ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

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

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

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Pursuant to 29 C.F.R. 24.108(a)(1) and the Administrative Review Board's ("ARB" or "Board") October 11, 2011 Order, the Assistant Secretary for the Occupational Safety and Health Administration ("OSHA"), through counsel, submits this brief as amicus curiae to assist 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 therefore has a significant interest in how such complaints are handled.

[1] For purposes of this brief, the "Environmental Acts" are the Clean Air Act, 42 U.S.C. 7622, the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610, and the Safe Drinking Water Act, 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.

It is the Assistant Secretary's position that the federal court pleading requirements of Federal Rules of Civil Procedure 8 and 9 are not applicable to administrative whistleblower complaints under the Environmental Acts, and that complainant Douglas Evans's complaint therefore should not have been dismissed based on the Rule 8 pleading standard articulated in Ashcroft v. Iqbal, 556 U.S. 662 (2009). This conclusion is grounded in the regulations governing the whistleblower protection provisions of the Environmental Acts, the rules of practice for administrative hearings before an Administrative Law Judge ("ALJ"), and the Board's recent decision in Sylvester v. Parexel International, LLC, No. 07-123 (ARB May 25, 2011). For the reasons set forth more fully below, the Assistant Secretary therefore respectfully urges the Board to conclude that a Federal Rule 12(b)(6) motion to dismiss is not applicable to Evans's complaint, and therefore, remand to the ALJ for further proceedings is appropriate.

STATEMENT OF THE ISSUE

Whether administrative whistleblower complaints filed with OSHA may be dismissed for failure to state a claim under Rule 12 of the Federal Rules of Civil Procedure, particularly under the heightened pleading standards set forth in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009).

STATEMENT OF THE CASE

Statement of Facts and Procedural History[2]

Evans worked as an Environmental Specialist for respondent, the United States Environmental Protection Agency ("EPA"). Final Decision and Order ("FD&O") at 1 (Apr. 30, 2010). 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 (Mar. 11, 2008). OSHA determined that Evans's July 2004 letter did

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2 The Assistant Secretary's initial amicus brief in this case provides a full statement of facts and prior proceedings. For purposes of this supplemental brief, the Assistant Secretary only briefly summarizes the factual background and recent procedural history.

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[3] with OSHA.[4] 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

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

[4] 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.

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 FD&O (Apr. 30, 2010). On May 10, 2010, Evans filed a motion for reconsideration. The Assistant Secretary submitted an amicus brief in support of Evans's motion for reconsideration. By order dated August 18, 2010, the Board denied Evans's request for reconsideration.

Evans appealed the Board's decision to the Ninth Circuit Court of Appeals. On May 25, 2011, while the appeal was pending, the Board decided Sylvester. The Secretary of Labor ("Secretary") subsequently filed an unopposed motion to remand the case, because "the ARB has recently reconsidered the central issue presented in this case: whether administrative whistleblower complaints . . . may be dismissed for failure to state a claim under Rule 12." Secy's C.A. Mot. for Remand at 1 (June 10, 2011). On July 11, 2011, The Ninth Circuit granted the Secretary's motion.

On October 11, 2011, the Board issued a Notice of Remand and Order Establishing Briefing Schedule, directing the parties, including the Assistant Secretary, to submit briefs within thirty days of the date of the order. On January 19, 2012, the

Assistant Secretary filed a motion for leave to file an amicus brief on or before February 24, 2012. On January 26, 2012, the Assistant Secretary's motion was granted.

ARGUMENT

WHISTLEBLOWER COMPLAINTS TO OSHA ARE SIGNIFICANTLY DIFFERENT FROM FEDERAL COURT PLEADINGS AND SHOULD NOT BE SUBJECT TO FEDERAL COURT PLEADING STANDARDS

I. Whistleblower Complaints to OSHA Are Informal Documents Intended to Initiate Investigations, Not Adjudications, And Are Not Subject to Federal Court Pleading Requirements

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 the Department of Labor's regulations, is the vehicle by which a whistleblower can prompt OSHA to initiate an investigation. As such, the whistleblower complaint is not analogous to a complaint that commences litigation in federal court.

Borrowing from the Federal Rules of Civil Procedure, the Board dismissed Evans's complaint under 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), 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 alleged in the complaint"); 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 thirty 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). Also, complainants filing within this short time period realistically may not have the opportunity to obtain assistance from counsel and may file pro se, buttressing the conclusion that the complaint filed with OSHA is intended to be an informal document.

The regulations implementing the whistleblower provisions of the Environmental Acts at issue likewise contemplate that whistleblower complaints are informal documents intended to trigger an administrative investigation, not formal pleadings analogous to complaints in federal court. 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," and that a complainant may even make an oral complaint, or file a complaint in any language. 29 C.F.R. 24.103(b) ("A complaint may be filed orally or in writing. . . . [T]he complaint may be filed in any language.").[5]

Similarly, 29 C.F.R. 24.104, which governs OSHA investigations under the Environmental Acts, confirms that complaints are to be filed with OSHA for purposes of initiating

[5] These whistleblower rules were revised in January 2011 to explicitly allow complaints to be filed orally with OSHA. However, the ARB itself had long permitted oral complaints, even before the regulations explicitly permitted them. See, e.g., Roberts v. Rivas Envtl. Consultants, Inc., No. 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 Energy Reorganization Act of 1974, 42 U.S.C. 5851, and the Department's accompanying regulations in 29 C.F.R. Part 24).

an investigation, not an adjudicatory proceeding. In federal court, the plaintiff's "plain and short statement" contained in the complaint gives notice of a claim so that the defendant may mount a defense. See Twombly, 550 U.S. at 555. By contrast, a complaint under the Environmental Acts filed with OSHA is intended to enlist OSHA's assistance to investigate the complaint's allegations. See 29 C.F.R. 24.104. Upon the filing of a complaint with OSHA, the Assistant Secretary is to determine whether "[t]he complaint, supplemented as appropriate by interviews of the complainant" alleges "the existence of facts and evidence to make a prima facie showing." 29 C.F.R. 24.104(e). Thus, the "complaint" is not limited to what is contained in the complainant's initial filing with OSHA. Rather, the regulations specifically contemplate that the initial filing will be supplemented by additional information obtained from the complainant. This framework differs dramatically from the framework applicable to complaints in federal court, where litigants are generally confined to matters in the pleadings on a motion to dismiss for failure to state a claim. See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 323 (2007); 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).

The Secretary has recognized that administrative complaints under analogous whistleblower statutes such as the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. 5851, are "informal filings." For example, in Richter v. Baldwin Associates, No. 84-ERA-9-12, slip op. at 6 (Sec'y of Labor Mar. 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, [780 F.2d 1505, 1509 (10th Cir. 1985)], is not a formal pleading setting forth legal causes of action. Rather it is an informal complaint filed with the Wage and Hour Division of the U.S. Department of Labor for the purpose of initiating an investigation on behalf of the Secretary of Labor, who has been charged with the responsibility of administrating section 5851.[6] . . . The complaint is, therefore, a most informal document.

Id.; see also Ruud v. Westinghouse Hanford Co., No. 96-087, slip op. at 21 n.27 (ARB Nov. 10, 1997) (explaining that "[o]ur disposition comports with Department of Labor precedent that complaints are informal filings"). That conclusion - that a complaint is a "most informal document" - is plainly correct and further supports the Assistant Secretary's position that

6 The Secretary has delegated responsibility for administrating the Environmental Acts to OSHA. See Secretary's Order 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012).

whistleblower complaints under the Environmental Acts should not be subject to formal federal court pleading standards.

The procedures following an OSHA investigation also differ from federal court proceedings and do not contemplate the filing of a "complaint" as that term is used in the Federal Rules of Civil Procedure. 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 complainant file a new or amended complaint when he or she seeks relief from an ALJ. See 29 C.F.R. 24.106; see also Secretary's Order 1-2010, 75 Fed. Reg. 3924, 3925 (Jan. 25, 2010) (Board "shall observe" Department's regulations in its decisions). Similarly, a whistleblower is not required to file a complaint when petitioning the Board for review.

The Rules of Practice and Procedure for Administrative Law Judges ("ALJ Rules") likewise illustrate that administrative complaints filed with OSHA under the Environmental Acts are not akin to court complaints, and therefore federal court pleading standards do not apply to them. Under the ALJ rules, a "complaint" means "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]

In addition, the ALJ rules require answers to complaints, 29 C.F.R. 18.5(a) and (d), but do not specifically provide for motions to dismiss complaints. Instead, ALJs have general authority to apply the Federal Rules of Civil Procedure, except when "any statute, executive order or regulation" controls, as the rules at 29 C.F.R. Part 24 do here. 29 C.F.R. 18.1(a). After initiation of ALJ proceedings, an ALJ may order parties to file pre-hearing statements of position addressing issues in the proceeding, stipulated facts, facts in dispute, witnesses, applicable law, and the conclusion to be drawn. 29 C.F.R. 18.7.

[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).

Upon motion by a party or upon the ALJ's own motion, an ALJ may also direct the parties to participate in a pre-hearing conference. 29 C.F.R. 18.8. At least twenty days before a hearing, any party may move for summary decision on all or any part of the proceeding. 29 C.F.R. 18.40(a). An ALJ may enter a summary decision if the pleadings, affidavits, material obtained by discovery or otherwise, or materials officially noticed show that there is no genuine issue of material fact and a party is entitled to summary decision. 29 C.F.R. 18.40(d) and 18.41. Where a genuine question of material fact is raised, the ALJ sets the case for an evidentiary hearing. 29 C.F.R. 18.41(b).

For all of these reasons, a plain reading of the ALJ rules and the rules applicable to whistleblower complaints under the Environmental Acts leads to the conclusion that complaints filed with OSHA under those Acts are not equivalent to federal court complaints and the pleading standards applicable to federal court complaints should not be applied to them.

The pleading standards applicable in federal court litigation impose burdens on complainants and are unnecessary to the adjudication of whistleblower cases under the Environmental Acts. Such pleading standards are not consistent with the

Assistant Secretary's reasonable construction of the regulations governing these whistleblower provisions.[8]

II. The Reasoning in The Board's En Banc Decision in Sylvester is Applicable to All Whistleblower Cases

On May 25, 2011, the Board issued an en banc decision in Sylvester v. Parexel International, LLC, No. 07-123 (ARB May 25, 2011), that, inter alia, addressed whether the Rule 8 pleading standards articulated in Twombly and Iqbal applied to whistleblower cases brought under the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. 1514A. The ARB concluded that a complainant does not have to meet the federal court pleading standard established by Twombly and Iqbal, that is, the requirement to plead factual content in a complaint sufficient to state a "plausible" claim for relief. The Board reasoned that SOX complaints are filed with OSHA, which then investigates the complaint, and requiring a complainant to file the equivalent of a federal court complaint with OSHA would contravene OSHA's duty

[8] While this brief specifically addresses complaints under the Environmental Acts, the Assistant Secretary believes that the reasoning explained here applies equally to the other whistleblower statutes implemented by OSHA, which are governed by statutory and regulatory procedures very similar to those governing the Environmental Acts and similarly contemplate that the complaint to OSHA, as supplemented by interviews of the complainant, must state a prima facie allegation. See, e.g., 29 C.F.R. Part 1979 (procedures governing complaints under the Wendell H. Ford Aviation and Investment Act for the 21st Century, 49 U.S.C. 42121); 29 C.F.R. Part 1982 (procedures governing complaints under the National Transit Systems Security Act, 6 U.S.C. 1142, and the Federal Railroad Safety Act, 49 U.S.C. 20109).

to interview the complainant and supplement the complaint. See Sylvester, slip op. at 12-14. This conclusion should be extended to all whistleblower cases under the Environmental Acts and other whistleblower statutes administered by OSHA, as the "procedural requirements [of Twombly/Iqbal] are not analogous to cases arising under" the employee protection provisions of any of these whistleblower statutes. Id. at 13. The same rationale that the Board applied in Sylvester to SOX whistleblower cases applies with equal force to the employee protection provisions of the Environmental Acts. The statutory and regulatory schemes of SOX and the Environmental Acts are very similar, and the statutes share a broad remedial purpose. SOX complainants follow the same procedures as whistleblowers under the Environmental Acts for initiating an investigation with OSHA. The "complaint" regulations governing SOX and the Environmental Acts are similar, although the regulations implementing the Environmental Acts allow for an even broader, more informal "complaint" (permitting oral complaints and complaints in any language) than the SOX regulations that were in place when Sylvester was issued. See 29 C.F.R. 1980.103 (2010); 29 C.F.R. 24.103.[9] Similarly, cases are initiated before

[9] In November 2011, OSHA published an interim final rule revising the procedures under SOX to provide, as rules governing the Environmental Acts do, that complaints to OSHA may be made orally and in any language. See U.S. Dep't of Labor,

an ALJ in the same manner across statutes. Indeed, a complaint under the Environmental Acts is subject to the same "procedural paradigm" as SOX complainants. Sylvester, slip op. at 13. In addition, OSHA has the same "express[] duty" to investigate and supplement the complaints under both SOX and the Environmental Acts. Id. Indeed, in the most recent regulations for the environmental acts, the Department advised that the regulatory revisions "were designed to make [the Environmental Act regulations] as consistent as possible with the more recently promulgated procedures for handling retaliation complaints under other whistleblower provisions" such as SOX. See U.S. Dep't of Labor, Occupational Safety and Health Admin., *Procedures for the Handling of Retaliation Complaints under the Employee Protection Provisions of Six Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as Amended*, 76 Fed. Reg. 2808 (Jan. 18, 2011). The Department further explained that because "OSHA recognizes the importance of consistency in the procedures governing the whistleblower statutes that it administers, it has tried to standardize these regulations with other whistleblower regulations promulgated by OSHA." Id. Moreover, whistleblower proceedings before an ALJ for both SOX and the Environmental

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Occupational Safety and Health Admin., *Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended*, 76 Fed. Reg. 68084, 68086 (Nov. 3, 2011).

Acts are governed by the same regulations. See ALJ Rules. Given these similarities, there is no reason why Sylvester's holding should not be equally applicable to whistleblower complaints under the Environmental Acts.

III. 29 C.F.R. 18.40 is The Exclusive Means For Seeking Dismissal of Whistleblower Complaints on The Merits

The summary decision provisions in 29 C.F.R. 18.40 are the exclusive means for seeking dismissal of whistleblower complaints under the Environmental Acts on the merits. That conclusion follows logically from the absence of ALJ rules allowing dismissal of whistleblower complaints and the inapplicability of Rule 12(b)(6) to whistleblower complaints.

In this regard, the Assistant Secretary agrees with Judge Cooper Brown's partial dissent in Sylvester that neither Federal Rule of Civil Procedure 12(b)(6) nor federal court pleading standards apply to OSHA whistleblower complaints, as they are not "complaints" as those pleadings are envisioned under the Federal Rules of Civil Procedure. See Sylvester, slip op. at 29, 31 (Cooper Brown, J. dissenting in part). The Assistant Secretary believes that the Board's statement in Sylvester that "Rule 12 motions challenging the sufficiency of the pleadings are highly disfavored by the SOX regulations and highly impractical under the Office of Administrative Law Judge (OALJ) rules" may lead to confusion regarding whether Rule 12 motions

may be used at all, and if so, what pleading standards apply. Slip op. at 13. Specifically, the Assistant Secretary notes that although the Sylvester decision appears to bifurcate the "heightened pleading standards" of Twombly/Iqbal from Rule 12(b)(6), the two are in fact intertwined. Sylvester, slip op. at 29. Accordingly, the Assistant Secretary urges the Board to clarify, for the reasons discussed more fully below, that Rule 12(b)(6) motions are never appropriately applied to whistleblower complaints filed with OSHA.[10]

As the partial dissent explained, "[t]he applicability of Fed. R. Civ. P. Rule 12(b)(6) is premised upon the existence of a complaint filed to commence a civil action in federal court . . . which must meet the pleading requirements of Fed. R. Civ. P. Rule 8(a)(2) (or where fraud is alleged, the more stringent pleading requirements of Fed. R. Civ. P. Rule 9(b))." Sylvester, slip op. at 30. The requirements of Twombly/Iqbal are part and parcel of those pleading standards. The Supreme Court has explicitly explained that Twombly's "plausibility

[10] The Assistant Secretary has previously enunciated this position in amicus briefs in the instant case, as well as in the Sylvester case. See Br. for the Assistant Sec'y as Amicus Curiae at 17, Evans, ARB No. 08-059 ("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"); Br. for the Assistant Sec'y as Amicus Curiae at 10, Sylvester, ARB No. 07-123 ("The summary decision provisions in 29 C.F.R. § 18.40 are the exclusive means for seeking dismissal of SOX complaints on the merits.").

standard" is not a heightened pleading standard beyond what the Federal Rules had always required. Twombly, 550 U.S. at 569 n.14. The Supreme Court further noted that changes to general pleading requirements "can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation." Id. (internal quotation marks and citation omitted). Thus, Twombly and Iqbal merely put a judicial gloss on Rule 8 pleading requirements, and Twombly/Iqbal's "plausibility standard" may not be extricated from the Federal Rules. See also Twombly, 550 U.S. at 546 (Conley's "'no set of facts' language . . . is best forgotten as an incomplete, negative gloss on an accepted pleading standard.") (emphasis added). Thus, the Board's conclusion in Sylvester that Twombly and Iqbal do not apply to whistleblower complaints, leads logically to the conclusion that Rule 12(b)(6) motions do not apply to such complaints because the motions are premised on the applicability of the Rule 8 pleading requirements.

This conclusion does not undermine the authority of ALJs to manage their dockets and efficiently dispose of meritless cases. 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 twenty 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 ALJ may set the matter for argument and call for submission of briefs. See 29 C.F.R. 18.40. As the partial dissent noted in Sylvester, summary decision may be sought "with or without supporting affidavits," clearly contemplating that summary decision may be available on a purely legal issue. Slip op. at 32. 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.[11]

Furthermore, ALJs have the authority to structure proceedings consistent with the ALJ Rules. See 29 C.F.R. 18.29(a)(9) (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"). For example, they can require pre-hearing statements of position or hold pre-hearing conferences under 29 C.F.R. 18.7 and 18.8 to narrow issues. They can limit discovery under 29 C.F.R. 24.107(a). An ALJ may, in appropriate circumstances, respond to

[11] 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. See 29 C.F.R. 18.40.

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 and 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 the standard called for by 29 C.F.R. 18.40, and may not simply evaluate Evans's allegations in his complaint to OSHA on the basis of Federal Rule 12 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. 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.

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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FEBRUARY 2012

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 23rd day of February, 2012, via express mail, upon the following:

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