ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

DOUGLAS EVANS, Complainant, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	*	ARB Case No. 08-059 ALJ Case No. 2008-CAA-003

BRIEF OF THE ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY AND HEALTH AS AMICUS CURIAE

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DOUGLAS EVANS,		
Complainant,		
v.	ARB Case No. 08-059	
	ALJ Case No. 2008-CAA-003	
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BRIEF OF THE ASSISTANT SECRETARY OF LABOR
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Pursuant to 29 C.F.R. 1980.108(a)(1), the Assistant Secretary for the Occupational Safety and Health Administration ("OSHA"), through counsel, submits this brief as amicus curiae to assist the Administrative Review Board ("ARB" or "the Board") in determining when administrative complaints may properly be dismissed under the whistleblower protection provisions of the Environmental Acts.[1] The Assistant Secretary is responsible for implementing these whistleblower protection provisions and

[1] For purposes of this brief, the "Environmental Acts" are the Clean Air Act ("CAA"), 42 U.S.C. § 7622, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9610, and the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300j-9(i). Complainant Douglas Evans alleged in a complaint filed with OSHA that he was subjected to retaliation for engaging in protected activity under the Environmental Acts.

therefore has a significant interest in how such complaints are handled.

It is the Assistant Secretary's position that pleading requirements applicable to complaints filed in federal court are not applicable to administrative whistleblower complaints, and that complainant Douglas Evans's complaint therefore should not have been dismissed based on the heightened pleading standard set forth in Ashcroft v. Iqbal, 556 U.S. ____, 129 S. Ct. 1937 (2009). This conclusion is grounded in the applicable regulations governing the whistleblower protection provisions of the Environmental Acts, as well as the rules of practice for administrative hearings before an Administrative Law Judge ("ALJ"). For the reasons set forth more fully below, the Assistant Secretary therefore respectfully urges the Board to grant the complainant's motion for reconsideration and remand this case to the ALJ for further proceedings.

STATEMENT OF THE ISSUE

Whether administrative whistleblower complaints are subject to formal pleading requirements that apply to complaints filed in United States District Courts pursuant to the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

I. Statement of Facts and Procedural History

Evans worked as an Environmental Specialist for respondent, the United States Environmental Protection Agency ("EPA"). Final Decision and Order, 1. In July 2004, Evans wrote a letter to the EPA Administrator complaining that EPA employees were required to participate in emergency response work without adequate training. See Letter from Douglas Evans to EPA Administrator Michael O. Leavitt dated July 7, 2004. On May 26, 2006, Evans filed a complaint with OSHA in which he alleged that he was subjected to retaliation for engaging in protected activity under the Environmental Acts. See OSHA Complaint. Specifically, Evans alleged that when he raised "compliance issues with management about the environmental risks of having employees participate in emergency response (ER) work without sufficient training," the EPA, among other actions, placed him on administrative leave and eventually discharged him. Id.

Following an investigation, OSHA dismissed the complaint on November 21, 2007. Decision and Order of ALJ ("D&O") at 2. OSHA determined that Evans's July 2004 letter did not constitute protected activity because it failed to address any public safety or environmental concerns. Secretary's Findings at 2. OSHA further determined that Evans had engaged in protected activity under the Environmental Acts by filing his original

complaint and amendments[2] with OSHA.[3] However, OSHA concluded that the EPA had demonstrated that it had not been motivated by the protected activity when it took adverse employment actions against Evans, but rather had legitimately taken those actions based on credible complaints by Evans's co-workers that he had threatened workplace violence. D&O at 2; Secretary's Findings at 2-3.

Evans submitted timely objections to OSHA's findings and requested a hearing before an ALJ. Prior to any discovery or a hearing, the EPA filed a motion to dismiss the complaint, arguing, among other things, that the complaint did not contain sufficient factual allegations to suggest that Evans had engaged in protected activity. D&O at 1. On March 11, 2008, the ALJ dismissed the complaint, concluding that Evans "fail[ed] to state a claim upon which relief can be granted . . . ." D&O at 5.

Evans appealed the ALJ's decision to the Board. On April 30, 2010, after a de novo review, the Board granted the EPA's motion to dismiss and dismissed the complaint. See Final

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[2] Evans filed at least five amendments to his original complaint.

[3] Although the Secretary's Findings do not explicitly state the rationale for determining that Evans's complaint to OSHA, as amended, constituted protected activity, it appears that this determination was premised upon the fact that Evans had received a notice of proposed removal (and was ultimately terminated) after filing his complaint with OSHA.

Decision and Order ("FD&O"). On May 10, 2010, Evans filed a motion for reconsideration. On May 20, 2010, the Assistant Secretary for Occupational Safety and Health filed a motion notifying the Board of its consideration of the case for participation as amicus curiae. The Assistant Secretary now submits this brief as amicus curiae in support of Evans's motion for reconsideration.

II. The ALJ's Decision

By decision and order dated March 11, 2008, the ALJ granted the EPA's motion and dismissed the complaint. In its motion to dismiss, the EPA argued, inter alia, that the complaint should be dismissed for failure to state a claim because Evans's "complaint does not contain sufficient factual matter to suggest that he engaged in protected activity . . . ." Respondent Motion to Dismiss at 5; D&O at 1. In opposing the motion, Evans contended that complainants are not required to plead their protected activity with specificity. D&O at 3. Evans also contended that the appropriate remedy for a deficient complaint is leave to amend, not dismissal. Id.

The ALJ concluded that Evans was "unable to show that he engaged in protected activity" and that the "complaint fails to state a claim upon which relief can be granted and must be dismissed with prejudice." D&O at 2. Specifically, the ALJ concluded that the "proper standard for determining whether a

whistleblower complaint states a claim is that set out in Federal Rule of Civil Procedure 12(b)(6)." Id. Relying in part on Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), the ALJ found that Evans failed to show that the EPA violated the whistleblower protection provisions of the Environmental Acts. D&O at 3. The ALJ further noted that Evans's complaint did not specify to whom he raised compliance issues, what environmental risks were involved, or the nature of the alleged violations. Id. at 4. The ALJ thus concluded that "[b]ased on such vague allegations, I cannot find that Complainant has engaged in protected activity to warrant federal whistleblower protections without any evidence of this activity." Id. The ALJ refused to permit Evans to amend his complaint or conduct any discovery, and dismissed the complaint with prejudice. Id. at 3, 5.[4]

III. The ARB's Decision

In a decision dated April 30, 2010, the Board (over a dissent) granted the EPA's motion to dismiss. The majority concluded that Evans "failed to present a complaint upon which relief can be granted" under the CAA, CERCA, or SDWA and that summary decision also was warranted because Evans "failed to adduce evidence that he engaged in protected activity . . . ."

[4] The ALJ explicitly refused to treat the EPA's motion as a motion for summary decision, reasoning that "since dismissal is proper here without resort to any factual allegations, summary decision standards are irrelevant." D&O at 3 n.1.

FD&O at 6.[5] The majority noted that the Supreme Court "clarified the pleading requirements a complaint must satisfy to survive a motion to dismiss" in Ashcroft v. Iqbal, 556 U.S. ____, 129 S. Ct. 1937 (2009), and that Iqbal placed the burden on Evans to "frame a complaint with 'enough facts to state a claim to relief that is plausible on its face.'" FD&O at 2-3 (quoting Iqbal, 129 S. Ct. at 1940). The majority similarly concluded that a complaint "must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory," and that Evans therefore was required, among other things, to "present a factual allegation indicating that the activity [in which he engaged] could qualify for protection under the environmental acts." Id. at 4 (citation omitted).

Applying these standards, the majority focused on one paragraph of the complaint (in which Evans described his alleged protected activity) and scrutinized its language in order to determine whether Evans's allegations stated a facially plausible claim. The majority concluded that Evans's complaint was required to "indicate that he apprised EPA or another

[5] The majority also declined to address Evans's claims pursuant to the Energy Reorganization Act and the Toxic Substances Control Act because it concluded that the federal government had not waived sovereign immunity under those statutes. FD&O at 3. The Assistant Secretary does not take a position on the disposition of Evans's claims under those two statutes.

enforcement authority of conduct by EPA that could constitute a violation of the CAA, CERCLA, or SDWA." FD&O at 3. The majority concluded, however, that neither Evans's complaint nor his July 2004 letter to the EPA Administrator (which it deemed incorporated into the complaint) indicated "how the training could lead to CAA, CERCLA, or SDWA violations, or how the resulting risks would lead to such violations." FD&O at 4-5. The majority therefore concluded that Evans's allegations of protected activity failed to state a claim upon which relief could be granted. Finally, the majority concluded in the alternative that the EPA was entitled to summary decision because the parties had submitted evidence outside the pleadings (Evans's July 2004 letter to the EPA Administrator and three declarations of Evans's co-workers) that failed to create a genuine issue of material fact as to whether Evans had engaged in protected activity. FD&O at 5-6.

Judge E. Cooper Brown dissented from the majority's conclusion that Evans's allegations of protected activity were inadequate. FD&O at 10-15. Specifically, the dissent noted that the "ALJ's requirement of specificity imposes upon a claimant seeking whistleblower protection under the Environmental Acts a heightened pleading standard that [was] expressly rejected by the Supreme Court" in a pre-Iqbal decision, Swierkeiewicz v. Sorema N.A., 534 U.S. 506 (2002).

FD&O at 11. Concluding that Swierkeiewicz retained its vitality notwithstanding the Supreme Court's decisions in Iqbal and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007), Judge Cooper Brown found that Evans's complaint satisfied the "minimal pleading requirements" set forth in Swierkeiewicz. FD&O at 14. Judge Cooper Brown also dissented from the majority's determination that summary dismissal was warranted. FD&O at 15.

ARGUMENT

I. Standard of Review

"[I]t is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions." Macktal v. U.S. Dept. of Labor, 286 F.3d 822, 825-26 (5th Cir. 2002). In particular, the Board has authority to reconsider its decisions in cases under the employee protection provisions of the Environmental Acts. See Leveille v. New York Air Nat'l Guard, No. 98-079, 2000 WL 670308 (ARB May 16, 2000). "The Board has adopted principles federal courts employ in deciding requests for reconsideration." Chelladurai v. Infinite Solutions, Inc., ARB No. 03-072 (ARB July 24, 2006). Thus, the Board will grant reconsideration when the circumstances so warrant, including when any of the following circumstances are present: (1) material differences in fact or law of which the moving party could not have known through reasonable diligence prior to

seeking reconsideration, (2) new material facts that occurred after the court's decision, (3) a change in the law after the court's decision, and (4) failure to consider material facts presented to the court before its decision. See, e.g., Chelladurai v. Infinite Solutions, Inc., ARB No. 03-072 (ARB July 24, 2006); Carpenter v. Bishop Well Servs. Corp., No. 07-060, 2009 WL 5386126 (ARB Dec. 31, 2009). Such a motion is also analogous to requesting reconsideration of a final judgment or appealable interlocutory order under Fed. R. Civ. P. 59 or 60(b). "Amending judgments may be appropriate under Rule 59 to correct manifest errors of law or fact upon which the judgment is based, [or] to prevent manifest injustice . . . ." IMO: U.S. Dept. of Energy Davis-Bacon Determination for Project No. W-211, No. 03-016, 2004 WL 2390979 (ARB Oct. 6, 2004).

Although the standards for reconsideration are strict, reconsideration is appropriate in this case. The issue presented on reconsideration is an issue of law that has not already been litigated by the parties, and that will arise again in future cases. The governing statutory and regulatory structure reveals that Iqbal-type pleading requirements should not apply to administrative whistleblower complaints, and that Evans's complaint therefore should not have been evaluated or dismissed under the type of heightened pleading standard reflected in Iqbal. This case thus gives the Board an

opportunity both to ensure that a proper standard is applied to Evans's whistleblower claims and to provide clarification to parties in future cases regarding the appropriate standards for evaluating the sufficiency of a claim.

II. Applicable Statutory and Regulatory Requirements Establish that Whistleblower Complaints to OSHA Are Informal Documents Intended for Investigation, Not Adjudication

The statutory and regulatory requirements of the whistleblower protection provisions of the Environmental Acts make clear that administrative whistleblower complaints to OSHA should not be subject to pleading standards that apply to litigation in federal court. The whistleblower complaint, as contemplated by these statutes and regulations, is the vehicle by which a whistleblower can initiate an investigation; such complaints are not utilized to commence litigation.

Borrowing from the Federal Rules of Civil Procedure, the Board dismissed Evans's complaint under the CAA, CERCLA, and SDWA for failure to state a claim upon which relief may be granted. However, the statutory language of the CAA and the SDWA specify only that a complaint is used to launch an investigation. See 42 U.S.C. § 7622(b)(2)(A) (stating that under the CAA, "[u]pon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation"); 42 U.S.C. § 300j-9(i)(2)(B)(i) (stating that under the SDWA, "[u]pon receipt of a complaint filed under

subparagraph (A), the Secretary shall conduct an investigation of the violation alleged in the complaint”). The CERCLA does not even refer to a complaint; rather, it provides that an employee who believes he has been retaliated against need only “apply . . . for a review of such firing or alleged discrimination" to the Secretary of Labor, who shall then "cause such investigation to be made as he deems appropriate.” 42 U.S.C. § 9610(b). The short period of time in which to file a complaint with OSHA (within 30 days of the alleged violation) further supports the conclusion that whistleblower complaints are merely intended to launch an investigative process. See 29 C.F.R. 24.103(d).

The regulations implementing the whistleblower provisions at issue likewise contemplate that whistleblower complaints are informal documents intended to trigger an administrative investigation, not formal pleadings intended to commence litigation. See 29 C.F.R. Part 24. For instance, the provision governing the filing of retaliation complaints explains that “[n]o particular form of complaint is required,” provided 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." 29 C.F.R. 24.103(b) (emphasis added).[6]

Similarly, 29 C.F.R. 24.104, which governs OSHA investigations under the environmental whistleblower provisions, confirms that complaints are to be filed with OSHA for purposes of initiating an investigation, not an adjudicatory proceeding. Although this provision notes that a complaint must "allege the existence of facts and evidence to make a prima facie showing," it also encourages the complaint to be "supplemented as appropriate by interviews of the complainant." 29 C.F.R. 24.104(d)(2). The thrust of these provisions is investigatory, not adjudicative; indeed, the whistleblower complaint is discussed most prevalently in the "Investigation" section of the regulations, and is rarely mentioned otherwise.

[6] 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 in the past. See, e.g., Roberts v. Rivas Envtl. Consultants, 96-CER-1, 1997 WL 578330, at *3 n.6 (ARB Sept. 17, 1997) (complainant's oral statement to an OSHA investigator, and the subsequent preparation of an internal memorandum by that investigator summarizing the oral complaint, satisfied the "in writing" requirement of CERCLA, 42 U.S.C. § 9610(b), and the Department's accompanying regulations in 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 the ERA and the Department's accompanying regulations in 29 C.F.R. Part 24).

29 C.F.R. 24.104 provides OSHA with the regulatory authority 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. 24.104(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.

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 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 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 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.[7]

III. Whistleblower Complaints to OSHA are Significantly Different From Federal Court Pleadings and Should Not Be Subject to Federal Court Pleading Standards

A. Rule 12(b)(6) Motions in Federal Court

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." Federal Rule of Civil Procedure 11(b) requires that the factual contentions set forth in a complaint

[7] 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).

or other paper "have evidentiary support" or be likely to have such support "after a reasonable opportunity for further investigation or discovery." 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.

For approximately 50 years, motions to dismiss pursuant to Rule 12(b)(6) were governed by the "no set of facts" standard set forth in Conley v. Gibson, 355 U.S. 41 (1957). Under this liberal pleading standard, a complaint filed in United States District Court would not be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) unless it "appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46. However, the Supreme Court recently "retired" the Conley standard and replaced it with a new "plausibility standard" for evaluating the sufficiency of the allegations in a federal court complaint. See Ashcroft v. Iqbal, 556 U.S. __, 129 S. Ct. 1937, 1944-1949 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Under this heightened standard, a "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible

on its face." Iqbal, 129 S. Ct. at 1949 (quotations and citation omitted); see Twombly, 550 U.S. at 555.

Specifically, the Iqbal court concluded that a claim has "facial plausibility" when the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949. As a result, dismissal of a complaint filed in federal court is now warranted when the complaint pleads facts that are "consistent with" a defendant's liability but "stops short of the line between possibility and plausibility of entitlement to relief." Id. (quoting Twombly, 550 U.S. at 557) (internal quotations omitted). Indeed, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," dismissal is now required because the complaint "has not show[n] [] that the pleader is entitled to relief." Id. at 1950 (internal quotations and citation omitted).

The pleading requirements set forth in Iqbal and Twombly apply to all civil cases in federal court, Iqbal, 129 S. Ct. at 1950, and they represent a departure from prior pleading standards. See, e.g., St. Germain v. Howard, 556 F.3d 261, 263 n.2 (5th Cir. 2009) ("*Twombly* jettisoned the minimum notice pleading requirements of *Conley v. Gibson*."). The Iqbal standard may often require a very close parsing of the

particular allegations of a complaint to ascertain whether they have "'nudged'" the claim at issue "'across the line from conceivable to plausible.'" Iqbal, 129 S. Ct. at 1951 (quoting Twombly, 550 U.S. at 570).

B. Rule 12(b)(6) Pleading Standards Are Inapplicable to Administrative Whistleblower Complaints to OSHA

Given the myriad differences between administrative complaints to OSHA and complaints filed in federal district courts – including the fact that the pertinent statutory and regulatory whistleblower protection provisions do not contemplate or provide for 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 should not be available as a remedy. The Secretary has recognized that administrative complaints are "informal filings."[8] That conclusion is plainly

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[8] In Richter et al. 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

correct. Indeed, as discussed supra, a complaint used to initiate an investigation by OSHA is not a "complaint" as contemplated by Part 18, nor is it a "complaint" for purposes of Rules 8(a)(2) and 12(b)(6) of the Federal Rules of Civil Procedure.

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 in order to investigate the complainant's allegations. Whistleblowers have a very brief window of time for filing such a complaint; the regulations provide for a 30-day time limit. See 29 C.F.R. 24.103(d). At this stage, and particularly in light of the tight statutory deadline for filing retaliation complaints, many complainants proceed *pro se*.

In addition, the Department's regulations do not limit the complainant to the allegations contained in the four corners of his complaint; rather, the regulations explicitly contemplate that the complaint may be supplemented by interviews. This

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> section 5851 . . . . The complaint is, therefore, a most informal document.

Id.; 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").

framework is dramatically different from the framework applicable to complaints in federal court, in which litigants are confined to matters in the pleadings on a motion to dismiss. See, e.g., McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007) ("our review [of the grant of a motion to dismiss] is limited to the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference") (citation omitted).

Given this landscape, it is inappropriate to apply the pleading requirements of Rule 8(a)(2) to administrative whistleblower complaints, or to dismiss such complaints pursuant to the standards governing Rule 12(b)(6) motions.[9] The requirement that the Federal Rules of Civil Procedure "shall be applied in any situation not provided for or controlled by [the ALJ Rules], or by any statute, executive order or regulation," 29 C.F.R. 18.1(a), is entirely consistent with this conclusion. The treatment of administrative whistleblower complaints is in fact "provided for" by the applicable regulations, which, as noted, carefully and repeatedly distinguish such complaints from

[9] We are cognizant that the Board has on occasion entertained and granted motions to dismiss pursuant to Rule 12(b)(6). To the extent that applying federal pleading standards to administrative whistleblower complaints ever was appropriate, it now seems particularly ill-suited in light of the pleading standard reflected in Twombly and Iqbal.

the type of pleading that may be governed by the Federal Rules of Civil Procedure.

Although a complaint should not be dismissed on the basis of a deficient pleading, the regulations governing summary decision remain available to isolate and dispose of legally flawed claims at an early stage of the proceedings. In particular, under 29 C.F.R. 18.40, any party may, at least 20 days before the date fixed for any hearing, move with or without supporting affidavits for summary decision on all or any part of the proceeding. The administrative law judge may set the matter for argument and call for submission of briefs. 29 C.F.R. 18.40. This regulation thus establishes a mechanism by which a party that perceives a fundamental flaw in another party's claim may seek summary decision at an early stage.[10]

ALJs have the authority to structure proceedings consistent with the ALJ Rules. See 29 C.F.R. 18.29 (an ALJ has all powers necessary to conduct fair and impartial hearings and may "[d]o all other things necessary to enable him or her to discharge the duties of the office"). Thus, an ALJ may, in appropriate

[10] For example, a respondent may be able to demonstrate as a matter of law, and without the need for extensive discovery, that a particular claim is time-barred; that particular conduct does not qualify as protected activity as a matter of law; or that the complainant had no employment relationship with the respondent. The ALJ rules governing motions for summary decision parallel those of Federal Rule of Civil Procedure 56. 29 C.F.R. 18.40.

circumstances, respond to an early-filed motion for summary decision by bifurcating discovery so that a threshold issue may be addressed first. See 29 C.F.R. 18.13, 18.14. An ALJ may also, of course, set appropriate limits on discovery sua sponte. Indeed, in this case, the ALJ may decide on remand that full discovery is not warranted. However, the ALJ is required to decide the case based on an evidentiary standard, and may not simply evaluate Evans's allegations on the basis of federal pleading standards.

The Assistant Secretary takes no position on whether Evans could survive a motion for summary decision on the issue of whether he engaged in statutorily protected activity. The Assistant Secretary notes, however, that a remand to the ALJ to consider this issue is appropriate notwithstanding the Board's conclusion that summary decision constituted an alternate ground for dismissing Evans's complaint. The ALJ based its decision solely on Rule 12(b)(6) pleading requirements and should be given the first opportunity to determine whether summary decision is warranted, particularly since the EPA consistently contended that it sought dismissal of the complaint solely pursuant to Rule 12(b)(6) standards. Moreover, as the Board noted (and as EPA contended), Evans's July 2004 letter was incorporated into the complaint by reference, and the declarations Evans submitted were presented in an attempt to

show that he should be permitted to proceed with his claim and pursue discovery, not to invite summary disposition. Finally, the Board's determination on summary decision may have been colored by its close analysis of the complaint and application of federal pleading requirements. Given this context, the Assistant Secretary respectfully requests that the ALJ should have the opportunity to consider the propriety of summary decision in the first instance.

Accordingly, because federal court pleading requirements should not be applied to whistleblower complaints to OSHA, the ARB should grant the motion for reconsideration and remand the case to the ALJ for further proceedings.

CONCLUSION

For the reasons set forth above, the Assistant Secretary respectfully requests that this Board remand this case to the ALJ for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing "Brief of the Assistant Secretary for Occupational Safety and Health as Amicus Curiae" have been served this 17th day of June, 2010, via Federal Express, upon the following:

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