's filing of a complaint with 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 29 C.F.R. Part 24).

C. *Iqbal* and *Twombly* do not apply to DOL administrative complaints.

Iqbal and *Twombly* do not apply to Department of Labor complaints. Under *Swierkeiewicz v. Sorema N.A*., 534 US. 506, 122 S.Ct. 992 (2002), no heightened pleading is required in any employment discrimination cases. In *Ashcroft v. Iqbal,* 556 US. ___, 129 S. Ct. 1937 (2009), the plaintiff accused government officials of purposefully violating his First or Fifth Amendment rights. The Supreme Court required the complaint to allege facts that would allow the court to plausibly infer such purposeful invidious discrimination. This case law is inapplicable to administrative complaints. Under *Swierkeiewicz,* it does not even apply to employment discrimination claims in federal court. Similarly, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) has no application. In employment law, it is not necessary to find even an intent to lie to conclude that a given reason is pretextual. *St. Mary's Honor Center v. Hicks*, 509

U.S. 502, 511 (1993). *Iqbal* presents standards and requirements that do not apply here.

The difference in pleading standards between U.S. District Court and the Department of Labor present a consideration for complainants in deciding whether to file a claim in U.S. District Court. Those who choose to opt out of the Department of Labor process in favor of federal court will be voluntarily assuming a duty to plead their claim in the manner acceptable to the federal courts.

D. Applying pleading standards to OSHA complaints is inconsistent with public policy.

A myriad of differences distinguish OSHA administrative complaints from complaints filed in federal district courts. These include the role of OSHA in conducting an investigation and preparing a determination, the short time limits, the regulatory rejection of any required form, and the absence of motions to dismiss based on pleading deficiencies. Federal pleading standards should not be applied to whistleblower complaints, and dismissal of a complaint pursuant to Rule 12(b)(6) standards is not and should not be available. The Secretary has recognized that administrative complaints are "informal filings." In *Richter v. Baldwin Associates*, No. 84-ERA-9-12, slip op., at 9-10 (Sec'y of Labor March 12, 1986), a whistleblower case concerning the ERA, the Secretary explained that:

> This complaint, although "equivalent to the filing of a formal legal complaint," *Kansas Gas & Electric Co. v. Brock*, slip op. at 8, is not a formal pleading setting forth legal causes of action. Rather it is an informal complaint filed with the Wage and Hour Division of the U.S. Department of Labor for the purpose of initiating an investigation on behalf of the Secretary of Labor, who has been charged with the responsibility of administrating section 5851 . . . . The complaint is, therefore, a most informal document.

See also *Ruud v. Westinghouse Hanford Co*., ARB Case No. 96-087, n.27 (ARB November 10, 2007) (explaining that "[o]ur disposition comports with Department of Labor precedent that

complaints are informal filings").

In *Minard v. Nerco Delamar Co*., 92-SWD-1 (Sec'y Jan. 25, 1994), an SWDA whistleblower case, the complainant alleged that he was fired by the Respondent because he complained to management about the dumping of antifreeze and a spill of oil. The Complainant, however, stipulated that neither antifreeze nor motor oil is classified as hazardous waste under the SWDA, and the ALJ recommended dismissal based on lack of jurisdiction. The Secretary, however, concluded that where the complainant has a reasonable belief that the substance is hazardous and regulated as such, he or she is protected under the SWDA. In applying the reasonable belief test, the Secretary considered whether "under the circumstances it was reasonable, given [the Complainant's] training and experience . . .." Protected activity does not have to cite to the law. *Van Asdale v. Int'l Game Technology*, 577 F.3d 989 (9th Cir. 2009) ("An employee need not cite a code section he believes was violated . . .."); *Ruud*, cited above.

In *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 397, 71 L. Ed. 2d 234, 102 S. Ct. 1127 (1982), the Supreme Court stated:

> In *Love v. Pullman Co.,* 404 U. S. 522 (1972), we announced a guiding principle for construing the provisions of Title VII. Declining to read literally another filing provision of Title VII, we explained that a technical reading would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Id.* at 404 U. S. 527. That principle must be applied here as well.

Administrative agencies have a duty to consider the whole record. *NLRB v. A & T Mfg. Co*., 738 F.2d 148, 149 (6th Cir. 1984). See also 29 C.F.R. § 18.57(b) (the ALJ decision "shall be based upon the whole record"); *Hall v. US Army*, ARB Nos. 02-108, 03-013, ALJ No. 1997-SDW-5 (Dec. 30, 2004), p. 28. To do that, they must first make the record. It is from the record that cases can be decided on the merits.

IV. 29 C.F.R. § 18.40 IS THE EXCLUSIVE MEANS FOR PRE-HEARING DISMISSAL BY AN ALJ.

29 C.F.R. § 1980.104 allows OSHA to dismiss a complaint at the investigatory level. After reviewing the complaint and conducting appropriate interviews, OSHA may dismiss a complaint for failure to make a prima facie showing. 29 C.F.R. § 1980.104(d)(1). However, the regulations do not contain a similar provision by which an ALJ may dismiss a complaint for failure to make a prima facie showing. It would be illogical for DOL regulations to provide an analog to FRCP 12 when the DOL regulations do not require filing any complaint.

After OSHA investigates a complaint and issues its findings and order, any party who desires review may file objections to the findings and order and request a *de novo* hearing before an ALJ. There is no requirement in the Part 1980 or Part 24 regulations that a whistleblower file a new or amended complaint when he seeks relief from an ALJ. See 29 C.F.R. § 24.106. Similarly, a whistleblower is not required to file a complaint when he or she petitions the Board for review. Indeed, there is no requirement that the complaint filed with OSHA be filed with either adjudicatory body at any point. The availability of the OSHA determination mitigates any concerns that respondents might not know what they are responding to. The Rules of Practice and Procedure for Administrative Law Judges ("ALJ Rules") likewise illustrate that administrative complaints filed with OSHA are not akin to court complaints. The ALJ Rules define "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).

A complaint filed with OSHA to initiate an investigation does not initiate an adjudicatory proceeding with the ALJ; rather, objections to findings initiate such a proceeding, and a petition for review initiates a proceeding before the Board. *See* 29 C.F.R. § 24.106; 29 C.F.R. § 24.110. Accordingly, a "complaint" filed with OSHA does not fit within the definition of "complaint" as used in the ALJ Rules, nor does a "complaint" filed with OSHA constitute a "pleading" as that term is defined in the Rules. 29 C.F.R. § 18.2(i). The requirements of the ALJ Rules concerning

complaints thus are inapplicable to administrative complaints filed with OSHA. Other provisions in the ALJ Rules confirm this conclusion. For example, administrative complaints filed with OSHA are not "served" pursuant to 29 C.F.R. § 18.3(d), nor does the respondent file an answer pursuant to 29 C.F.R. §§ 18.5(a) and (d)(2).

A civil action in federal court is commenced by the filing of a complaint. Fed. R. Civ. P. 3. Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 12(b)(6) provides that a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted, which may result in a judicial determination that the complaint should be dismissed with prejudice at the outset of the litigation. 29 C.F.R. Part 18 has no analogue.

V. THE CONTENT OF AN INITIAL OSHA COMPLAINT IS NOT GERMAINE TO ALJ PROCEEDINGS.

ALJ proceedings are commenced with an objection to an OSHA determination and a request for hearing. As discussed above, the OSHA complaint and the request for hearing are not "pleadings" governed by the Federal Rules of Civil Procedure, and for good reason. The OSHA investigation is a predicate to ALJ proceedings. The ALJ and the parties have the benefit of OSHA's determination, and do not need formal pleading.[2] The DOL process represents the triumph of substance over form. Cases should be decided on the merits, not on disputes about the specificity of pleading. Focusing on the merits furthers the purpose of maximizing the probability that wronged employees receive their remedies. Consideration of OSHA complaints may be

[2] Still, the OSHA determination has no weight. *Majors v. Asea Brown Boveri, Inc*., 96-ERA-33, D&O of ARB, at 1, n. 1 (Aug. 1, 1997); *Collins v. Beazer Homes*, 334 F.Supp. 2d 1365. 1377 n. 16 (N.D. Ga. 2004). The initial determination is of no force or effect. *Hobby v. Georgia Power Co*., 90-ERA-30 (Sec'y Aug. 4, 1995). The OSHA investigation is not a due process hearing. The ALJ hearing is. Therefore, it is appropriate that the ALJ's RD&O has weight, and that the OSHA determination does not.

necessary to assure that the Department has jurisdiction. In this context, it is the timing of the complaint, rather than its contents, that is relevant.

VI. CONCLUSION

The remedial purpose of the statutes call for decisions on the merits of each case. Much time and energy will be saved if judges focus on the merits and not on technicalities of pleading. As Department rules reject any requirement of form for initial complaints, none should be required here. Whistleblower cases in this Department have no pleading requirements comparable to the Federal Rules of Civil Procedure.

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I certify that a true copy of the foregoing Brief of Amicus Curiae Douglas Evans was served by regular mail, unless email is indicated, on the following persons of the following address on this 31st day of December, 2010:

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