FINAL

No. 04-3245

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY C. SASSÉ,

Petitioner

v.

DEPARTMENT OF LABOR; UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE,

Respondents

On Petition for Review of a Final Order of the
Administrative Review Board,
United States Department of Labor

BRIEF FOR THE DEPARTMENT OF LABOR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: Page

Cases--continued: Page

Cases--continued: Page

Constitution, statutes and regulations:

Constitution, statutes and regulations--continued: Page

STATEMENT CONCERNING ORAL ARGUMENT

Counsel for the Department of Labor requests oral argument. Counsel is in the unusual and sensitive position of defending a decision of the Department of Labor adjudicating a dispute between an Assistant United States Attorney and the Department of Justice. The factual record is also lengthy. Counsel believes that oral argument will assist the Court in understanding the record and the issues to be decided.

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STATEMENT OF JURISDICTION

This case arises under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C. 7622, Solid Waste Disposal Act (SWDA), 42 U.S.C. 6971, and Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1367. The Secretary of Labor has jurisdiction to investigate and adjudicate such cases pursuant to 42 U.S.C. 7622(b), 42 U.S.C. 6971(b), and 33 U.S.C. 1367(b). The Department of Labor's Administrative Review Board issued the final decision in this case pursuant to a delegation of authority from the Secretary. 29 C.F.R. 24.8(a); see Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (2002) (current

delegation). This Court has jurisdiction to review the Board's decision because the alleged violation occurred in Cleveland, Ohio and petitioner Sassé resides or transacts business in that area. See 42 U.S.C. 7622(c)(1); 42 U.S.C. 6971(b), 6976(b); 33 U.S.C. 1367(b), 1369(b). The Board's January 30, 2004 final decision and order is a final order that disposes of all parties' claims. The February 26, 2004 petition for review was filed within 60 days of the Board's January 30, 2004 decision and is therefore timely. See 42 U.S.C. 7622(c)(1) (60-day appeal period); 42 U.S.C. 6976(b) (90-day period); 33 U.S.C. 1369(b) (120-day period).

STATEMENT OF THE ISSUES

1. Whether the Department of Labor's Administrative Review Board correctly dismissed as untimely a complaint by an Assistant United States Attorney (AUSA) against the Department of Justice where the Board found no discrete adverse action within the applicable limitations period and no hostile work environment.

2. Whether the Board correctly rejected an ALJ's sua sponte amendment of the AUSA's complaint to include a post-complaint suspension.

3. Whether the Board correctly concluded, in the alternative, that prosecutorial discretion barred consideration

of some of the AUSA's allegations and that the other allegations failed on the merits.

STATEMENT OF THE CASE

In November 1996, Gregory Sassé, an AUSA, filed a complaint with the Department of Labor under the CAA, SWDA, and FWPCA whistleblower provisions, alleging that his employer, the United States Department of Justice (DOJ), was retaliating against him for investigating and prosecuting environmental crimes. (R 1, APX 89-153).[1] DOJ denied access to information, and on that basis the Department of Labor's Wage and Hour Division determined in June 1998 that DOJ had violated the CAA, SWDA, and FWPCA provisions. (R 3a, APX 154-157). DOJ obtained a hearing before an administrative law judge pursuant to 29 C.F.R. 24.4(d)(3), and moved to dismiss the complaint for lack of jurisdiction and failure to state a claim. (R 4, APX 158-159; R 8, APX 162-205). In December 1998, the ALJ denied DOJ's motion (R 24, APX 268-275), and in August 2000, the Department of Labor's Administrative Review Board denied DOJ's request for interlocutory appeal. (R 52, APX 282-285).

In June and July 2001, the ALJ held a hearing on the merits and in May 2002, the ALJ issued a recommended decision and order

[1] Sassé also sued individual DOJ employees, but the ALJ dismissed them as defendants in March 1999 (R 35, APX 278-279) and Sassé has not appealed the dismissal.

pursuant to 29 C.F.R. 24.7. The ALJ concluded that DOJ had not violated the CAA, SWDA, or FWPCA whistleblower provisions with respect to the allegations in Sassé's original complaint. (R 150 Administrative Law Judge Decision ("ALJ") 5-14, APX 62-71). The ALJ concluded that DOJ had violated these statutes, however, with respect to a post-complaint suspension that, in the ALJ's view, was tried by consent at the hearing. (Id. at 14-23, APX 71-80).

In January 2004, the Administrative Review Board issued a final decision and order dismissing Sassé's complaint. The Board concluded that Sassé's complaint was untimely under the applicable 30-day limitations period and, alternatively, that the complaint failed because prosecutorial discretion barred review of some of DOJ's actions and Sassé failed to prove that other DOJ actions were discriminatory. (R 197 Administrative Review Board Decision ("ARB") 8-26, 34-36 APX 25-43, 51-53). The Board also held that the ALJ erred by amending Sassé's complaint to include the post-complaint suspension because the suspension was neither a continuing violation nor tried by consent. (Id. at 29-30, APX 46-47). Alternatively, the Board found that the suspension was not discriminatory. (Id. at 30-33, APX 47-50). Sassé seeks review of the Board's decision.

STATEMENT OF FACTS

A. CAA, SWDA, and FWPCA provisions

The Clean Air Act (CAA) establishes standards to regulate air pollution. See 42 U.S.C. 7401 et seq. The Solid Waste Disposal Act (SWDA) establishes standards to regulate the disposal of solid waste, see 42 U.S.C. 6901 et seq., and the Federal Water Pollution Control Act (FWPCA) establishes standards to regulate water pollution. 33 U.S.C. 1251 et seq. Persons who violate the statutes are subject to civil and criminal sanctions. 33 U.S.C. 1319; 42 U.S.C. 6928; 42 U.S.C. 7413.

The CAA, SWDA, and FWPCA also prohibit discrimination against employees who have engaged in activities protected under those statutes. Under the CAA, an employer may not discriminate against an employee because the employee

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
>
> (2) testified or is about to testify in any such proceeding, or
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C. 7622(a). The SWDA prohibits persons from discriminating against an employee or an authorized representative of employees because

> such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

42 U.S.C. 6971(a). The FWPCA similarly prohibits discrimination against an employee or representative because

> such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

33 U.S.C. 1367(a). The Secretary of Labor adjudicates complaints filed under these employee protection provisions. 33 U.S.C. 1367(b); 42 U.S.C. 6971(b); 42 U.S.C. 7622(b); see also 29 C.F.R. pt. 24 (implementing regulations).

B. Activities leading to Sassé's complaint

Since 1983, Gregory Sassé has been an Assistant United States Attorney (AUSA) in the Northern District of Ohio. (R 197 ARB 2, APX 19; Sassé TR 32, APX 340). Initially, he was assigned to the Organized Crimes Drug Task Force, where he was considered competent but not on a par with other attorneys in the unit. (R 197 ARB 22, APX 39; Sassé TR 35, APX 341; McHargh

TR 890-891, APX 403-404; see RX O-2, APX 711-712 ("fully successful" ratings)). He was then assigned to the Economic Crimes Unit, where his supervisor found him experienced and able but not productive enough. (R 197 ARB 22, APX 39; Rowland TR 898, APX 405). In an attempt to find him a niche that would satisfy and motivate him, the Chief of the Criminal Division decided in 1987 to have Sassé learn about legislation criminalizing violations of environmental laws. (R 197 ARB 22, APX 39; Sassé TR 42, 441, APX 342, 368; Rowland TR 899, APX 406).

In 1988 and 1989, the Division Chief and Sassé's supervisor assigned him two environmental crimes cases, one of which involved dumping of toxic materials at Cleveland's airport. (R 197 ARB 2, APX 19; Sassé TR 47, APX 343; Rowland TR 903, APX 407). See United States v. Bogas, 920 F.2d 363 (6th Cir. 1990) (airport case); United States v. Rutana, 932 F.2d 1155 (6th Cir.) (other case), cert. denied, 502 U.S. 907 (1991). Sassé received his first overall "excellent" appraisals in 1989, 1990, and 1991, the years he worked on these cases. (R 197 ARB 2, APX 19; RX O-2, APX 711-712).

In 1991, Sassé attended an environmental conference in New Orleans with the United States Attorney, and after the conference she asked him to help form an environmental task force of federal, state, and local agencies. (R 197 ARB 2, APX

19; Sassé TR 123, 127-129, APX 346, 347). During the next quarterly "file review" of his pending cases, Sassé told the Division Chief that he was going to be very busy on the task force and did not know if he could get to his other cases. (R 197 ARB 2-3, APX 19-20; Cain TR 1078, APX 425). The Division Chief, who was aware that Sassé had fallen behind in his case assignments, checked with the First AUSA, who had supervisory responsibility over the Division Chiefs, to see whether Sassé should make the task force a full time job to the exclusion of his other cases. (R 197 ARB 3, 21, APX 20, 38; Cain TR 1078-1079, APX 425; RX N-3, APX 709). The First Assistant viewed it appropriate to assign other work. (R 197 ARB 3, APX 20; Foley TR 1136, APX 430; see Cain TR 1079, APX 425). At the next file review the Division Chief told Sassé that "just because he went gallivanting around New Orleans with the United States Attorney, didn't mean he didn't have to finish his other work." (R 197 ARB 3, APX 20; Cain TR 1079, APX 425).

In 1992, Sassé received an overall rating of "excellent" for his 1991 appraisal, but believed he was "downgraded" from "outstanding" to "excellent" on the "appeals" element of his appraisal because of his environmental work. (R 197 ARB 3, 20, APX 20, 37; Sassé TR 116-117, APX 344). In particular, he blamed the Chief of the Criminal Division, who had opposed taking appeals in Bogas and Rutana. (R 197 ARB 13, APX 30; Cain

TR 1081-1085, APX 425-426; RX B-2, APX 681). The Deputy Chief of the Criminal Division explained to Sassé that the "appeals" rating, which made no difference to Sassé's overall rating, reflected the "help" that Sassé received from the Environmental Crimes Section of DOJ's Environmental and Natural Resources Division in Washington, D.C., which wrote the government's appellate brief in Bogas and substantially re-wrote Sassé's draft brief in Rutana. (R 197 ARB 19-20, APX 36-37; Sassé TR 119, 122, 352, APX 345, 363). Sassé thought that such help was irrelevant and believed he should also have received an "outstanding" rating for appeals in 1992, a year he had no appeals. (R 197 ARB 20, APX 37; Sassé TR 120, APX 345).

For 1993, Sassé again received an overall rating of excellent, but the Deputy Chief noted concerns that Sassé was taking too much leave, not returning phone calls, and not moving his cases. (R 197 ARB 3, APX 20; Stickan TR 934-945, APX 408-411). One of those cases was a major environmental case involving a company that collects and disposes of hazardous waste throughout the United States. (Stickan TR 935-936, APX 408-409). For 1994, Sassé received another overall rating of "excellent," but was reduced from "outstanding" to "excellent" on the "training" element, and from "excellent" to "fully successful" on the "case management" element. (R 197 ARB 3, 20, APX 20, 37; Sassé TR 356-357, APX 364; RX G-2a, APX 685-701).

The Deputy Chief explained that the case management rating reflected delays and mistakes Sassé had made in assigned cases, and the training rating reflected Sassé's decreased participation in office training activities in 1994. (Stickan TR 946-962, 968, 970-971, APX 411-415, 417; see also R 197 ARB 21, APX 38; Sassé TR 369-371, APX 365).

In 1995, Sassé responded to the changes in his 1994 appraisal, which made no difference to his overall rating, by filing a grievance. (R 197 ARB 3, 8, APX 20, 25; Sassé TR 354-355, 391, APX 363, 367; RX G-2b, APX 702-705). In the grievance Sassé complained about supervisory hostility toward his environmental work and blamed his case management problems on an incompetent secretary. (R 197 ARB 3, 8, APX 20, 25; Sassé TR 377-379, APX 366). In his view, the Division Chief assigned this secretary to do his work to harass him. (R 197 ARB 22, APX 39; Sassé TR 156-158, 306-309, APX 348, 361). The Deputy Chief explained that neither the Chief nor Sassé's environmental work had anything to do with the secretarial assignment. (R 197 ARB 22, APX 39). Instead, this secretary was assigned in October 1992 to Sassé and to another AUSA who did no environmental work because their offices were close to her office. (R 197 ARB 22-23, APX 39-40; Stickan TR 989-990, APX 419). The Deputy Chief also took steps to improve that secretary's performance. (R 197

ARB 23, APX 40; Stickan TR 965-966, 992-994, APX 416, 420; see also Sassé TR 515, APX 375).

While Sassé was grieving his 1994 "downgrades," the major environmental case involving a company that collects and disposes of hazardous waste throughout the United States was transferred from Sassé to DOJ's Environmental and Natural Resources Division (ENRD). (R 197 ARB 3, APX 20; Sassé TR 601, APX 380). ENRD later decided to close the case without prosecuting anyone. (R 197 ARB 3, APX 20; Uhlman TR 591-621, APX 378-385). Sassé thought the transfer was a "good idea" (Sassé TR 493, APX 370), but later asserted that his Division Chief had transferred the case to ENRD because of his personal antipathy toward environmental cases and to protect former Environmental Protection Agency (EPA) officials who now worked for that company. (R 197 ARB 3, APX 20; Sassé TR 271-286, APX 355-359). The Chief of ENRD's Environmental Crimes Section (ECS) explained that ENRD became involved in the case in the fall of 1994 when it received an unusual request from Sassé's office to grant immunity to a "whole bunch" of individuals. (Uhlman TR 571-574, 601, APX 377, 380; see RX Q-8, APX 713). The case was transferred to ENRD after the EPA requested a transfer. (Sassé TR 491-492, APX 369; Stickan TR 1018, APX 424). ENRD decided against prosecution because of weaknesses in the evidence. (Uhlman TR 613-617, APX 383-384). The Chief of

ECS, who was assigned to the case, explained that Sassé agreed with the decision not to prosecute and that ECS had no communications with Sassé's supervisors about the matter. (Uhlman TR 617-619, 682, APX 384-385, 386; see also Sassé TR 495-496, APX 370; R 197 ARB 13 n.6, APX 30-31).

In February 1996, the Executive Office for the United States Attorneys (EOUSA) denied Sassé's grievance. (RX G-3, APX 706-708; Sassé TR 390, APX 367; see R 197 ARB 20, APX 37). In April 1996, Sassé agreed with the Deputy Chief that the secretary Sassé had complained about had improved so much that she should be rated excellent in every performance element for 1995. (R 197 ARB 23, APX 40; Sassé TR 516, APX 375; RX D-4, APX 682-684). In November 1996, Sassé filed a 65-page complaint with the Department of Labor, alleging that supervisory actions discussed above amounted to discrimination prohibited by the CAA, SWDA, and FWPCA whistleblower provisions. (R 1, APX 89-153). He also alleged that he had been assigned a higher caseload than an average AUSA, harassed during file reviews, and denied awards and training because of his environmental activities. (Id. at 20-21, 32, 52, APX 108-109, 120, 140).

C. Post-complaint activities

In 1997, while still working as an AUSA, Sassé proposed to officials of the National Aeronautics and Space Administration (NASA) that he work for them in a private capacity to help

ensure that NASA contractors adhere to environmental laws. (R 197 ARB 3-4, APX 20-21; 1/14/00 Letter from DeFalaise to Sassé, at 1-2, APX 329-330 (R 154 attachment); Sassé TR 505-507, APX 373). At that time, NASA owned property next to the Cleveland airport that Sassé had discovered, from his work on Bogas and the environmental task force, to be severely contaminated. (R 197 ARB 4, APX 21; Sassé TR 256-258, APX 353-354; see also Watson TR 206-220, APX 349-352). The NASA officials referred Sassé's business proposal to NASA's Office of Inspector General (OIG), who in turn referred the matter to DOJ's OIG. (R 197 ARB 4, APX 21; DeFalaise Letter, supra, at 2, APX 330). In late 1998, DOJ officials informed Sassé that he was under a criminal investigation in connection with his NASA proposal. (R 197 ARB 4, APX 21; Sassé TR 502, 507, APX 372, 373). Sassé filed a whistleblower complaint with the Department of Labor alleging that the investigation was retaliatory. (Sassé TR 508-509, APX 373-374). The Department of Labor investigated and found no discrimination, and Sassé failed to seek review of that determination. (Id. at 509-510, APX 374).

In the summer of 1999, Sassé took a medical leave of absence for heart surgery. (Sassé TR 322, APX 362). Concerned about the status of pending environmental cases, the EPA agent in charge of investigations asked DOJ to assign a new attorney to Sassé's cases while he was out of the office. (Martin TR

704-705, APX 387). The Deputy Chief in Sassé's division assigned a new attorney and personally assumed Sassé's role in chairing the environmental task force. (Martin TR 711, APX 388; Stickan TR 1002-1004, APX 421-422). When Sassé returned to work, his appearance and actions raised concerns about the status of his health. (Edwards TR 806-816, APX 396-399; Stickan TR 1005-1008, APX 422-423). Accordingly, the Deputy Chief chose not to give Sassé his prior caseload. (Stickan TR 1005-1006, APX 422). The EPA agent in charge of investigations felt that the attorney who had assumed Sassé's environmental cases was doing "outstanding" work and agreed with the decision not to assign the cases back to Sassé. (Martin TR 730, APX 391). Sassé was invited to attend meetings of the environmental task force and attended one or two after his surgery, then stopped attending. (Sassé TR 254, APX 353).

On January 14, 2000, the EOUSA proposed to suspend Sassé for five days because his business proposal to NASA violated ethical standards of DOJ and the Office of Government Ethics. (R 197 ARB 4, APX 21; DeFalaise Letter, supra, at 1-2, APX 329-330). Those standards require, among other things, that DOJ employees obtain prior approval before engaging in outside employment that involves a subject matter in their employing agency's area of responsibility, 5 C.F.R. 3801.106(c), and prohibit a government employee from using public office for his

own private gain, 5 C.F.R. 2635.702. (R 197 ARB 4, APX 21); see also 18 U.S.C. 208 (criminal conflict of interest provision).

In late January or early February 2000, Sassé received a request from a staff person in Congressman Kucinich's office to assist that office in evaluating environmental issues at the Cleveland airport, which was in the Congressman's district. (R 197 ARB 4, APX 21; Sassé TR 254-256, APX 253). On February 2, 2000, Sassé informed the First AUSA of this contact. (R 197 ARB 4, APX 21; RX Z-4, APX 725). The First AUSA obtained more details from Sassé on the environmental problems and then asked him to write a memo detailing his concerns. (R 197 ARB 4, APX 21; Edwards TR 831-832, 839, APX 400-401; RX Z-5, APX 726). Sassé wrote a memo alleging that NASA officials were covering up contamination on the NASA property near the airport. (R 197 ARB 4, APX 21; CX 17-E, APX 433-435). DOJ, the EPA, the Federal Bureau of Investigation (FBI), and NASA's OIG investigated, and in June or July 2000, they unanimously concluded that there was no current evidence of criminal wrongdoing. (R 197 ARB 4, APX 21; Martin TR 721-723, APX 389-390; Edwards TR 840-845, APX 401-402; CX 17-E, APX 433-435).

On May 2, 2000, acting on the January 14, 2000 proposed disciplinary action, the Director of EOUSA suspended Sassé for five days for his October 1997 attempt to obtain private employment with NASA. (R 197 ARB 4, APX 21; 5/2/00 Letter from

Santelle to Sassé, APX 333-335 (R 154 attachment)). The Director concluded that Sassé had violated the DOJ ethical regulation requiring prior approval before an employee engages in outside employment and the Office of Government Ethics regulation prohibiting an employee from using his public office for private gain. (R 197 ARB 4-5, APX 21-22; Santelle Letter, supra, at 2, APX 334). Sassé did not appeal the suspension, and he served the suspension from July 17, 2000, through July 21, 2000. (R 197 ARB 5, APX 22).

Sassé has continued to receive "meets to exceeds" performance ratings. (Stickan TR 983, APX 418). He continues to be paid at the maximum pay rate for AUSAs. (R 150 ALJ 5, APX 62; Edwards TR 758-760, APX 392-393).

ADMINISTRATIVE PROCEEDINGS

A. DOJ's motions to dismiss the case and exclude evidence

In July 1998, DOJ filed a motion to dismiss the complaint for lack of subject matter jurisdiction and failure to state a cause of action within the applicable 30-day limitations period. (R 8, APX 162-205). Before ruling on the motion the ALJ asked Sassé for a list of particular events alleged to be discriminatory. (R 18, at 46-47, APX 211-212). Sassé responded, in October 1998, with a 211-paragraph list that largely repeated allegations in his 65-page complaint. (R 20, APX 213-266). In December 1998, the ALJ recommended that DOJ's

motion be denied because Sassé had alleged activity protected under the CAA, SWDA, and FWPCA whistleblower provisions and it was premature to determine whether the complaint was timely. (R 24, at 5, 8, APX 272, 275). In August 2000, the Board denied interlocutory review, stating that it had subject matter jurisdiction and that DOJ's argument about subject matter jurisdiction addressed a different issue -- whether Sassé's actions could be considered protected activities under the CAA, SWDA, and FWPCA provisions -- that could be addressed after an ALJ adjudication. (R 52, at 3-4, APX 284-285).

On remand, DOJ filed a motion for partial summary decision, arguing that alleged incidents occurring outside the limitations period were time-barred. (R 84, APX 289-298). DOJ later filed a motion for summary decision repeating this argument and also arguing that Sassé's prosecution of environmental crimes was not protected activity and that Sassé's failed to establish a hostile work environment. (R 98, at 1, 21-27, APX 300, 319-325). The ALJ overruled the motion without discussion and proceeded to hear the case on the merits. (R 197 ARB 5, APX 22; TR 6, APX 339). At that hearing, DOJ moved to strike evidence concerning the post-complaint condition of NASA's property near Cleveland's airport and post-complaint Congressional request for Sassé's assistance. (R 197 ARB 29, APX 46; TR 1106-1107, APX 427). Sassé's counsel opposed the motion, stating that

> there is no specific claim related to NASA. There is no specific claim related to the other matters which the Government seeks to strike.

(R 197 ARB 29, APX 46; TR 1108, APX 427). The ALJ denied the motion, stating that the evidence concerned "a continuation of a pattern of violations." (R 197 ARB 29-30, APX 46-47; TR 1108-1109, APX 427). Stating that "these matters have been tried," the ALJ then amended Sassé's complaint "to include continuing violations." (R 197 ARB 30, APX 47; TR 1109, APX 427).

B. The ALJ's recommended decision

In his May 2002 recommended decision, the ALJ concluded that DOJ had not violated the CAA, SWDA, or FWPCA whistleblower provisions with respect to the allegations in Sassé's original complaint. (R 150 ALJ 5-14, APX 62-71). The ALJ reasoned that the activities Sassé claimed were protected -- prosecuting environmental crimes and serving on an environmental task force -- were not protected because they were part of his normal job duties. (Id. at 5-8, APX 62-65). The ALJ also concluded that DOJ had not retaliated against Sassé for engaging in these activities. (Id. at 8-9, APX 65-66). After reviewing ENRD's reasons for not prosecuting the major environmental case that was transferred from Sassé, the ALJ concluded that DOJ's decision not to prosecute was beyond the scope of the whistleblower provisions. (Id. at 9-13, APX 66-70).

The ALJ also concluded, however, that DOJ had violated the whistleblower provisions when it suspended Sassé for five days in May 2000 in retaliation for his contacts in January or February 2000 with Congressman Kucinich's office. (R 150 ALJ 14-23, APX 71-80). The ALJ recognized that his rulings at the hearing had not "directly addressed" whether to consider post-complaint evidence as evidence of retaliation for post-complaint protected activity rather than evidence of continuing retaliation for pre-complaint protected activities. (Id. at 14-15, APX 71-72). The ALJ concluded, however, that evidence concerning retaliation for post-complaint protected activity should be considered because DOJ "had the opportunity to and did address these matters with evidence, cross-examination and argument." (Id. at 15, APX 72). In the ALJ's view, the May 2000 suspension was retaliatory because the NASA engineer, who was the only witness other than Sassé to testify for Sassé, had reported feeling pressure from NASA over the airport property. (Id. at 16-18, 21, APX 73-75, 78). The ALJ also inferred discrimination because, in the ALJ's view, DOJ's suspension "took the form of an arbitrary enforcement of a petty government regulation [that] prohibits federal personnel from using government owned equipment for their own use." (Id. at 21, APX 78).

C. The Administrative Review Board's decision

In its January 2004 decision, the Board held that Sassé's complaint was untimely under the applicable 30-day limitations period in 33 U.S.C. 1367(b), 42 U.S.C. 6971(b), and 42 U.S.C. 7622(b)(1). (R 197 ARB 8, APX 25). The Board reasoned that each adverse action alleged by Sassé in his complaint occurred outside that 30-day period. The Board rejected Sassé's argument that his secretary was "reassigned" to him within the 30-day period, and held that no hostile work environment existed to enlarge that period. (Id. at 9-10, APX 26-27).

Alternatively, the Board held that Sassé's complaint failed on the merits. (R 197 ARB 13-26, APX 30-43). Without deciding whether Sassé's work on environmental crimes was protected activity, the Board held it could not review actions by DOJ that were based on prosecutorial discretion, i.e., the recommendation by the Chief in Sassé's Division not to appeal Bogas and Rutana, and ENRD's decision not to pursue the major environmental case that Sassé had previously handled. (Id. at 13-18, APX 30-35). The Board reviewed other DOJ actions, however, contrary to arguments by DOJ and the Department of Labor's Assistant Secretary for Occupational Safety and Health (OSHA). (Id. at

13-17, APX 30-34).[2] The Board found that none of these other actions was discriminatory. (Id. at 19-21, APX 36-38 (no discrimination in performance evaluations and awards); id. at 21-22, APX 38-39 (concerns of Sassé's Division Chief stemmed from Sassé's low productivity, not his work on an environmental task force); id. at 22-23, APX 39-40 (secretarial assignment was based solely on office proximity); id. at 23-24, APX 40-41 (Sassé's caseload was not significantly greater than average for an AUSA or a result of supervisory animus); id. at 25-26, APX 42-43 (no obstruction of Sassé's access to training and instruction, much less obstruction for discriminatory reasons)).

The Board also held that the ALJ erred as a matter of law by amending Sassé's complaint to include a claim that the May 2000 suspension was discriminatory. (R 197 ARB 29-30, APX 46-47). The time period for challenging the suspension expired in June 2000, the Board reasoned, because the suspension was a discrete act and not, as the ALJ concluded, part of a continuing violation. (Id. at 29, APX 46). DOJ also did not try the

[2] The Assistant Secretary investigates whistleblower complaints and may participate as a party or amicus in administrative proceedings. 29 C.F.R. 24.1(c), 24.4, 24.6(f). Although the Assistant Secretary urged a different position than the Board adopted on some issues, this brief defends the Board's decision because the Board issues final agency decisions for the Department of Labor. 29 C.F.R. 24.8(a). The Department of Labor, rather than the Department of Justice, is the proper respondent on appeal. See Fed. R. App. P. 15(a)(2)(B).

suspension by consent, the Board stated, because evidence concerning Sassé's congressional contacts, the NASA property, and the suspension related to the complainant's reasoning and credibility. (Id. at 30, APX 47). Thus, the submission and consideration of this evidence did not indicate that an unlawful suspension claim was being heard. (See ibid. (the ALJ's recommended decision was the first notice DOJ received of a claim based on Sassé's suspension)).

Alternatively, the Board held that the suspension was not discriminatory. (R 197 ARB 30-33, APX 47-50). First, the Board found no evidence that the persons who suspended Sassé and recommended his suspension knew about Sassé's congressional contact, or that they had any motive to retaliate against Sassé because of that contact. (Id. at 31, APX 48). Second, the Board found that the ALJ's recommended decision was based on factual errors. (Id. at 32-33, APX 49-50). The ALJ found that Sassé was suspended for misusing government property, the Board stated, whereas the primary reason for the suspension was Sassé's serious breach of ethics in using his position as an AUSA to seek private employment with NASA. (Id. at 32, APX 49). The ALJ also found that adverse action was not taken until after Sassé's contact with Congressman Kucinich, the Board stated, when in fact the suspension was proposed before that contact and was the culmination of a process that began in 1997. (Id. at

32-33, APX 49-50). Finally, the Board found "no nexus whatever" between the experience of the NASA engineer with NASA and Sassé's experience in DOJ. (Id. at 33, APX 50).

SUMMARY OF ARGUMENT

I. Substantial evidence supports the Board's finding that Sassé's complaint was untimely. The applicable limitations period requires a complaint within 30 days after an alleged violation occurs. Sassé alleges discrete violations that occurred more than 30 days before his November 26, 1996 complaint, including claims about 1991 and 1994 performance appraisals, a 1992 decision to reassign Secretary X to Sassé, denial of awards, and a failure in 1995 to provide training. Under National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), these claims are time-barred even if they relate to acts occurring within the limitations period.

Sassé's hostile work environment claim is also untimely. Sassé has failed to prove that any acts contributing to a hostile work environment occurred within 30 days of his complaint, as required under Morgan. He has also failed to prove the existence of a hostile work environment. In arguing that a November 1996 assignment of Secretary X to Sassé makes his complaint timely, Sassé ignores the untimeliness of the discrete acts alleged in his complaint. He also fails to prove that a reassignment occurred in November 1996 because

substantial evidence supports the Board's finding of fact that Secretary X was not assigned to Sassé in November 1996.

II. The Board acted well within its discretion in finding that DOJ did not implicitly consent to a trial of Sassé's unpleaded claim that the May 2000 suspension was discriminatory. Implied consent requires that the parties understand that evidence presented at trial is aimed at the unpleaded issue. Implied consent does not exist when evidence is relevant to a pleaded issue as well as to the unpleaded one. Here, there was no implied consent because the post-complaint evidence of Sassé's business proposal to NASA, his contacts with Congressman Kucinich's office, and his continuing involvement with the NASA property near the Cleveland airport was relevant, under Board precedents, to the allegations in Sassé's complaint. Sassé's attorney also told the ALJ, when DOJ asked to exclude the evidence, that there was no specific claim related to these matters. The ALJ admitted in his recommended decision that, in allowing the evidence, the ALJ had not addressed whether the evidence related to a new claim based on Sassé's post-complaint congressional contacts. Contrary to Sassé's argument, DOJ did not get a fair chance to address the suspension evidence when the ALJ reopened the record, because the reopening had nothing to do with the suspension issue and the parties did not know that a new issue concerning the suspension had entered the case.

III. Alternatively, Sassé's claims fail on the merits. The Board permissibly construed the CAA, SWDA, and FWPCA whistleblower provisions not to permit the Board to examine DOJ's prosecutorial decisionmaking. It is well established that courts do not examine DOJ's prosecutorial decisionmaking because courts are not equipped to assess all factors relevant to prosecutorial decisionmaking and such an examination raises serious separation of powers concerns. Based on those concerns and on the principle that Congress would not abrogate DOJ's well-established prosecutorial authority without expressly saying so in statutory text, the Board concluded that the CAA, SWDA, and FWPCA whistleblower provisions do not allow the Department of Labor to examine DOJ's prosecutorial decisionmaking. Sassé's argument -- that the Board can review DOJ's prosecutorial decisionmaking to see if an adverse employment action resulted from DOJ hostility to prosecution of environmental crimes but not to set aside prosecutorial decisions -- should be rejected. Such review raises the same concerns that led courts not to review DOJ's prosecutorial decisionmaking in other contexts. In each case, review would require courts to assess factors they are not equipped to assess and raises serious separation of powers concerns by exposing DOJ's motives and decisionmaking to outside inquiry and possibly revealing government enforcement policies.

Substantial evidence supports the Board's findings that Sassé also failed to prove that DOJ's actions were discriminatory, even if they did not involve prosecutorial discretion. The record supports the Board's finding that Sassé received lowered ratings and no awards because of shortcomings in his work, including low productivity. Sassé and another attorney who did no environmental work were assigned to Secretary X in 1992 because their offices were close to hers, and in later years DOJ effectively addressed problems in Secretary X's work. Sassé's caseload was not significantly greater than the average for an AUSA, and he had access to training and instruction. DOJ suspended Sassé because he violated government ethics rules by using his DOJ position to attempt to obtain private employment with NASA. Sassé failed to establish his hostile work environment claim because his allegations of harassment, even if true, are not the kind of severe or pervasive harassment required to establish a hostile work environment claim. Sassé's contrary arguments are based mainly on his own testimony and speculative inferences that are insufficient to overturn Board findings of fact that are supported by substantial evidence.

ARGUMENT

I. THE BOARD CORRECTLY DISMISSED SASSÉ'S COMPLAINT AS UNTIMELY

A. Standard of review

This Court may overturn the Board's decision "only if we find that the decision 'is unsupported by substantial evidence' or if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Varnadore v. Secretary of Labor, 141 F.3d 625, 630 (6th Cir. 1998) (quoting 5 U.S.C. 706(2)(A)). The Board's findings on timeliness are reviewed for substantial evidence. See Varnadore, 141 F.3d at 630-631. That standard "is a lower standard than weight of the evidence and 'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" Painting Co. v. NLRB, 298 F.3d 492, 499 (6th Cir. 2002) (citations omitted).

B. Discrete acts that occurred more than 30 days before Sassé filed his complaint are time-barred

In National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 105 (2002), the Supreme Court held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., "precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period." The Court reasoned that Title VII requires that a charge be filed within a specified number of days after an unlawful employment practice

"occurred," and that "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.'" 536 U.S. at 109-110. Discrete acts of discrimination "are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Id. at 113. Morgan thereby "overturns prior Sixth Circuit law" allowing plaintiffs to establish a continuing violation "by proof that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period." Sharpe v. Cureton, 319 F.3d 259, 268 (6th Cir.), cert. denied, 124 S. Ct. 228 (2003).[3]

The rationale of Morgan, that a violation "occur[s]" on the day that it happens, applies in this case because the whistleblower provisions at issue require the filing of a complaint within 30 days after an alleged violation "occurs." 33 U.S.C. 1367(b); 42 U.S.C. 6971(b); 42 U.S.C. 7622(b)(1). Cf. Bell v. Ohio State Univ., 351 F.3d 240, 247-248 (6th Cir. 2003) (finding "'no principled basis upon which to restrict Morgan to Title VII claims'") (citing Sharpe, 319 F.3d at 267).

[3] After Morgan, this Court continues to recognize a continuing violation exception to a limitations period based on a pattern or policy of discrimination. See Sharpe, 319 F.3d at 268. No such pattern or policy has been established in this case. See id. at 266-267 (policy requires a showing that "'intentional discrimination against the class of which the plaintiff was a member was the company's standing operating procedure'") (citation omitted).

Accordingly, discrete acts of alleged discrimination that occurred more than 30 days before Sassé filed his complaint are time-barred even if they are related to incidents that occurred within the limitations period.

In this case the Board correctly concluded that time-barred discrete acts of discrimination include Sassé's claims about unfair performance appraisals in 1991 and 1994, the 1992 decision to assign Secretary X to Sassé, and the failure up to 1995 to send Sassé to training he wanted. (R 197 ARB 9-10, APX 26-27); see Pegram v. Honeywell, Inc., 361 F.3d 272, 280 (5th Cir. 2004) (failure to train is discrete act); Miller v. New Hampshire Dep't of Corr., 296 F.3d 18, 22 (1st Cir. 2002) (same for performance appraisal); Bell, 351 F.3d at 243-248 (same for actions a university took in response to a student's academic problems). Sassé's claims about being denied awards before November 1996 are also discrete events that are time-barred. (See Sassé TR 296, APX 560 (awards always had a monetary component)).

C. The hostile work environment claim is untimely because no act contributing to the claim occurred within the limitations period

Under Morgan, the entire period of a hostile work environment may be considered by a court, so long as "an act contributing to the claim occurs within the filing period." Morgan, 536 U.S. at 117; see also McFarland v. Henderson, 307

F.3d 402, 408 (6th Cir. 2002). Absent such an act, a hostile work environment claim is untimely. See Pegram, 361 F.3d at 279-280; Varnadore, 141 F.3d at 630-631 (affirming Secretary's finding that whistleblower complaint was untimely where no act of retaliation occurred within the 30-day limitations period).

In this case, Sassé has failed to show that any acts contributing to a hostile work environment occurred within 30 days of his November 26, 1996 complaint. His hostile environment claim mainly concerns alleged comments made by his supervisors. (See R 197 ARB 35-36, APX 52-53). Sassé has not shown, however, that such comments occurred within 30 days of his November 26, 1996 complaint. See Lucas v. Chicago Transit Auth., 367 F.3d 714, 723-727 (7th Cir. 2004) (employees' conclusory statements, without times, dates or places, failed to establish a hostile act within the limitations period). Nor has he shown that any other act contributing to a hostile work environment occurred within that period because, as we discuss below, the Board correctly held that no hostile work environment existed at all. See Varnadore, 141 F.3d at 630-631. Accordingly, Sassé failed to establish a timely claim of a hostile work environment.

D. Sassé's timeliness arguments are meritless

Sassé asserts that his complaint was timely for two reasons. First, he claims the Board drew "plainly wrong"

inferences in concluding that Secretary X was not reassigned to Sassé shortly before he filed his complaint. Pet. Br. 23. Second, he argues that under the continuing violation doctrine, all events occurring before he filed his complaint were timely. Id. at 29-30. Neither of these arguments has any merit.[4]

1. The secretarial "reassignment"

Even if Secretary X was reassigned to Sassé shortly before his complaint, that action would not alter the fact that discrete acts occurring before the alleged reassignment are still untimely, even if related to the "reassignment." See Morgan, 536 U.S. at 113; Sharpe, 319 F.3d at 268. Accordingly, the existence of a discriminatory "reassignment" within 30 days of Sassé's complaint bears only on the Board's finding that no discrete act occurred within that period. If a reassignment occurred, the complaint would be timely as to the allegation that the reassignment was discriminatory. If no reassignment occurred, then Sassé's complaints about his continued assignment to Secretary X are untimely, even though he may have requested that the Secretary's assignment to him be terminated. See Kovacevich v. Kent State Univ., 224 F.3d 806, 829 (6th Cir. 2000) ("denial of a request for relief from discrimination does

[4] Sassé also asserts that his post-complaint suspension was tried by consent and became a timely part of the complaint. Pet. Br. 24-29. Like the Board, we discuss this post-complaint suspension as a separate issue.

not itself constitute a discriminatory act that tolls the statute of limitations").

The record supports the Board's finding of no reassignment within the relevant 30-day time period. The Deputy Chief in Sassé's division testified that Secretary X was assigned to Sassé in 1992 and that she was "still" his secretary "until" she was reassigned in 1997. (R 197 ARB 9, 22, APX 26, 39; Stickan TR 980, APX 418). Sassé stated, when he filed his complaint, that Secretary X "continues to be complainant's secretary" despite his requests for someone else. (R 197 ARB 9, APX 26 (quoting complaint)). The only time that Secretary X did not work for Sassé was when she was on a performance improvement plan and he gave work to other secretaries. (Ibid.; Sassé TR 516-517, APX 375-376; Stickan TR 965, 992-994, APX 416, 420). That plan ended, however, with Sassé's April 1996 approval (R 197 ARB 9, APX 26; Stickan TR 994-995, APX 420), and by November 1996 Sassé was again admittedly complaining about Secretary X's performance. (R 20, ¶ 199, APX 263 (complainant's list of discriminatory acts)). The logical inference from these facts is that there was no "reassignment" of Secretary X to Sassé in November 1996. Instead, there was a failure to assign Secretary X away from Sassé, which is not itself "a discriminatory act that tolls the statute of limitations." Kovacevich, 224 F.3d at 829.

None of Sassé's arguments detracts from the Board's inference, let alone shows that it is so illogical that it fails the substantial evidence test. See Painting Co., 298 F.3d at 499 (possibility of drawing two inconsistent conclusions from the evidence does not prevent an agency's finding from being supported by substantial evidence). Sassé first asserts that "the ALJ should be given more deference." Pet. Br. 22. The ALJ never decided whether a reassignment occurred however, and therefore gets no deference with respect to a finding he did not make. See Varnadore, 141 F.3d at 630-631. Sassé then relies on his own statement, without record support, that the Division Chief reassigned secretaries on November 22, 1996, and that Secretary X was again assigned as his secretary. Pet. Br. 24. That statement shows only that Sassé viewed his failure to obtain a new secretary as a reassignment. Sassé also argues that DOJ "admitted" in a motion for partial summary decision that the "reassignment" was within the statute of limitations. Id. at 23. DOJ did not admit that a reassignment occurred, however. (See R 18, at 37, APX 210; R 179, at 4-5, APX 337-338). Its motion for partial summary decision addressed only Sassé's "allegations," see Pet. Br. 23 (quoting motion), before evidence was submitted at the hearing and before Morgan changed the law on continuing violations. The motion therefore in no way precluded DOJ, let alone the Board, from reaching a contrary

decision based on the hearing record and the standards set out in Morgan.

2. Sassé's misunderstanding of the continuing violation doctrine

In arguing that "all" of the events occurring before his complaint were timely, Sassé asserts that the essence of his claim is that he has been the victim of a hostile work environment and that the "reassignment" of Secretary X and five-day, post-complaint suspension are just two examples of a "pattern and practice of harassing Mr. Sassé in retaliation for his environmental crime work." Pet. Br. 29-30. As discussed above, the "reassignment" never occurred. A suspension is also a "discrete act" and not part of a hostile work environment. See Morgan, 536 U.S. at 113-119 (discussing difference between discrete acts and hostile work environment); Conley v. Village of Bedford Park, 215 F.3d 703, 710 (7th Cir. 2000) (suspension is a discrete act). Sassé has therefore failed to show that the Board erred in dismissing his complaint as untimely.

II. THE POST-COMPLAINT SUSPENSION CLAIM WAS NOT TRIED BY CONSENT

A. Standard of review

This Court applies an abuse of discretion standard to review a decision on whether an issue not raised in the pleadings has been tried by implied consent. Craft v. United States, 233 F.3d 358, 371 (6th Cir. 2000), rev'd on other

grounds, 535 U.S. 274 (2002); see also Kovacevich, 224 F.3d at 831. A similar standard applies in this case, but it applies to the Board's decision, not to the ALJ's recommended decision. See Varnadore, 141 F.3d at 630 (the Administrative Procedure Act (APA)'s "highly deferential standard of review is not altered merely because [the Board] disagrees with the ALJ," and this Court "'defer[s] to the inferences that the [Board] derives from the evidence, not to those of the ALJ'") (citations omitted).

B. DOJ did not consent because the suspension claim was not pleaded and the parties did not understand evidence at trial to be aimed at such a claim

When an issue not raised by the pleadings is tried by implied consent of the parties, the Department's rules of procedure, like Fed. R. Civ. P. 15(b), permit the pleadings to be amended to conform to the evidence. See 29 C.F.R. 18.5(e); (R 150 ALJ 15, APX 72). To establish implied consent, however, "'it must appear that the parties understood the evidence to be aimed at the unpleaded issue.'" Kovacevich, 224 F.3d at 831 (citation omitted); see also, e.g., Carlisle Equip. Co. v. United States Sec'y of Labor, 24 F.3d 790, 795 (6th Cir. 1994). An "agency may not base its decision upon an issue the parties tried inadvertently. . . . [E]vidence introduced at a hearing that is relevant to a pleaded issue as well as an unpleaded issue cannot serve to give the opposing party fair notice that the new,

unpleaded issue is entering the case." Yellow Freight Sys., Inc. v. Martin, 954 F.2d 353, 358 (6th Cir. 1992).

The Board properly applied these principles in this case. Before the ALJ hearing, Sassé gave no notice in his pleadings or otherwise that his May 2000 suspension was at issue. See Pet. Br. 27-29 (quoting pleadings, which say nothing about the suspension). At the June 2001 ALJ hearing, he discussed his business proposal to NASA, his contacts with Congressman Kucinich's office, and his May 2000 suspension in the context of relating his continuing involvement with the NASA property near the Cleveland airport. (R 197 ARB 28-29, APX 45-46; Sassé TR 499-511, APX 371-374). That post-complaint evidence was admissible because it tended to show that the environmental work he had been doing in the early 1990s, including work on the airport property brought to light during Bogas, was sufficiently important to provide a retaliatory motive for individuals opposed to environmental prosecutions. (See R 197 ARB 30, APX 47 (evidence admissible to shed light on the complainant's reasoning and credibility)); Remusat v. Bartlett Nuclear, Inc., Case No. 94-ERA-36, 1996 WL 171434, at *3 n.4 (Sec'y Feb. 26, 1996) ("events occurring subsequent to a complainant's termination may be pertinent to the complainant's case"); Seater v. Southern Cal. Edison Co., Case No. 96-013, 1996 WL 686411, at *5 (ARB Sept. 27, 1996) ("evidence of incidents occurring or

conditions developing in the [place of employment] as a result of [an employee's] accelerated departure may provide valuable indicia of the supervisory mindset at the pertinent time"). Because the evidence was "relevant to a pleaded issue," (Sassé's credibility and a possible motive for DOJ to take actions alleged in the complaint), it "cannot serve to give [DOJ] fair notice that the new, unpleaded issue is entering the case." Yellow Freight, 954 F.2d at 358.

Moreover, statements by the ALJ and Sassé's attorney confirm that DOJ lacked fair notice that a new issue had entered the case. Sassé's attorney expressly told the ALJ, when DOJ asked the ALJ to exclude the testimony, that "there is no specific claim related to NASA. There is no specific claim related to the other matters which the Government seeks to strike." (R 197 ARB 29, APX 46; TR 1108, APX 427). In issuing his decision, the ALJ admitted that his rulings permitting the evidence at the hearing had not "directly addressed" whether the evidence related to post-complaint protected activity (Sassé's congressional contacts) or pre-complaint protected activity. (R 150 ALJ 14-15, APX 71-72). These statements support the Board's finding that DOJ's first notice of a claim based solely on Sassé's suspension came when it received the ALJ's recommended decision. (R 197 ARB 30, APX 47). They also show that the parties did not "'under[stand] the evidence to be aimed at the

unpleaded issue," as is required to establish implied consent. Kovacevich, 224 F.3d at 831 (citation omitted). Accordingly, the Board did not abuse its discretion in finding no implied consent. Cf. Carlisle, 24 F.3d at 795 (error for agency to find implied consent where "the discussion between the ALJ and counsel, the complaint, and the evidence admitted at the hearing" addressed another issue).[5]

III. SASSÉ'S CLAIMS FAIL ON THE MERITS

A. Standard of review

The Board's conclusion that prosecutorial discretion bars review of DOJ's prosecutorial actions is a legal conclusion reviewable de novo, with appropriate deference to the Board's reasonable interpretation of the whistleblower provisions. See American Nuclear Res., Inc. v. United States Dep't of Labor, 134 F.3d 1292, 1294 (6th Cir. 1998). The Board's findings of no discrimination are upheld if supported by substantial evidence. See Varnadore, 141 F.3d at 631; American Nuclear, 134 F.3d at 1294.

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[5] Sassé asserts that DOJ had a fair opportunity to address the suspension issue because the ALJ allowed DOJ to reopen its case after initially denying DOJ the opportunity to call rebuttal witnesses. Pet. Br. 25-27. The evidence at issue in the ALJ's reopening rulings had nothing to do with Sassé's suspension. (See TR 1109-1112, APX 427-428 (ALJ's initial denial); TR 1126, APX 429 (ALJ's reopening)). DOJ had no fair opportunity to address the suspension issue because there was no notice that Sassé was raising a claim based on the suspension.

B. DOJ's prosecutorial actions are not reviewable

A decision whether to prosecute "has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" Heckler v. Chaney, 470 U.S. 821, 832 (1985) (quoting U.S. Const. art. II, § 3); see also United States v. Renfro, 620 F.2d 569, 574 (6th Cir.), cert. denied, 449 U.S. 902 (1980). The Attorney General and United States Attorneys are designated by the President to help him discharge his constitutional responsibility. 28 U.S.C. 509, 516, 519, 547. Accordingly, they have broad discretion to enforce federal criminal laws. United States v. Armstrong, 517 U.S. 456, 464 (1996).

Because of this broad discretion, a prosecutorial decision not to take enforcement action is not reviewable. See Armstrong, 517 U.S. at 464; Heckler, 470 U.S. at 831-832. Even where a prosecutor's discretion is subject to constitutional constraints, as when a prosecution is based on an unjustifiable standard such as race, religion, or other arbitrary classification, a prosecutorial decision is presumptively correct and clear evidence to the contrary is needed to overcome the presumption. Armstrong, 517 U.S. at 464-465. This deference to prosecutorial discretion rests in part on a court's

difficulty in evaluating the factors that go into a prosecutorial decision. Id. at 465. It also stems

> from a concern not to unnecessarily impair the performance of a core executive constitutional function. 'Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.'

Ibid. (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)); see also Renfro, 620 F.2d at 574 ("'intervention by the court in the internal affairs of the Justice Department would clearly constitute a violation of the Separation of Powers Doctrine'") (citation omitted); Peek v. Mitchell, 419 F.2d 575, 577 (6th Cir. 1970) ("'courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions'") (citation omitted).

In light of these principles, the Board correctly concluded that it should not construe the whistleblower provisions at issue here to permit review of DOJ's prosecutorial decisions to appeal or seek indictment. Congress has long recognized the Attorney General's authority to manage and direct DOJ's prosecutorial decisionmaking. See 28 U.S.C. 509, 516, 519. Other stautes should not be construed to intrude on this authority unless they do so expressly. (See R 197 ARB 16, APX

33 ("prosecutorial discretion occupies such a prominent place in American jurisprudence that Congress would have been explicit had it intended to abrogate prosecutorial discretion in the whistleblower provisions")). Put differently, the Board permissibly construed the general anti-retaliation language in the CAA, SWDA, and FWPCA provisions not to authorize the Secretary of Labor to scrutinize prosecutorial decisionmaking that other statutes have long committed to the Attorney General.

Sassé does not dispute the importance of preserving DOJ's prosecutorial discretion or the Board's legal analysis. Instead, he argues that, so long as a prosecutorial decision is not itself an actionable form of discrimination, DOJ should have to explain its prosecutorial decisions in defending against charges that it took adverse employment actions because of hostility to an AUSA's prosecution of environmental crimes. Pet. Br. 31-33. Sassé would therefore permit the Department of Labor and a court to find discrimination by second-guessing a DOJ prosecutorial decision. (See also R 161, at 23, APX 336 (Sassé's request for the Board to order that Sassé "be assigned a new supervisor and restored to his role as an environmental crimes prosecutor")).

The Board correctly rejected Sassé's approach. (See R 197 ARB 15, APX 32 (striking portion of ALJ's decision that

conducted such a review)).[6] As discussed above, courts refuse to review DOJ prosecutorial decisions because they are not equipped to assess all the factors that go into such decisions. See Armstrong, 517 U.S. at 465. Courts do not become better equipped just because they are reviewing a prosecutorial decision in deciding whether to set aside some employment action rather than the prosecutorial decision itself. Sassé's approach also raises separation of powers concerns because it "'threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.'" Id. at 465 (citation omitted); (see R 150 ALJ 9-14, APX 66-71 (ALJ's examination of DOJ's reasons for not prosecuting a major environmental case)). The Board's construction of the CAA, SWDA, and FWPCA provisions should be upheld because it avoids these concerns. See, e.g., United States v. Brown, 25 F.3d 307, 309 (6th Cir.) ("we are guided by the principle that we should interpret statutes to avoid

[6] Sassé asserts that the Board misconstrued his argument to mean that supervisory hostility to environmental crimes itself violates the environmental statutes. Pet. Br. 31. That assertion is incorrect because it is based on the Board's quotation of a brief submitted to the Board, not on the Board's analysis.

constitutional problems whenever possible"), cert. denied, 513 U.S. 1045 (1994).[7]

C. The Board's findings of no discrimination are supported by substantial evidence

In a whistleblower case, a complainant must establish by a preponderance of the evidence that the respondent took adverse employment action against the complainant because of the complainant's protected activity. (R 197 ARB 18, APX 35); see, e.g., White v. Burlington N. & S.F. Ry., 364 F.3d 789, 795-800 (6th Cir. 2004) (en banc) (reaffirming adverse action requirement for retaliation case); American Nuclear, 134 F.3d at 1295 (whistleblower elements). To meet this burden, the complainant first has to establish a prima facie case of discrimination. (R 197 ARB 18, APX 35); see, e.g., Bartlik v. United States Dep't of Labor, 73 F.3d 100, 102, 103 n.6 (6th Cir. 1996). If the complainant does so, the employer must produce a legitimate, nondiscriminatory reason for its actions. (R 197 ARB 18, APX 35); see, e.g., DeFord v. Secretary of Labor,

[7] Sassé also argues that prosecuting crimes is protected activity because it falls within the statutory definitions of protected activity. Pet. Br. 30-31. This Court should not address that issue because the Board found it unnecessary to do so and its decision can be affirmed on other grounds. If the Court decides that the issue needs to be addressed, it should remand the case so that the Board can decide the issue in the first instance, given the Board's expertise in whistleblower matters and the deference that Courts give to agency interpretations of the statutes they administer.

700 F.2d 281, 285 (6th Cir. 1983). If the employer does so, the complainant must prove by a preponderance of the evidence that the employer intentionally discriminated. (R 197 ARB 18, APX 35); see, e.g., Kovacevich, 224 F.3d at 821-826.

When a complainant alleges a hostile work environment, he must prove that he experienced harassment severe or pervasive enough to alter the conditions of employment and create an abusive work environment. (R 197 ARB 34, APX 51); see, e.g., Morgan, 536 U.S. at 116; Burnett v. Tyco Corp., 203 F.3d 980, 982 (6th Cir.), cert. denied, 531 U.S. 928 (2000). Such proof substitutes for the "adverse employment action" element of a plaintiff's claim. White, 364 F.3d at 795 n.1. The complainant must still establish the other elements of his case, i.e., that the harassment was in retaliation for protected activity. See, e.g., Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792-793 (6th Cir. 2000).

In this case, the Board found that DOJ did not discriminate against Sassé under these standards. (R 197 ARB 19-26, 30-36, APX 36-43, 47-53). It specifically found no retaliation because of Sassé's prosecution of environmental crimes and service on an environmental task force; no retaliation because of Sassé's congressional contacts; and no hostile work environment. Those findings should be affirmed because they are supported by substantial evidence.

1. DOJ did not retaliate against Sassé because he prosecuted environmental crimes and served on an environmental task force

In a detailed analysis of the record, the Board found that even if the allegations in Sassé's complaint were timely, they were meritless. (R 197 ARB 19-26, APX 36-43). That finding should be affirmed because, as the Board concluded, Sassé simply did not prove the elements of his case.

Initially, the Board properly questioned whether Sassé had established that the lower ratings on parts of his appraisals even amounted to an adverse employment action because the overall ratings of "Excellent" remained the same and Sassé suffered no economic loss or lost opportunities. (R 197 ARB 19, APX 36); see Primes v. Reno, 190 F.3d 765, 767 (6th Cir. 1999) (AUSA's "fully successful" evaluation is not an adverse action); Hollins v. Atlantic Co., 188 F.3d 652, 662 (6th Cir. 1999) ("lowered ratings do not establish an adverse employment action"). The Board then found that the ratings and lack of awards were based on shortcomings in Sassé's work and not discriminatory animus. (R 197 ARB 20-21, APX 37-38). That finding should be affirmed because Sassé has presented nothing to challenge it, not even the "vague impressions of office practices" that the Board rejected as insufficient. (Id. at 21, APX 38).

The Board also permissibly found a lack of discrimination because the Chief of Sassé's Division was not hostile to Sassé's environmental work, as shown by his assigning Sassé to environmental work and authorization for Sassé to travel around the country to attend dozens of seminars and give presentations on environmental law issues. (R 197 ARB 22, APX 39). The Board found, with record support, that the Chief told Sassé that he still had to do his other work, despite "gallivanting around New Orleans" during an environmental seminar with the United States Attorney, because the Chief was concerned with Sassé's low productivity. (Id. at 3, 22, APX 20, 39). The Board further found that there is not a "scintilla of evidence" to support Sassé's "baseless accusation" that the Chief or anyone else at DOJ decided not to pursue a major environmental case against a company because former EPA employees worked there. (Id. at 13 n.6, APX 30). Sassé presents nothing to suggest that these findings are invalid under a substantial evidence standard of review except for attacks on the Chief that simply are not true.[8]

[8] Sassé asserts as a fact his own testimony that the Chief angrily claimed that he (the Chief) had dumped hazardous waste before he worked for the government. Pet. Br. 9-10. The Chief flatly denied that accusation, and the Board rejected Sassé's uncorroborated assertion as "implausible." (R 197 ARB 36, APX 53). Sassé then asserts as fact his testimony that the Chief used foul language to discuss environmental cases and made the gallivanting comment repeatedly during file reviews instead of just once. Pet. Br. 10-12. As the Board found, none of Sassé's (continued . . .)

Sassé has also failed to show any reason to second-guess the Board's findings that none of DOJ's reasons for its actions is pretextual. The Board found that in 1992 DOJ assigned Secretary X to Sassé and to another attorney who did no environmental work because their offices were close to hers, and in later years DOJ effectively addressed problems in her work. (R 197 ARB 22-23, APX 39-40). Sassé provides nothing to undermine the Board's findings except the baseless assertion that the Board's finding of a 1992 reassignment somehow makes the Board's separate finding of no 1996 reassignment (id. at 9-10, APX 26-27) "insufficiently clear." Pet. Br. 36. The Board found that Sassé's caseload was not significantly greater than average for an AUSA or a result of discriminatory animus. (R 197 ARB 23-24, APX 40-41). Sassé does not even address this finding. The Board found no DOJ obstruction of Sassé's access to training and instruction, much less obstruction for discriminatory reasons. (Id. at 25-26, APX 42-43). Again, Sassé fails to address this finding. Instead, Sassé argues that the Board should have deferred to ALJ fact findings in favor of Sassé, without mentioning that the ALJ, like the Board, found that DOJ did not discriminate against Sassé for his work

(. . . continued)
testimony is corroborated in any way, and other witnesses denied it. (R 197 ARB 36, APX 53).

prosecuting environmental crimes and serving on the environmental task force. Pet. Br. 34; (see R 150 ALJ 8-14, APX 65-71).[9] Sassé also argues that the Board erroneously based its decision on Sassé's failure to establish a prima facie case, Pet. Br. 35, when the Board in fact ruled on the ultimate issue of discrimination and found that Sassé failed to prove that DOJ's reasons for its actions were pretextual. (See R 197 ARB 19-26, APX 36-43).[10]

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[9] In his statement of facts, but not in his argument, Sassé asserts that DOJ used his health problems as an opportunity to diminish his environmental crime fighting efforts. Pet. Br. 13. As discussed above, pp. 13-14, in 1999 DOJ reassigned Sassé's environmental work at the EPA's request when Sassé was on leave for heart surgery. When Sassé returned to work, DOJ and the EPA agreed not to return the cases to Sassé because the attorney who was then working on the cases was doing an outstanding job and there were serious concerns about Sassé's health status. (Martin TR 730, APX 391; Stickan TR 1005-1006, APX 422). Sassé's suggestion that the Deputy Chief discriminated against him by scrutinizing his leave records more closely than he investigated the reasons for Sassé's unhappiness with the Chief (Pet. Br. 12-13) is also meritless. The Deputy Chief stated that he investigated Sassé's use of leave because Sassé had the lowest leave balance in the office and gave no reason for using leave except the inappropriate reason of "morale." (Stickan TR 943-944, APX 410-411). The Deputy Chief was expected to investigate under the United States Attorney's leave policy because such excessive leave use adversely affects productivity and scheduling. (Edwards TR 786-789, APX 394-395).

[10] Sassé is also wrong in stating that reliance on a plaintiff's failure to prove a prima facie case is necessarily reversible error. Pet. Br. 35; see Kovacevich, 224 F.3d at 824. In Department of Labor whistleblower cases, "adjusting the order of proof" becomes an "academic exercise[] of little or no value" where substantial evidence supports the Secretary's determination. DeFord, 700 F.2d at 285.

2. DOJ did not discriminate against Sassé when it suspended him

The Board held that even if Sassé's suspension was properly before the ALJ, Sassé is entitled to no relief because he failed to prove that the suspension was retaliatory. (R 197 ARB 30, APX 47). That finding also should be affirmed because it is supported by substantial evidence, even considering the ALJ's contrary recommended finding. See Painting Co., 298 F.3d at 499 ("'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence'") (citation omitted); Varnadore, 141 F.3d at 630 (this Court "'defer[s] to the inferences that the [Board] derives from the evidence, not to those of the ALJ'") (citations omitted).

First, there is no evidence that the persons in EOUSA who suspended Sassé or recommended the suspension knew about his contacts with Congressman Kucinich's office. (R 197 ARB 30-31, APX 47-48). Their lack of knowledge by itself means that Sassé cannot prove that the suspension was in retaliation for those contacts. See, e.g., Bartlik, 73 F.3d at 102. The Board therefore correctly overturned the ALJ's contrary finding without according it any special deference.

Second, the record fully supports the Board's finding that Sassé failed to establish the causality element of his claim.

(See R 197 ARB 31, APX 48). DOJ asserted that Sassé was suspended in May 2000 because in 1997 he violated government ethics rules by using his DOJ position to attempt to obtain private employment with NASA. Sassé had to prove that this reason was a pretext for discrimination. The Board found that he failed to do so for numerous reasons supported by the record, including DOJ's lack of reason to care about Sassé's involvement with the NASA property because its condition was already public knowledge in 1997; DOJ's prompt investigation into Sassé's allegations of NASA wrongdoing, which was the opposite of a cover up; and the serious nature of Sassé's ethical violation, which warranted a five-day suspension. (Id. at 30-33, APX 47-50). Sassé ignores these findings and presents nothing to suggest that the findings are so unreasonable that they fail the substantial evidence test.[11]

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[11] Sassé argues that the suspension must have been retaliatory because he was first investigated on October 14, 1998, only nine days after he filed his 211-paragraph list of retaliatory acts and served EOUSA with a copy. Pet. Br. 37. This argument, supported by RX Y-5, which was withdrawn at the ALJ hearing (TR 1239, APX 431), is not properly before this Court because Sassé did not raise it to the Board. See, e.g., United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 36-37 (1952); Hix v. Director, OWCP, 824 F.2d 526, 527-528 (6th Cir. 1987). The argument is also meritless because the Board found that the investigation of Sassé was ongoing from October 1997, well before Sassé filed his list of retaliatory acts. (R 197 ARB 32, APX 49). Sassé's request for the Court to equate his experience with the experience of a NASA engineer with NASA (Pet. Br. 38-39) is meritless because the engineer, unlike Sassé, did not (continued . . .)

3. There was no hostile work environment, let alone an environment that was discriminatory

As discussed above, a complainant who alleges a hostile work environment must prove that he experienced harassment severe or pervasive enough to alter the conditions of employment and create an abusive work environment. (R 197 ARB 34, APX 51); see, e.g., Morgan, 536 U.S. at 116; Burnett, 203 F.3d at 982. Such proof substitutes for the "adverse employment action" element of a plaintiff's claim but does not relieve the complainant of his burden of proving that the harassment was in retaliation for protected activity. (R 197 ARB 34, APX 51); see White, 364 F.3d at 795 n.1; Morris, 201 F.3d at 792-793.

In this case, the Board and ALJ both rejected Sassé's arguments that DOJ had discriminated against him because of his environmental prosecutions. (R 197 ARB 19-26, 35-36, APX 36-43, 52-53; R 150 ALJ 9, APX 66). The Board additionally found that even if Sassé's allegations of harassment occurred, they do not establish a hostile work environment. (R 197 ARB 35, APX 52; see also R 150 ALJ 9, APX 66 ("The nature of the interactions described by Complainant regarding prosecution decisions are to be expected and are found to be a normal part of the give and take expected in [Sassé's] office.")). That finding should be

(. . . continued)
violate government ethics rules, and DOJ, unlike NASA, was not charged with wrongdoing concerning the NASA property.

affirmed as supported by substantial evidence because Sassé is basically complaining about the kind of "offensive utterances" that do not establish severe or pervasive harassment as a matter of law. See, e.g., Burnett, 203 F.3d at 983-985; Black v. Zaring Homes, Inc., 104 F.3d 822, 826-827 (6th Cir.), cert. denied, 522 U.S. 865 (1997); Crawford v. Medina Gen. Hosp., 96 F.3d 830, 836 (6th Cir. 1996). Like the AUSA in Primes, 190 F.3d at 767, he is simply "unhappy and resentful," and not the victim of discrimination.[12]

[12] Sassé does not dispute that the conduct described by the Board was not by itself severe or pervasive enough to alter the conditions of his employment. Instead, he argues that because incidents of harassment should be considered together rather than separately, see Williams v. General Motors Corp., 187 F.3d 553, 562 (6th Cir. 1999), the Board should have combined the allegedly harassing conduct in this case with the other acts that the Board analyzed as discrete retaliatory acts to see whether they "could add up to being a hostile environment." Pet. Br. 34. This Court, however, analyzes discrete claims of discrimination separately from harassment claims. See, e.g., Allen v. Michigan Dep't of Corr., 165 F.3d 405, 409-412 (6th Cir. 1999). Actions that are not discriminatory -- such as the discrete acts in this case -- also do not count toward a hostile environment claim. Morris, 201 F.3d at 790-791.

CONCLUSION

The petition for review should be denied.

Respectfully submitted.

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JUNE 2004

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), and Circuit Rule 32(a), I hereby certify that the Brief for the Secretary of Labor is monospaced, has 10.5 or fewer characters per inch and contains 12,030 words as determined by the Microsoft Word software system used to prepare the brief.

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RESPONDENT'S CROSS DESIGNATION
OF APPENDIX CONTENTS

Respondent, pursuant to Sixth Circuit Rule 30(b), hereby designates the following filings in the administrative record as additional items to be included in the joint appendix:

Description of Item	Date Filed With ARB	Record Entry No.
C. Merchant letter to E. Sweeney	06/10/98	3a
Respondent's letter to ALJ Vittone requesting hearing	06/17/98	4
Transcript of pre-hearing conference, pp. 37, 46-47	09/09/98	18
ALJ's order denying Respondent's motion to dismiss	12/08/98	24
ALJ's order dismissing individual respondents	03/03/99	35
ARB's decision remanding case to ALJ	08/31/00	52
Complainant's first appeal brief, p. 23	07/10/02	161
Respondent's brief in response to the Assistant Secretary's brief, pp. 4-5	10/15/02	179
Letter from Attorney Johnson to ALJ Tierney enclosing copies of requested materials (with enclosures; see below)	06/02/02	154
05/02/00 Santelle letter to Sasse (attached to R 154)	06/02/02	154
01/14/00 DeFalaise letter to Sasse (attached to R 154)	06/02/02	154
Transcripts of Hearing held 06/25/01 through 07/17/01:		
pp. 6, 32, 35, 42, 47, 116-117, 119, 120, 122-123, 127-129, 156-158	06/25/01	116
pp. 206-220, 254-258, 271-286, 296, 306-309, 322	06/26/01	117
pp. 352, 354-357, 369-371, 377-379, 390-391, 441, 491-493, 495-496, 499-511, 515-517	06/27/01	119
pp. 571-574, 591-621, 682, 704-705, 711, 721-723, 730	06/29/01	120
pp. 758-760, 786-789, 806-816, 831-832, 839-845, 890-891, 898-899, 903	07/02/01	121
pp. 934-962, 965-966, 968, 970-971, 980, 983, 989-990, 992-995, 1002-1008, 1018	07/03/01	122

pp. 1078-1079, 1081-1085, 1106-1112	07/05/01	125
pp. 1126, 1136, 1239	07/17/01	133
Hearing Exhibits:		
RX B-2 -- 04/13/93 cover sheet to Rutana report and recommendation for appeal (p. 699)		
RX D-4 -- 04/96 draft performance appraisal for Sassé's secretary (pp. 756-758)		
RX G-2a -- Sassé's 1994 performance appraisal (pp. 765-780)		
RX G-2b -- Sassé's grievance of performance evaluation without supporting documents (pp. 781-784)		
RX G-3 -- 02/20/96 letter from DiBattiste to Sassé re: decision on 1994 performance rating grievance (pp. 859-861)		
RX N-3 -- Undated handwritten note from Cain to Foley re: Sassé's work on the Task Force (p. 950)		
RX O-2 -- Chart of Sassé's 1984-2000 performance appraisal elements and ratings (pp. 984-985)		
RX Q-8 -- 10/24/94 memorandum from Sassé to Strickan et al. re: authorization to apply for compulsion orders (p. 1144)		
RX Z-4 -- 02/2/00 e-mail from Sassé to Edwards re: congressional contact (p. 1427)		
RX Z-5 -- Undated reply e-mail from Edwards to Sassé re: congressional contact (p. 1428)		

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2004, two copies of the final brief for respondent, United States Department of Labor, and cross-designation of appendix contents were sent by first-class mail, postage prepaid, to the following counsel of record:

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