



Issue Date: 22 February 2018

In the Matter of:
MICHAEL NOLAN
COMPLAINANT

v.

2017-CAA-00002

JWS REFRIDGERATION
RESPONDENT

Complainant
Pro Se
Steven E. Hovsepian, Esquire
For Respondent.

DECISION AND ORDER
DENIAL OF CLAIM
DENYING COMPLAINANT'S MOTION FOR SUMMARY DECISION
GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION
HEARING CANCELLED

This Clean Air Act whistleblower case was scheduled for hearing February 27, 2018 in Miami, Florida. Although the Complainant is pro se, I advised him on numerous occasions, in pleadings and via emails to get a lawyer.

The parties have filed cross Motions for Summary Decision. Neither of the parties took depositions. The Complainant did not verify his allegations and produced no affidavits to support his position. The key issue is whether he is a "whistleblower" as that term is defined by the Act. 42 USC §7622 (a)(1),(2), and (3). I find that he cannot prove that he meets the statutory criteria.

RATIONALE

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, found at Title 29 C.F.R. Part 18, provide that an administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue of material fact. Title 29 C.F.R. Section 18.40; Federal Rule of Civil Procedure 56(c).

Summary judgment is appropriate when the record "show[s] that there is no genuine issue

as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). No genuine issue of material fact exists when the "record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary judgment has the burden of establishing the "absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).

On August 22, 2017, after I received Respondent's initial Motion for Summary Decision, I entered an order, in essence directing the parties to confer and to provide me with enough information to hold a hearing. I outlined the summary decision process and extended the period for Complainant to respond. On October 19, I continued the date of hearing from November 20, 2017. On October 24, 2017, Respondent filed a Motion in Limine/Motion to Exclude Exhibits and Testimony, based upon:

Pursuant to the Court's Pre-Hearing Order issued on May 10, 2017, all discovery in this matter was terminated as of October 16, 2017. Additionally, both parties were ordered to submit Pre-Hearing Submissions no later than September 1, 2017. Respondent timely submitted its Pre-Hearing Submissions, however Complainant has failed and/or refused to do so as of the date of this motion.

I denied the Motion but I re-addressed 29 CFR § 18.72: Summary decision and I related the law as to proof under the CAA and rescheduled the hearing for February 27, 2018.

On December 27, the Respondent filed an Amended Motion for Summary Decision with a memorandum of law. The Complainant requested appointment of a settlement judge and requested that the hearing be done via telephone. On January 31, Complainant filed a Motion for Summary Decision. Respondent filed objections.

The Respondent argues that the following are "undisputed" facts":

1. Complainant was hired as Respondent's Operations Manager on May 13, 2013. (Declaration of Scragg, Par 2).
2. As the Operations Manager, Complainant was responsible for various duties which included monitoring adherence to applicable rules, regulations and procedures for Respondent. (Declaration of Scragg, Par. 3).
3. Complainant admits the OSHA and CAA issues he raises were within his job duties as the Operations Manager, and in fact represented to this Court that: "Evidence shows Complainant was made responsible for this matter per his Job Description..."; and "Mr. Nolan could not ignore safety and regulatory issues that were part of his Job Description...". (Complainant Request for Review; April 13,

2017, pg. 2; emphasis added).

4. Based on Complainant's job performance concerns, Respondent's CEO met with Complainant on November 7, 2013 to discuss his performance deficiencies and to extend his initial 6 month probationary period. (Declaration of Scragg, Par. 4).
5. Complainant's performance did not improve and he was terminated on December 7, 2013. (Declaration of Scragg, Par. 5). The termination was based solely on his failure to meet performance expectations and was in no way related to any purported OSHA or CAA issues raised. (Declaration of Scragg, Par. 6).
6. Prior to hiring Complainant, Respondent was made aware of an OSHA investigation and findings and was in the process of abating the issues raised, which included those issues now raised by Complainant. (Declaration of Scragg, Par. 6).

In response to the allegation that he would have been terminated from his job in any event, Complainant argued the following:

3. The only defense the Respondent has provided is that Michael Nolan was not performing his job and there were accusations of being rude which is why he was terminated. Ample evidence has been provided in email communications showing the exact opposite. The Complainant did in fact receive a performance pay increase per his contract. Exhibits provided by the Complainant demonstrate a long list of responsibilities successfully performed and professional communications between all employees until the abrupt beginning of the adverse retaliatory actions against the Complainant in October after the OSHA repairs finally began under the direction of Mr. Nolan. The false accusations of rudeness by the managers Jeanette Jose and Robert Perez are baseless accusations and further acts of retaliation under the direction of CEO John Scragg and a weak attempt at a defense for illegal behavior.

4. The accusation that the termination was due in some part to a website is wholly false and ridiculous. Exhibit 19 itself shows CEO John Scragg clearly stating the Complainant's role in the company. Diverting and demoting the Operations Manager to only creating a website is textbook retaliation and ridiculous considering the severe safety issues, financial difficulties and human resource department issues the Complainant was tasked with. Evidence also shows the CEO John Scragg diverting the time and efforts of Michael Nolan for organizing remodeling work on his personal home during company time. This is hardly the act of someone concerned that his manager is not able to finish his actual work duties. Evidence also shows that the Complainant was successfully working on the website as requested in addition to all his other responsibilities. The Complainant had already mostly designed a modern website and was tasked with designing an e-commerce website as well. The Respondent and his managers refused to cooperate with providing the requested and

necessary content knowing it was all just a ruse. John Scragg himself then removed Michael Nolan from this task. It is also impossible for a modern, professional website including an e-commerce website to be designed and operating from nothing, by a new company employee working from Guam with US mainland based designers and hosting companies in the eight-week time frame as described in the Respondents motion. The creation of a website was not part of the Operations Manager job description and Michael Nolan is not now and never claimed to be a website designer. The task of the website was a ruse to intimidate, reassign from OSHA and EPA work and use as a false cause now for termination to hide the actual retaliation.

Respondent objected to the fact that Complainant did not attach any affidavit or declaration in support of the above allegation, and further failed to provide any cited authority. 29 C.F.R. 18.33(c)(4):

Furthermore, pursuant to 29 C.F.R. 18.72(c)(2), Respondent objects to Complainant's self-serving, unsworn statements contained throughout the motion, which is essentially the entire motion with the exception to specific references to Respondent's exhibits.

Complainant is not a lawyer. Again, 29 C.F.R. 18.33(c)(4) sets forth:

Unless the motion is unopposed, the supporting papers must include affidavits, declarations or other proof to establish the factual basis for the relief. For a dispositive motion and a motion relating to discovery, a memorandum of points and authority must also be submitted. A judge may direct the parties file additional documents in support of any motion.

The Complainant has not directed me to any specific evidence to show that he complained to OSHA or to Mr. Scragg about irregularities in the OSHA investigation.

I assume that the Complainant would have testified at hearing consistent with paragraphs 3 and 4 of his assertion set forth above. However the testimony given by the other witnesses given to OSHA are not admissible, unless they are given under oath and are subject to cross examination by Respondent.

In Complainant's Motion for Summary Decision, he states the following:

2. The Complainant Michael Nolan was asked to come to Guam as the Operations Manager by CEO John Scragg in 2013 after several years of a working relationship and family friendship in Fort Myers, Florida where Mr. Scragg and his wife Audre DaCosta-Scragg had purchased a home and kept their yacht. The request was made because of Mr. Nolan's honesty, modern business talents and work ethic that John Scragg had come to know well and had mentioned in the job offer letter which has been submitted into evidence. CEO John W. Scragg was retiring from his company JWS

Refrigeration as shown in Managers meeting minutes recorded by Jeanette Jose and submitted as an exhibit in evidence and there was no manager in the company on Guam before Mr. Nolan's arrival who was competent enough to carry on the business operations after his departure. The managerial incompetence prior to Mr. Nolan's arrival is proven by the disastrous financial state of the company upon Mr. Nolan's arrival in late August of 2013 as shown in the Complainants exhibits of evidence, the willfully neglected OSHA inspection items from earlier 2013 resulting in the citations and large fines shown in exhibits of evidence and the uncompleted list of OSHA recommended safety repairs from an OSHA walkthrough in 2012.

3. There is absolutely no evidence of any performance or personal attitude issues regarding the Michael Nolan prior to the CEO John Scragg recognizing in October 2013 he could be facing potential criminal legal action if the OSHA willful neglect and EPA issues in the company were addressed, and potentially exposed by Mr. Nolan in the process of just bringing the company into compliance. Exhibits of evidence prove CEO John Scragg consistently commending Michael Nolan and agreeing with his assessments of the non-performing managers, including current witnesses for the Respondent, and personally approved the policies he was implementing. Exhibits show communication by Michael Nolan to be highly professional even after the retaliation began which completely disproves the fabricated accusations levied against him as a defense. The October 9th polite request by Jeanette Jose for Michael Nolan to attend the meeting with OSHA on Guam on the 10th to discuss the situation the company which is submitted as evidence and the letter begging for a reduction in fines to the Hawaii OSHA office written and signed by the General Manager Mark Crisostomo, moreover the fact that the violations had existed and yet were never brought to the attention of the Operations Manager previously is undisputable evidence that this protected activity Mr. Nolan was engaged in was in fact the responsibilities of those managers and the CEO who had been completely ignoring them for months prior to Mr. Nolan's employment. Performing the work of others at their request, especially regarding their own previous willfully neglected duties to the public and the employee's safety is indisputably outside the normal duties of Mr. Nolan hired just weeks earlier. Thus, to imply the Manager Rule would apply as a defense for the Respondent's behavior is a total fallacy.

4. After Michael Nolan's October 10th Meeting with OSHA, CEO John Scragg and his managers, who were responsible for the willful neglect of the OSHA matters and years of failure to create any policy whatsoever for EPA mandated Freon disposal, colluded to intimidate, discredit and then quickly terminate the Operations Manager and committed a number of simply textbook retaliatory actions per the DOL Whistleblower programs very description of retaliatory action against an employee engaged in protected activity. This is what caused the Whistleblower complaint to be filed. The individuals who were directly responsible for the failures and neglect of the company responsibilities prior to Michael Nolan's employment on Guam are the same individuals now listed as witnesses and making baseless claims against Michael Nolan in this case.

5. CEO John Scragg has made sworn statements under penalty of perjury

during the investigation stating that he did not even know about the Operations Manager's work on fixing the OSHA safety issues, only to have a plethora of evidence submitted showing the exact opposite was the situation. It was also submitted as an exhibit of evidence by the Respondent that the CEO felt the need to make appalling false criminal accusations about Michael Nolan to third parties even after the Operations Manager had been terminated. It has been proven by submitted evidence that the Respondent made false claims of completion of the items citations had been issued for to the Hawaii OSHA office in order to beg for a reduction in fines. At the time of Operations Managers termination, the work had not been completed and in fact an invoice for parts of the dangerous forklift out of compliance had just been submitted as shown in exhibits by the Complainant. The Respondent has settled a major federal lawsuit in recent years involving other illegal activities regarding his Freon activities. It has been shown in evidence that the Respondent was willing to violate Guam labor law with this aberrant termination which a 40 plus year old corporation on Guam certainly knew or should have known about and even was willing to jeopardize the health and well-being of the Complainants eight-month pregnant spouse by forcing them to make a 20 plus hour flight off Guam. These are the cowardly and desperate acts of an organization attempting to cover up potentially illegal activity.

6. In conclusion, the material evidence in this case, the time line of events, the protected activity, retaliatory action and abrupt termination without stated cause at the time are undisputable and the accusations of the defense are baseless and even document attempts at intimidation and retaliation against the employee. The Complainant has submitted communications as evidence that the original investigating office of the DOL in San Francisco repeatedly said they had staffing and case back log problems which is why the original investigation of this case was mishandled and transferred to a completely different part of the country apparently for completion. Both parties have now submitted the evidence necessary to allow a Summary Decision and have requested this resolution. A decision in this manner will save all parties the time and costs involved as well as the courts frustration with necessarily having a Pro-Se litigant. Proceeding with a hearing at this point will not change the material facts and exhibits of evidence in this matter which completely support the Whistleblower complaint. The Complainant and his family have a concern considering the Respondents apparent desire to fly a group of people to Miami, FL all the way from Guam at enormous expense for a brief hearing, instead of considering picking up a phone if the telephonic hearing was granted. While the absurd squandering of company money was a major concern for Mr. Nolan while he was Operations Manager; the concern now is the potential willingness and clear ability of the Respondent to commit acts of further retaliation against the Complainant. This concern is based on knowledge gained from the former friendship between John Scragg and the Complainant and their families prior to the business relationship on Guam and the high degree of hostility and immaturity shown towards the Complainant in the course of this matter. The Complainant respectfully requests that the court also consider this when arriving at a decision of judgement for the Complainant's lost wages, lost personal property and any other relief this court deem appropriate.

Respondent asserts that despite Complainant's unsworn self-serving allegations, Complainant cannot provide any admissible evidence to rebut the following material facts as to Respondents legitimate reason for termination.

- a. Complainant's lack of progress and failure to complete the company website changes, which are documented as early as October 2013 as Complainant approached his 90 day probationary period; (Attached Declarations, Exhibits A-E).
- b. Disapproval of Mr. Scragg regarding the lack of progress on the website which was a high priority assignment for Complainant. (Attached Declarations, Exhibits A-E).
- c. Complainant's unacceptable and unprofessional behavior toward the CFO and HR manager in November of 2013. (Declarations of Jeannette Jose and Robert Perez).
- d. Additional concerns brought to Mr. Scragg's attention regarding Complainant's performance, use of his time, and oversight of customer issues that could have been avoided. (Declaration of Robert Perez).
- e. Lack of any evidence whatsoever that anyone at JWS expressed any objection or refusal to properly address any OSHA issues; no one at JWS expressed any desire or intention to retaliate against Complainant; other individuals dealing with these same OSHA issues were in no way retaliated against by JWS; Complainant's termination was based solely on performance and had nothing to do with any OSHA issues. (Attached Declarations, Exhibits A-E).

Respondent argues that the admissible evidence supports a finding that Respondent's termination supports a finding by clear and convincing evidence that Respondent would have taken the same adverse action in the absence of any alleged protected activity.

Complainant has requested not to travel for the hearing and reminds me that his witnesses are in several locations, including Guam. In email exchanges I provided the parties several ways to handle the logistics. By now all of the discovery should have ended and the parties should be ready for a hearing. Neither of the parties has submitted subpoenas for my signature, and neither has submitted any depositions, although the Respondent has submitted several affidavits. Although they have submitted some "exhibits," the parties did not follow my prehearing orders.

I accept that Complainant's statement:

The managerial incompetence prior to Mr. Nolan's arrival is proven by the disastrous financial state of the company upon Mr. Nolan's arrival in late August of 2013 as shown in the Complainants exhibits of evidence, the willfully neglected OSHA inspection items from earlier 2013 resulting in the citations and large fines shown in exhibits of evidence

and the uncompleted list of OSHA recommended safety repairs from an OSHA walkthrough in 2012.

may very well be accurate.

However, a review of the entire record and especially the cited exhibits does not show that the Complainant placed OSHA or his employer on notice that alleged CAA violations were occurring during the course of the OSHA investigation that would place him in protected activity. To the contrary, I accept the Respondent's assertions:

Lack of any evidence whatsoever that anyone at JWS expressed any objection or refusal to properly address any OSHA issues; no one at JWS expressed any desire or intention to retaliate against Complainant; other individuals dealing with these same OSHA issues were in no way retaliated against by JWS; Complainant's termination was based solely on performance and had nothing to do with any OSHA issues. (Attached Declarations, Exhibits A-E).

Complainant did not produce any evidence to rebut the affidavits.

The primary issue is whether the Complainant is a "whistleblower" as that term is defined by law. 42 USC §7622, employee protection states in part:

(a) Discharge or discrimination prohibited

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of 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.

The Complainant stated in a pleading dated October 6, 2017:

My family and I were not relocated to Guam by the respondent until July of 2013 and my first day of work was July 23, 2017. I have included the flight itinerary from May of 2013 proving I was not on Guam during the time they claim I was working. The job offer, of course, made no mention of any outstanding OSHA violations or any such

issues, particularly since the surprise OSHA inspection and citations were written after my trip initial trip to Guam. This is a matter of evidence in case record. The OSHA actions against the respondent were ignored by the respondent until the fines were received in September of 2013 by mail. At that time John Scragg demanded his assistant and General Manager beg the OSHA Hawaii Branch for forgiveness and a fine reduction in writing and claimed repairs had begun, when they in fact had not at all. This letter is signed by General Manager Mark Crisostomo and is on file with the Department. This fact also proves the allegation made by the respondent and his attorney that it was the Operations Manager's sole duty to address the respondents OSHA violations and illegal behavior was both false and in bad faith. I have submitted communications between myself and the respondent including CEO John Scragg which show the initiation of the corrective actions in October, beginning with a meeting to discuss the "situation" as Mr. Scragg's personal assistant calls it, with an OSHA investigator on Guam who had a relationship with the respondent's General Manager Mark Crisostomo. It was not until after this OSHA investigator, Mr. Anthony Quidachay, informed the respondent that they were obviously displaying "willful neglect" and would be held criminally liable, did any repair of the facilities take place.

Although the documents submitted show that the Respondent was charged with violations, there is no evidence to show that Complainant complained to OSHA or even complained internally.

However, apparently the first notice given by Complainant that there were improprieties committed by Respondent's CEO was the filing of the claim after Complainant was in the process of being terminated by Respondent.

Respondent was involved with OSHA investigations when the Complainant was hired. Part of his job required him to manage some of the CAA matters. However, he cannot show that he complained until after his job was placed in jeopardy. An employee does not engage in protected activity when he reports something the employer already knew. *Hitchcock v. FedEx Ground Package System, Inc.*, 442 F.3d 1104, 1106 (8th Cir. 2006). I accept that Respondent produced evidence to establish that Respondent was already aware of the issues Complainant raised, and was in the process of abating these issues (SOF 6).

I accept Respondent's rendition:

Complainant admits the OSHA and CAA issues he raises were within his job duties as the Operations Manager, and in fact represented to this Court that: "Evidence shows Complainant was made responsible for this matter per his Job Description..."; and "Mr. Nolan could not ignore safety and regulatory issues that were part of his Job Description...". (Complainant Request for Review; April 13, 2017, pg. 2; emphasis added).

Searching the record before me, I cannot find any evidence that the Complainant actually

“blew the whistle” until he filed the claim.¹ Although the Complainant documents possible irregularities, there is no showing that he placed OSHA or the Respondent on notice that he was a whistleblower until this claim was filed. By that time, he had been terminated from his job.

After having been fully advised in this matter, I hereby:

1. **CANCEL** the oral hearing.
2. Treat the pleadings and proposed exhibits submitted in this case as evidence “on the record” as that term is defined by the Administrative Procedure Act.
3. Find that there are no material issues in dispute as to whether or not Complainant was a “whistleblower” entitled to protected activity under 42 USC §7622 (a)(1),(2), and (3).
4. Find that the preponderance of the evidence shows that Complainant was not a “whistleblower” as that term is defined in the law as he did not:
 - (1) commence, caused to be commenced, or was 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) testify or was about to testify in any such proceeding, or
 - (3) assist or participate or was 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.
5. I hereby **DENY** Complainant’s Motion for Summary Decision.
6. I hereby **GRANT** summary decision to Respondent.

¹ Typically the following generally constitute effective complaints to other entities:

- a. Complaints to local authorities
- b. Complaint to federal agency
- c. Contact with a public interest group or a private individual
- d. Contact with the media
- e. Complaint to general public
- f. Complaint to co-worker
- g. Complaint to Congress
- h. Seeking legal opinion

7. Complainant's request for relief in this matter is **DENIED**.

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing.

If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities.

The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and

24.110.