



Issue Date: 05 August 2011

CASE NO: 2011-CER-00001

In the Matter of:

CORNELIUS CASEY DROOG,
Complainant,

v.

INGERSOLL- RAND HUSSMAN,
Respondent.

DECISION AND ORDER DISMISSING COMPLAINT

This complaint arises under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610. On March 2, 2011, Cornelius Casey Droog (“Complainant”) filed a complaint with the Department of Labor, Occupational Safety and Health Administration (“OSHA”) against Ingersoll-Rand Hussman (“Respondent”) alleging retaliatory discharge, harassment, and blacklisting. Following an investigation, the assistant Regional Administrator issued his findings and dismissed the complaint on March 28, 2011, concluding that with the exception of Complainant’s blacklisting allegation, which occurred in early March of 2011, all of Complainant’s allegations are untimely and are not subject to equitable tolling or estoppel.

Complainant timely appealed the Secretary’s findings, and subsequently filed his complaint (“Contention”) on May 16, 2011. The case was scheduled for a hearing before the undersigned on June 27, 2011. On June 13, 2011, Respondent filed its Pretrial Statement and urged the undersigned to dismiss the complaint because the statute of limitations had expired. On June 27, 2011, Complainant submitted his Response to the Motion to Dismiss (“Resp. 1”) along with exhibits A through I. The hearing date of June 27, 2011 was vacated pending resolution of the motion. On July 11, 2011, the undersigned issued an order asking Complainant to show cause why Respondent’s motion to dismiss should not be granted. On July 22, 2011, Complainant submitted an Amended Prehearing Statement (“Resp. 2”) along with 189 pages of exhibits.

FINDINGS OF FACT

In 1985, Complainant began working for Respondent as an industrial refrigeration service technician. Contention at 1. In the course of his employment, he was involved in building experimental microturbine generators and giving training sessions at the jobsite in Monterey

Park, California.¹ *Id.* Sometime in 2004, Complainant began to experience serious respiratory and digestive problems, which he attributed to chemical exposure at the jobsite. *Id.* Complainant filed a claim for medical treatment and benefits in June or July of 2004. On August 25, 2004, Respondent denied Complainant's workers' compensation claim and refused to pay for his medical treatment. Resp. 2 at 112; Contention at 2-3. Complainant alleges that his brother, who also worked for Respondent, passed away from cancer after being exposed to chemicals at the same jobsite. Contention at 1, 5. Around November 17, 2005, Complainant was terminated from his job because of alleged timecard fraud. According to Complainant, he was terminated for raising concerns about chemical exposure, filing complaints with various government agencies and seeking medical attention.

Following his termination, Complainant hired an attorney, pursued his workers' compensation claim and filed a petition for discrimination with the State of California Workers Compensation Appeals Board pursuant to Labor Code section 132a alleging unjustly termination by Respondent. Resp. 2 at 46-47. On November 14, 2006, Complainant also filed a complaint in the Superior Court of California under the Fair Employment and Housing Act ("FEHA") for wrongful termination, harassment, and failure to engage in the interactive process.² *Id.* at 53. Complainant's case was set for a hearing in April of 2008, but Judge Barry Plotkin granted Respondent's summary judgment motion as to all causes of action on May 14, 2008.³ *Id.* at 128.

Between 2005 and 2009, Complainant successfully obtained employment with three different companies: Hill Phoenix Dover, Johnson Controls Inc., and DSG Mechanical Corporation.⁴ Like Respondent, all of these companies are members of the Air Conditioning,

¹ Monterey Park is home to a former Operating Industries, Inc. (OII) landfill. OII began operating the site in the 1940's, and thousands of companies used the site to dump millions of gallons of commercial, residential, and industrial wastes. In January 1984, the State of California placed OII's landfill on the California Hazardous Waste Priority List, and the site shut down operations later that year. EPA placed the site on Superfund's National Priorities List in May 1986 and began engaging in negotiations to facilitate cleanup efforts. *See* Environmental Protection Agency, *Operating Industries, Inc. Landfill: In California, Many Hands Make Greener Work*, <http://www.epa.gov/superfund/accomp/success/oii.htm> (last visited Aug. 3, 2011).

² Before initiating his lawsuit against Respondent in state court, Complainant filed a FEHA complaint with the DFEH on October 30, 2006, alleging harassment, termination, denial of accommodation, denial of medical leave and failure to engage in the interactive process. DFEH closed the file because Complainant asked for an immediate Right to Sue Notice. Resp. 2 at p.72, 86.

³ After dismissing the case, Judge Plotkin awarded Respondent costs and attorney's fees in the sum of \$18,737.55. Resp. 2 at 129. On March 13, 2009, Complainant's attorney informed him that Respondent was willing to waive these assessed costs and fees in exchange for a waiver of any appeal in the matter, and Complainant signed the waiver. *Id.* at 136; Resp. 1 at 9.

⁴ In his original pre-hearing statement Complainant provided the following work history: Hussmann (Ingersoll-Rand) 6/24/1985 -11/17/2005; Hill Phoenix (Dover) 02/21/2006 to 2/12/2008; Johnson Controls 05/05/2008 to 08/10/2009; DSG Mechanical 11/12/2009 to 11/29/2010. Resp. 1 at 4. In his amended Complaint, Complainant alleges that his employment with DSG Mechanical lasted until December 31, 2010. Resp. 2 at 4.

Refrigeration, and Mechanical Contractors Association of Southern California (ARCA/MCA).⁵ ARCA is headed by its Executive Vice President, Richard J. Sawhill, and engages in bargaining with Complainant's union, United Local 250, which is the seventh largest local in the United Association.⁶ Before becoming the Executive Vice President of ARCA, Mr. Sawhill worked for Respondent as the director of human resources and labor relations. Resp. 2 at 166. According to ARCA's official website, Mr. Sawhill continues to serve as the Executive Vice President till this day.⁷ *Id.* at 164.

According to Complainant, the retaliation began when he took a job with Hill Phoenix (Dover) Chino on February 21, 2006. Compl. 1 at 5. Complainant was demoted from this position less than a year later. Resp. 2 at 153. According to the company, Complainant was demoted for failure to perform his duties as a foreman. *Id.* at 159. The demotion letter indicates that Complainant was being demoted and placed on probation for failure to follow procedures and directions on 10/11/2006. *Id.* at 153. At some point during his employment with Hill Phoenix, Complainant raised back pain concerns due to "bone spurs on his spine that caused him pain especially after a long or laborious work day." *Id.* at 152. On March 21, 2007, management held a meeting with Complainant and decided not to require documentation from his doctor. An interoffice memo documenting the meeting states that the company agreed to accommodate Complainant by allowing him to take extra breaks when he has a heavy workload. *Id.* However, the memo likewise indicated that the demotion letter has been revised to add performance reviews every 30 days. *Id.* Complainant was subsequently terminated from Hill Phoenix on February 12, 2008. *Id.* at 158. According to the company, Complainant was terminated for failing to respond to phone calls on his company phone, for delinquenty turning in his paperwork and for sending inappropriate text messages. *Id.* at 159, 163.

Complainant filed a grievance with his union. A meeting with the company's representatives was held on March 12, 2008. During the meeting, Richard Sawhill stated that the true reason for Complainant's termination was "the nature of inappropriate e-mails to a female dispatcher on February 5th, 2008." *Id.* at 163. Sawhill interpreted Complainant's message which stated "I don't give a f..." as sexual harassment. *Id.* The union chose not to pursue the grievance further. *Id.* at 171. The union's business representative, Peter Barrera, informed Complainant that he was not going to appeal the decision. *Id.* In an email date March 26, 2008, Barrera tells Complainant that "There are no grounds to appeal the decision. The decision is final and I have consulted our Business Manager, George Vasquez and he concurs with the decision made. Casey, let this matter go, go back to work and go on with your life." *Id.*

⁵ By becoming members of the association, contractors join a multi-employer bargaining unit represented by ARCA/MCA. The Association represents individual companies with respect to trust fund and health and welfare fund issues. ARCA, <http://www.arcamca.org/> (last visited Aug. 2, 2011).

⁶ Local Union 250 History, <http://ua250.org/history.html> (last visited Aug. 1, 2011).

⁷ According to ARCA's website, since its inception, ARCA has had only three Executives, Henry Ely, James Burge, and the current Executive Vice President, Richard J. Sawhill. ARCA, *supra* note 6.

On May 5, 2008, Complainant began working for Johnson Controls, Inc. (“JCI”). *Id.* at 4. He was terminated from JCI on August 7, 2009. *Id.* at 172. According to the grievance form, Complainant entered into a dispute with his supervisor regarding travel time which was billed to a customer. *Id.* Complainant considered the practice “time card fraud” and sent the supervisor several inappropriate text messages. *Id.* Reportedly, after his termination, Complainant also entered a JCI Customer worksite without permission. *Id.* at 175. Complainant was warned that if he entered the area again, the company would report him to authorities for trespassing. *Id.* (Letter from JCI’s Director of Human Resources dated Aug. 15, 2009). According to Complainant, the company fired him after he was forced to undergo a mandatory stress test on July 23, 2009. *Id.* at 174. Complainant points out that the union representative improperly filled out his grievance form and that the grievance is still pending resolution. *Id.* at 172-73.

On November 12, 2009, Complainant took a job with DSG Mechanical Corp. (“DSG”). *Id.* at 189. In 2010, DSG became two weeks delinquent in remitting its monthly trust fund contributions on behalf of its employees/Local Union 250 members. On November 29, 2010, the union informed Complainant that it was obligated to remove him from employment with DSG due to this delinquency. *Id.* at 183. In response to Complainant’s inquiry, Jack Wilkerson, the Administrator of the ACR Joint Trusts, sent Complainant an e-mail explaining that in accordance with the Delinquency Policy of the Air-conditioning and Refrigeration Joint Trusts, the union was required to pull all of its trust participants who work for DSG. *Id.* at 184. Complainant was informed that his last day of work with DSG is November 29, 2010. *Id.* at 183. According to Complainant, DSG allowed him to continue performing non-union work until December 31, 2010. At that point, he was laid off “due to lack of work.” *Id.* at 189. Complainant contends that the President of DSG promised to rehire him once DSG received compensation for the work it completed on various government contracts. *Id.*

Motion to Dismiss Standard

Because neither 29 C.F.R. Part 24, which governs whistleblower proceedings, nor 29 C.F.R. Part 18, the procedures for administrative law judge hearings, address dismissal for failure to state a claim, the standards set forth in the Federal Rules of Civil Procedure are applicable. *Freels v. Lockheed Martin Energy Sys.*, 95-CAA-2, 94-ERA-6, at 10 (ARB Dec. 4, 1996); *Varnadore v. Oak Ridge Nat’l Lab.*, 92-CAA-2, 93-CAA-1, 94-CAA-2 (ARB Jun. 14, 1996), *aff’d Varnadore v. Sec’y of Labor, et al.*, 141 F.3d 625 (6th Cir. 1998). Under the Federal Rule of Civil Procedure 12(b)(6), dismissal is appropriate if the facts in the case fail to state a claim upon which relief can be granted. The complaint’s sufficiency does not rest upon the number or particularity of the facts alleged, and mere vagueness or lack of detail does not constitute sufficient grounds to dismiss the complaint. *Bolding v. Holshouser*, 575 F.2d 461 (4th Cir. 1978). Rather, a short and plain statement is sufficient if it gives the defendants fair notice of what the claim is and the grounds upon which it rests.

When considering a motion to dismiss, the court must take the complainant’s factual allegations as true, indulge all reasonable inferences and resolve any ambiguity or doubts regarding the sufficiency of the claim in favor of the complainant. *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278 (5th Cir. 1993). Under *Conley v. Gibson*, 355 U.S. 41 (1957), the court can only dismiss a claim if it appears, beyond a doubt, that the plaintiff would be able to

prove “no set of facts” in support of his claim that would entitle him to relief. In 2007, the Supreme Court adopted a new “plausibility” standard in *Bell Atlantic Corp. v. Twombly*, requiring that the complaint contain “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence” of illegality. 550 U.S. 544 (2007). The *Twombly* reading was upheld in *Ashcroft v. Iqbal* where the court stated as follows: “A court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions are not entitled to assumptions of truth ... when there are well pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to entitlement to relief.” 129 S. Ct. 1937, 1940-41 (2009).

The dismissal is nevertheless appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense such as noncompliance with the statute of limitations. *Omar ex rel. Cannon v. Lindsey*, 243 F. Supp. 2d 1339 (M.D. Fla. 2003), *aff’d*, 334 F.3d 1246 (11th Cir. 2003). Under CERCLA, an individual has thirty days from the time of the adverse action to file a complaint. 42 U.S.C. §9610(b), 29 C.F.R. § 24.3(b). Any complaint not filed within thirty days is considered time-barred. *See Greenwald v. City of North Miami Beach*, 587 F.2d 779 (5th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979). It is the employer’s burden to raise the time bar as an affirmative defense. *See Hood v. Sears Roebuck & Co.*, 168 F.3d 231 (5th Cir. 1999).

Courts recognize several equitable exceptions to statutory limitations periods. For example, “[w]here the unlawful employment practice manifests itself over time, rather than as series of discrete acts,” complainant may rely on a continuing violation exception. *McCustion v. Tennessee Valley Auth.*, 89-ERA-6 (Sec’y Nov. 13, 1991); *Simmons v. Florida Power Corp.*, 89-ERA-28 and 29 (ALJ Dec. 13, 1989). The Secretary of Labor utilizes a three factor test to evaluate whether particular alleged acts of discrimination constitute “a course of related discriminatory conduct” under the continuing violation theory: 1) whether the alleged acts involve the same subject matter, 2) whether the alleged acts are recurring or more in the nature of isolated decisions, and 3) the degree of permanence. *Thomas v. Arizona Pub. Serv.Co.*, Case No. 88-ERA-212 (citing *Berry v. Bd. of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983); *Webb v. Carolina Power & Light Co.*, ARB No. 96-176, ALJ 93-ERA-42 (Aug. 26, 1997). If discriminatory conduct satisfies the test, the complainant is not required to file suit when the first discriminatory act takes place; rather, timeliness is measured from the last occurrence of discrimination. *See Roberts v. North American Rockwell Corp.*, 650 F.2d 823 (6th Cir. 1981); *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 724 (D.C. Cir. 1978). Under limited circumstances, the ALJ also has discretion to decide that time bar should not apply because of equitable tolling. Equitable tolling is available to modify the periods provided by employee protection acts. *Tracy v. Consolidated Edison Co. of New York*, 89-CAA-1 (Sec’y, July 8, 1992). This doctrine focuses on the complainant’s excusable ignorance of his statutory rights and is applied on a very limited basis.⁸ *See Andrews v. Orr*, 851 F.2d 146, 150-51 (6th Cir. 1988); *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 19 (3d Cir. 1981).

⁸ Equitable tolling may allow additional time to file a claim in the following three situations: 1) where the employer prevents the employee from filing; 2) where the employee was prevented from asserting his rights by excusable ignorance; 3) where the employee actually filed a timely claim but did so in the wrong forum. *See McConnell v. General Telephone Co.*, 814 F.2d 1311 (9th Cir. 1987); *Marshall*, 657 F.2d at 19-20. The attorney’s ignorance of CERCLA complaint filing requirements precludes equitable tolling. “Equitable tolling is inappropriate when

CONCLUSIONS OF LAW

In an environmental whistleblower case under CERCLA, the complainant must allege and subsequently demonstrate that (1) he engaged in a protected activity; (2) he was subjected to an adverse action; (3) the respondent was aware of his protected activity when it took the adverse action;⁹ (4) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action. *See Zinn v. Univ. of Missouri*, 93-ERA-34, 36 (Jan. 18, 1996); *Gross v. Radian Int'l 7 Envtl. Dimensions, Inc.*, 1999-CAA-24 (Apr. 18, 2001). Based on the documentary evidence supplied by Complainant, the undersigned is able to discern two alleged adverse actions at issue in this matter: 1) Complainant's termination from his job with Respondent in 2005, and 2) subsequent acts of blacklisting undertaken by Respondent, ARCA/MCA and its Executive Vice President.

Termination

Complainant alleges that Respondent wrongfully terminated his employment in November of 2005 for pursuing a workers' compensation claim and filing various complaints with government agencies. Since more than thirty days have passed following the allegedly retaliatory termination, Complainant's claim with respect to this adverse action is time barred.¹⁰ *See* 42 U.S.C. §9610(b).

Blacklisting

Complainant alleges that since 2006 he lost employment with various contractors who belong to the ARCA/MCA in retaliation for filing and litigating his FEHA and workers compensation claims against Respondent. Contention at 4. Specifically, Complainant alleges that Richard J. Sawhill, the Executive Vice President of ARCA, has facilitated his terminations from Hill Phoenix (Dover) and DSG and has intentionally impeded his ability to receive effective union representation.

Blacklisting which is based on the employee's protected activity under the statute is considered an adverse action under CERCLA and other environmental statutes. *See* 29 CFR § 24.2(b). An act of blacklisting may arise "out of any understanding by which the name or identify of a person is communicated between two or more employers in order to prevent the

plaintiff has consulted counsel during the statutory period. Counsel are presumptively aware of whatever legal recourse may be available to their client, and this comparative knowledge of the law's requirements is imputed to [plaintiff]." *Hay v. Wells Cargo, Inc.*, 596 F. Supp. 635, 640 (D. Nev. 1984), *aff'd*, 796 F.2d 478 (9th Cir. 1986).

⁹ CERCLA defines protected activity in 42 U.S.C. §9610(a) which provides that "[n]o person shall fire or in any other way discriminate against . . . any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter." 42 U.S.C. §9610(a).

¹⁰ Although Respondent implies that Complainant's current claim is also barred by collateral estoppel, Respondent's counsel does not fully develop this argument. The undersigned also takes note of the fact that instead of attaching Judge Plotkin's final order granting summary judgment, Respondent only staples a four page "Statement of Intended Ruling" to its Pretrial Statement.

worker from engaging in employment.” 48 Am. Jur. 2D Labor and Labor Relations § 669 (2002). Because blacklisting usually cannot be easily discerned there may be a considerable lapse of time before a blacklisted employee has any basis for believing he is the subject of discrimination. Accordingly, blacklisting is often characterized as a continuing violation. See *Egenrieder v. Metro. Edison Co.*, 85-ERA-23 (Sec'y Apr. 20, 1987).

Nevertheless, courts will not reset the statute of limitations based on the continuing violations theory where the complainant was aware of the blacklisting activity but failed to exercise his statutory rights. See *Pickett v. Tennessee Valley Auth.*, ARB No. 00-076, ALJ No. 2000-CAA-9 (ARB Apr. 23, 2003) (the statute of limitations begins to run on the date when facts which would support a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his rights); *Holden v. Gulf States Util.*, 92-ERA-44 (ALJ Apr. 22, 1993) (where there was an instance of alleged blacklisting within 30 days prior to the filing of the complaint, but the complainant had knowledge of earlier instances of blacklisting, the complaint was not timely). For example, in *Pickett*, the ARB held that the complaint was barred by the statute of limitations because an adverse course of conduct undertaken by respondent against complainant was apparent long before complainant filed his complaint. *Pickett*, slip op. at 5-6. The ARB noted that even if one assumes, for the purpose of argument that the employer engaged in blacklisting, the complainant “should reasonably have suspected any such alleged blacklisting before June 1999.” *Id.* Specifically, complainant “received notice as the result of confluence of events” when his employer made him a series of allegedly unsuitable job offers, when he became aware of the employer’s OIG investigation, and when he was terminated from employment and the employer refused to reinstate him because of alleged downsizing. *Id.* The ARB pointed out that complainant’s communications also showed that he suspected “stonewalling” by Respondent. *Id.*

The ARB adhered to the *Pickett* line of reasoning in *Johnsen v. Houston Nana Inc., JV & Alyeska Pipeline Serv. Co.*, ARB No. 00-064, ALJ No. 99-TSC-4, 2003 WL 244812 (Jan. 27, 2003). In that case, the whistleblower was an electrical worker who was terminated from his position with employer on December 10, 1998. *Id.* at 1. In conjunction with the termination, the employer completed an employment termination report indicating that complainant was not eligible for rehire. *Id.* at 1-2. In late May of 1999, the union referred complainant for a job with the employer. *Id.* The employer rejected complainant’s employment bid and notified the union that he was not eligible for rehire. A month later complainant filed a whistleblower complaint with OSHA, which was subsequently dismissed by the ALJ and the ARB for untimeliness. *Id.* The ARB rejected complainant’s argument that employer’s refusal to hire him in May 1999 constituted a separate discriminatory act which restarted the statute of limitations under the continuing violation exception. It explained that because complainant received “definitive, final and unequivocal notice that adverse action had been taken against him” in 1998, he had thirty days from the date of the “no-hire” decision to initiate any complaints. *Id.* at 4. It explained that complainant was not subject to an adverse action since December 10, 1998, and cannot “extend the limitations period by repeatedly renewing [his] demand for reinstatement and then counting [his] time to file from each denial.” *Id.* (citing *Mitilnakis v. Chicago*, 735 F. Supp. 839 (N.D. Ill. 1990)). The ARB further held that complainant’s blacklisting allegation was also untimely because complainant knew about the “no-hire” decision at the time of his termination, and the

May 1999 letter to the union was not an independent act of blacklisting because it did not mention or imply that complainant engaged in protected activity. *Id.*

Here, Complainant appears to allege that Respondent is able to excise some power over ARCA and its members through its former employee, Mr. Richard J. Sawhill. *See* Resp. 2 at 164, 166. According to Complainant, Sawhill engaged in the following retaliatory actions against him: 1) participated in the decision to terminate his employment from Hill Phoenix during the committee meeting on March 19, 2008; 2) initiated a lawsuit against DSG for a small amount of delinquent funds in order to terminate Complainant's employment with the company;¹¹ 3) threatened Complainant's "union business agent" into not representing him during various termination proceedings. *See* Resp. 2 at 163, 189; Compl. at 2. As mentioned above, Mr. Sawhill served as Respondent's director of human resources and labor relations while Complainant was still working for the company. Contention at 3. Allegedly, Complainant had a problem with Mr. Sawhill in 1993, when "Mr. Sawhill was involved with covering up a scandal in the office that caused a suicide of a good friend" of his wife. *Id.* at 3. Complainant wanted to quit working for Respondent at that time but was told that if he quit it would affect his brother's employment. *Id.* According to Complainant, his brother was friends with Mr. Sawhill and knew his family. At some point, the brother's best friend and immediate supervisor, Rick Hatlen, was also in a relationship with Mr. Sawhill's daughter. *Id.* at 2. Complainant alleges that when his brother became terminally ill, he unsuccessfully solicited Mr. Sawhill help.

Even if the undersigned credits Complainant's theory that Respondent is able to excise some power over ARCA through its former employee, Mr. Sawhill, Complainant's claim remains time barred. Complainant filed his OSHA complaint on March 2, 2011; however, the last occurrence of discrimination took place on November 29, 2010. Resp. 2 at 183. On this date, Complainant was notified that Local 250 was removing him from employment with DSG due to delinquent fund contributions.¹² On August 4, 2011, Complainant filed an additional document titled "Amended Pre-Hearing Statement" arguing that his complaint is timely because DSG failed to rehire him at the end of February "like they said they would." In order to establish that an adverse action occurred in a case of failure to hire or failure to rehire, the complainant must plead that he was qualified for the position, that he applied for it or that the employer was otherwise obligated to consider him, and that the employer hired another individual not protected by the acts or that the position remained vacant after the application was rejected. *Holtzclaw v. Commonwealth of Kentucky Natural Res. and Envtl. Prot. Cabinet*, 95-CAA-7 (ARB Feb. 13, 1997) (citing to *Loyd v. Phillips Bros.*, 25 F.3d 518, 523 (7th Cir. 1994)). First, DSG is not a party to the current action. Second, Complainant has failed to plead that DSG had job openings in February of 2011 or solicited applications from other applicants. An unfulfilled promise by

¹¹ Complainant states: "I believe that Richard Sawhill Vice President with ARCA came up with a clever way to terminate my employment to protect DSG from a lawsuit unlike what happened at Johnson Controls, working with his friends at the Union after I refused to consider the accepting a Workers Compensation release on November 9, 2010, which is when the procedure for job termination started at DSG Mechanical." Resp. 2 at 189.

¹² According to complainant he continued to work for DSG in non-union capacity until 12/31/10 and was subsequently laid off "due to lack of work." Resp. 2 at 189. DSG and none of the other companies which Complainant worked for since 2005 have been joined as parties to the action.

DSG's president to rehire Complainant when and if the company receives government funds is not actionable.

Complainant's blacklisting claim fails under the continuous violations theory for the same reason: the last alleged adverse act occurred on November 29, 2010.¹³ Furthermore, it is evident that Complainant strongly suspected blacklisting and/or retaliation by Respondent since February of 2008 at the latest. On March 12, 2007, Hill Phoenix demoted Complainant "for failure to perform his duties as a foreman." Resp. 2 at 159. Complainant points out that the demotion took place soon after he refused to sign a release for his work injuries with Respondent. *Id.* at 4. At that time, Complainant's brother was still sick, and he "was still not sure about [his] own health." *Id.* According to Complainant, after his brother's death, Hill Phoenix began to collect evidence against him to terminate his employment. *Id.* On February 12, 2008, Complainant was allegedly terminated for sending inappropriate text messages and failing to comply with company procedures. *Id.* at 159. Richard Sawhill was present at the meeting between Local Union 250 and Hill Phoenix management concerning Complainant's termination. *Id.* at 163. Complainant states: "I was fired over a silly text message that Richard Sawhill saw was sexual harassment ... Richard Sawhill is the sole reason Hill Phoenix terminated my employment." *Id.* at 4. Because the undersigned finds that Complainant was aware of Respondent's blacklisting activity back in 2008, his claim is time barred.

Although *pro se* pleadings are held to a less exacting standard than those prepared by counsel, the undersigned cannot ascertain any cogent argument which would salvage the complaint in this case. *See Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-028, slip op. at 3 (ARB Feb. 28, 2003); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). Because Complainant's CERCLA claims are untimely, the undersigned must dismiss the case against Respondent.

ORDER

Complainant's CERCLA complaint against Ingersoll-Rand Hussman is hereby **DISMISSED** with prejudice for failure to state a claim upon which relief can be granted.

A

Russell D. Pulver
Administrative Law Judge

¹³ With respect to Complainant's blacklisting allegation, OSHA stated the following: "Complainant's timely alleged occurrence of blacklisting would not be considered adverse. Rather, Complainant asked Respondent for his old job back in early March 2011 and was denied. Because Complainant neither applied for, nor Respondent offered, a position of employment with Respondent, Complainant failed to allege an adverse employment action." After pouring over Complainant's filings, the undersigned has not been able to locate any evidence or allegation that Complainant asked for his job back in March 2011. However, even if he applied to work for the Respondent in 2011 and was denied, the complaint remains time barred because Complainant suspected blacklisting by Respondent at a much earlier date.

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 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. The date of the postmark, facsimile transmittal, or e-mail communication 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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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.

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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 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.