No. 20-70363

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT BARBOZA,

Petitioner,

v.

DEPARTMENT OF LABOR

Respondent,

BNSF RAILWAY COMPANY

Intervening Respondent.

On Petition for Review of the Final Decision and Order of the United States Department of Labor's Administrative Review Board

---

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

KATE S. O'SCANNLAIN
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

SARAH K. MARCUS
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

ELAINE M. SMITH
Attorney
U.S. Department of Labor
2300 Main Street, Suite 1020
Kansas City, MO 64108
(816) 285-7262
smith.elaine.m@dol.gov

TABLE OF CONTENTS

Table of Authorities

Page(s)

Cases

Cases – Continued:

Cases – Continued:

Statutes

Statues – Continued:

Code of Federal Regulations

Federal Rules of Civil Procedures

Other Authorities

On behalf of Respondent United States Department of Labor ("Department") Administrative Review Board ("ARB" or "Board"), the Secretary of Labor ("Secretary") submits this brief in response to the brief filed by Petitioner Robert A. Barboza ("Barboza").

STATEMENT OF JURISDICTION

This case arises under the employee protection ("whistleblower") provisions of the Federal Railroad Safety Act ("FRSA" or "Act"), 49 U.S.C. § 20109, and its implementing regulations, 29 C.F.R. Part 1982. The Secretary had subject matter jurisdiction over this case based on a complaint filed with the Occupational Safety and Health Administration ("OSHA") by Barboza against his employer, BNSF Railway Company ("BNSF"), pursuant to 49 U.S.C. § 20109(d)(1). The Administrative Review Board issued its Decision and Order on December 19, 2019, affirming Administrative Law Judge Steven B. Berlin's ("ALJ Berlin") grant of summary decision for BNSF on the grounds that Barboza failed to establish a genuine issue of material fact regarding whether he suffered an adverse action within the 180 days prior to filing his FRSA whistleblower complaint.[1] Board Dec.

[1] At all times relevant to this case, the Secretary of Labor delegated authority to the ARB to issue final agency decisions under the employee protection provisions of FRSA. *See* Sec'y of Labor's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *see also* 29 C.F.R. § 1982.110(a).

at 2, SER 001-005.[2] Barboza filed a timely petition for review of that Order in this Court on February 10, 2020. This Court has jurisdiction to review the ARB's decision because the alleged violations occurred in Arizona and California.[3] *See* 49 U.S.C. § 20109(d)(4) (review of Secretary's final order may be obtained in the court of appeals for the circuit in which the violation allegedly occurred); 49 U.S.C. § 42121(b)(4) (same); *see also* 29 C.F.R. § 1982.112(a).[4]

STATEMENT OF THE ISSUES

1. Whether the ARB correctly affirmed the ALJ's grant of summary decision concluding Barboza failed to establish a genuine issue of material fact of whether BNSF took an adverse action against him within the 180-day limitations period applicable to his FRSA whistleblower complaint.

---

[2] Documents included the Supplemental Excerpts of Record, which were also identified in the Certified List filed with the Court on May 22, 2019, are cited in this Brief as "SER." Abbreviations to portions of the SER are as follows: the OSHA Determination ("OSHA Determ."), the Department of Labor Administrative Law Judge's Summary Decision Order ("ALJ Dec."), the Administrative Review Board's Final Decision and Order ("Board Dec."), BNSF's Motion to Dismiss before the ALJ ("BNSF MTD"), and Barboza's Opposition to BNSF's Motion before the ALJ ("Barboza's Opp.").

[3] Barboza was living and working in Arizona up until at least September 6, 2016. It is unknown when he moved, but by March 16, 2017, Barboza was living and working in California. Both states are within this Court's jurisdiction.

[4] Proceedings under FRSA are governed by the rules, procedures, and burdens of proof, set forth in the whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b). *See* 49 U.S.C. § 20109(d)(2).

2. Whether the ARB correctly affirmed the ALJ's decision declining to defer ruling on BNSF's motion for summary decision until the close of discovery.

STATEMENT OF THE CASE

A. Nature of the Case

This case arises under the employee protection ("whistleblower") provision of the FRSA, which protects railroad employees who "notify . . . the railroad carrier . . . of a work-related personal injury or work-related illness of an employee," or a hazardous safety or security condition, or engage in other protected activities. *See* 49 U.S.C. § 20109(a)(4) and (b)(1)(A); 29 C.F.R. Part 1982. This whistleblower provision prohibits employers from discharging or otherwise retaliating against an employee who engages in such protected activity. *Id.*

An employee, who believes that he or she has been subjected to retaliation for protected activity in violation of the FRSA, may file a complaint with the Secretary of Labor. *See* 49 U.S.C. § 20109(d); 29 C.F.R. § 1982.103. To make a prima facie showing under the whistleblower-protection provision of the FRSA, an employee's complaint must allege: (1) the employee engaged in protected activity; (2) the employer knew the employee had engaged in the protected activity; (3) the employee suffered an adverse action; and (4) the protected activity was a contributing factor in the unfavorable action. *See* 49 U.S.C. § 20109(d)(2)(A)(i)

(citing 49 U.S.C. § 42121(b)); 29 C.F.R. § 1982.104(e)(1)-(3); *see also Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *Tamosaitis v. URS Inc.*, 781 F.3d 468, 481 (9th Cir. 2015) (interpreting a similarly structured whistleblower-protection provision in the Energy Reorganization Act). A whistleblower complaint must be filed with the Secretary within 180 days after an alleged violation of the Act occurs, absent grounds for equitable tolling of that limitations period. *See* 49 U.S.C. § 20109(d)(2)(A)(ii); 29 C.F.R. § 1982.103(d). The Secretary has delegated responsibility for receiving and investigating FRSA whistleblower complaints to OSHA. *See* Sec'y's Order No. 01-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012); *see also* 29 C.F.R. § 1982.104(a). Following an investigation, OSHA issues a determination either dismissing the complaint or finding a violation and ordering appropriate relief. *See* 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1982.105.

Either the complainant or the respondent may file objections to OSHA's determination within thirty days and may request a *de novo* hearing before a Department of Labor administrative law judge ("ALJ"). *See* 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1982.106. The ALJ has wide discretion to manage the hearing process, including the authority to limit discovery or to decide the matter without a hearing based on a motion to dismiss or motion for summary decision, as appropriate. *See generally* 29 C.F.R. Part 18. The ALJ's decision is

subject to discretionary review by the ARB. *See* 29 C.F.R. § 1982.110. The ARB's final decision is reviewable in the court of appeals for the circuit in which the violation allegedly occurred or in which the complainant resided on the date of the alleged violation. *See* 49 U.S.C. § 42121(b)(4)(A); 29 C.F.R. § 1982.112(a).

B. Statement of Facts

Barboza was employed by BNSF in various positions from 2006, until he voluntarily resigned on October 19, 2017. BNSF MTD at 1, 14-15, SER 018-020. In early February 2016, Barboza went on medical leave claiming he had work-related anxiety and high blood pressure. *Id.* at 15, 20, SER 020-021. Barboza started his medical leave shortly after reporting a safety complaint to his foreman and soon after being informed that his job was being abolished. *Id*. He remained on medical leave for nearly 14 months, through March 26, 2017. *Id.* at 20, SER 021. While on medical leave, Barboza filed an internal complaint with BNSF alleging retaliation, reported an occupational injury or illness, and filed a whistleblower complaint with OSHA. *Id.* at 15, 20-22, 28, SER 020-023.

1. Barboza's HR Complaint for Retaliation.

On February 28, 2016, about three weeks after Barboza began his medical leave, he filed an internal complaint with the BNSF human resources department. *Id.* at 21, SER 022. In this complaint, he alleged his job was "abolished" in retaliation for raising safety concerns with his foreman. *Id.* at 21-22, SER 022-23.

BNSF human resources investigated the allegation, and on April 15, 2016, the human resources manager notified Barboza his allegation of retaliation could not be substantiated. *Id.* at 26, SER 024. Barboza was dissatisfied with this outcome, and subsequently spoke with the BNSF Director of Human Resources. *Id.* at 27, SER 025. On August 29, 2016, the Director of Human Resources notified Barboza that he had reviewed the investigation, determined the investigation was "sound," and the allegation of retaliation, harassment, or any other mistreatment, was not substantiated. *Id.* The internal investigation was closed. *Id.*

2. Barboza's Report of a Personal Injury or Occupational Illness.

While still on medical leave, on September 5, 2016, Barboza filed an "Employee Personal Injury/Occupational Illness Report" form with BNSF. *Id.* at 28, SER 026. In this report, Barboza stated he was first treated or diagnosed with his condition in 2014, "over two years ago." *Id.* On September 9, 2016, BNSF notified Barboza it would hold a hearing to ascertain the facts in connection with Barboza's failure to immediately report an injury in 2014, as required by company procedures. BNSF MTD at 31, Barboza's Opp. at 12, SER 027, 040. For this disciplinary investigation, Barboza was represented by his union. BNSF MTD at 32-33, Barboza's Opp. at 30, SER 028-029, 041. With the agreement of Barboza's union representative, the hearing was postponed several times, September 14, 2016, November 9, 2016, and January 6, 2017. *Id.* However, on December 23,

2016, Barboza signed a statement clarifying that he was not submitting a claim for personal bodily injury, rather, his claim was for an occupational illness. BNSF MTD at 34, SER 030. After receiving Barboza's statement, BNSF canceled the disciplinary investigation on January 12, 2017. *Id.* at 35, SER 031.

3. Barboza's Return to Work and OSHA Complaint.

Barboza returned to work on March 26, 2017. *Id.* at 15, 20, SER 020-021. Before returning to work, on March 16, 2017, Barboza filed a whistleblower complaint with OSHA using an online complaint form. OSHA Determ. at 4-6, SER 015-016. Using this form, Barboza alleged BNSF retaliated against him by: denying benefits, discipline, harassment/intimidation, negative performance evaluations, suspension, and threatening to take any of those actions. *Id.* Barboza alleged these adverse actions started on September 9, 2016, occurred again on September 14, 2016, and November 9, 2016, and were continuing through the present time. *Id.*

On August 17, 2017, Barboza's attorney, who represented him through the summary decision briefing, filed an amended complaint with OSHA. *Id.* at 49-55, SER 032-038. The First Amended Complaint alleged the following as a basis for the underlying action:

- On April 15, 2016, BNSF's Human Resources department notified Barboza it could not substantiate his claims of retaliation; Respondent's Opening Brief ("Resp. Br.") at 11; BNSF MTD at 26, SER 024.

- Barboza met with the Human Resources Director, on or about July 12, 2016, and reiterated his concerns about the internal investigation; Resp. Br. at 11.

- On August 29, 2016, the Human Resources Director notified Barboza that no action would be taken in response to his internal retaliation complaint; Resp. Br. at 12; BNSF MTD at 27, SER 025.

- Barboza continued to email BNSF management (including the Human Resources Director) about his concerns into October 2016;

- On September 9, 2016, BNSF notified Barboza of an investigative hearing related to his report of an injury/illness; Resp. Br. at 13; BNSF MTD at 31, SER 027.

- BNSF notified Barboza of postponements of the investigatory hearing on three occasions (September 14, 2016, November 9, 2016, and January 6, 2017); Resp. Br. at 14-15; BNSF MTD at 32-33, SER 028-029, 041.

- On January 12, 2017, BNSF canceled the investigation; Resp. Br. at 15; BNSF MTD at 35, SER 031, and

- Barboza has been subjected to ongoing harassment, intimidation and a hostile work environment since he returned to work.

See generally Id. at 49-55, SER 032-038.

On August 24, 2017, OSHA dismissed Barboza's whistleblower complaint. OSHA Determ., SER 006-008. Subsequently, Barboza requested a hearing before an administrative law judge. Barboza's Objection and Request for a Hearing, SER 013-014.

C. The ALJ's Decision and Order

In the proceeding before the ALJ, the parties completed partial discovery and BNSF filed a motion to dismiss the Amended Complaint. ALJ Dec. at 1-2, SER 042-043. ALJ Berlin, after notifying the parties, converted the motion to one for summary decision, pursuant to 29 C.F.R. § 18.72(f)(3). *Id.* On summary decision, the ALJ was required to determine whether, based on the pleadings and other materials submitted, there was no genuine issue of material fact and the moving party was entitled to judgment as a matter of law. *See* 29 C.F.R. § 18.72; Fed. R. Civ. P. 56.

ALJ Berlin issued a Decision and Order dismissing Barboza's Complaint. ALJ Dec. at 13, SER 054. In granting the motion, ALJ Berlin held that there was no dispute of material fact and that Barboza failed to offer evidence of an adverse action occurring within the 180-day limitations period, as provided by 49 U.S.C. § 20109(d)(2)(A)(ii). *Id.*

First, ALJ Berlin recognized Barboza filed his OSHA complaint on March 16, 2017, and calculated the limitations period to exclude adverse actions occurring prior to September 17, 2016. ALJ Dec. at 8-9, SER 049-050 (citing 49 U.S.C. § 20109(d)(2)(A)(ii) (a complaint must be filed no later than 180 days after the alleged violation) and 29 C.F.R. § 1982.103(d)). ALJ Berlin found all except four of the alleged adverse actions occurred prior to September 17, 2016. *Id.* at 9, SER

050. The four exceptions considered were: (1) BNSF notified Barboza of postponements of the investigative hearing on two occasions, November 9, 2016 and January 6, 2017; (2) BNSF canceled the investigation on January 12, 2017; (3) Barboza failed to receive a response when he allegedly continued into October 2016 to email BNSF management (including the Human Resources Director) regarding the result of the internal retaliation investigation; and (4) Barboza was subjected to ongoing harassment, intimidation, and a hostile work environment after returning to work on March 27, 2017. *Id.*

ALJ Berlin noted the record supported a finding that only two of the alleged adverse actions occurred during the limitations period: (1) the joint management-union postponement of BNSF's investigation into whether Barboza timely notified BNSF of a workplace injury; and (2) BNSF's cancellation of the investigation entirely. ALJ Dec. at 10, SER 051. ALJ Berlin found the letter BNSF sent to Barboza on September 9, 2016, initiating a disciplinary investigation, was outside the limitations period. ALJ Dec. at 11, SER 052. As to the allegation of harassment and a hostile work environment, ALJ Berlin did not find any evidence in the record supporting Barboza's allegation. *Id.*

ALJ Berlin also did not find any evidence in the record that Barboza continued contacting BNSF management, while he was on medical leave, to complain about the retaliation outlined in his internal HR complaint. *Id.* at 3, 10,

SER 044, 051. Even so, ALJ Berlin considered the allegation and found it would not raise a genuine dispute of material fact. *Id.* at 10-11, SER 051-052. ALJ Berlin noted that a claim based on BNSF's failure to remedy his internal complaint of retaliation would be untimely because human resources notified Barboza on April 15, 2016, of the investigation's outcome, and on August 29, 2016, the Human Resources Director affirmed the department's determination. *Id.* Both of these decisions were outside the 180-day limitations period applicable to Barboza's FRSA whistleblower complaint. *Id.* at 10, n.13, SER 051. ALJ Berlin reasoned that once BNSF notified Barboza that the outcome of the investigation was unfavorable to him, the limitations began to run and Barboza could not "reset the limitations period" simply by continuing to challenge the result. *Id.*

In analyzing the two alleged adverse actions for which evidence was submitted, ALJ Berlin determined these actions were not adverse. *Id.* at 12, SER 053. ALJ Berlin found postponing the investigatory hearing was neither positive nor negative; it was simply a change in the date of the hearing. *Id.* Finally, ALJ Berlin found canceling the investigation was favorable to Barboza, not adverse. *Id.* Accordingly, ALJ Berlin granted BNSF's motion for summary decision and dismissed Barboza's complaint. *Id.* at 13, SER 054.

ALJ Berlin also considered Barboza's request to defer deciding the motion for summary decision until after the close of discovery in the case. *Id.* at 12, SER

053. ALJ Berlin ruled that there was no basis for postponing consideration of the motion because Barboza would have known about any adverse actions that he suffered and thus, would have been able to establish a genuine issue of material fact regarding whether he suffered an adverse action without the need for further discovery—for example, by submitting a declaration explaining what had happened. *Id.* Additionally, ALJ Berlin noted that BNSF had responded to all discovery Barboza propounded and Barboza did not identify what additional discovery he would have used or what evidence he would seek to obtain to oppose the motion for summary decision. *Id*.

In closing, ALJ Berlin noted Barboza did not argue for equitable tolling and even if he did, there was no basis to toll the limitations period. *Id.* at 13, SER 054. ALJ Berlin noted Barboza was represented by counsel from the time the case was with OSHA through the summary decision motion briefing and that nothing else about the case justified equitable tolling. *Id.*

D. The Board's Final Decision and Order

Barboza appealed ALJ Berlin's decision to the ARB. Complainant's Petition for Review and Opening Brief at 1-8, SER 057-064. The Board agreed with ALJ Berlin that Barboza failed to offer evidence that the original complaint had been filed within 180 days of an adverse action by BNSF. Board Dec. at 3, SER 003.

The ARB adopted the ALJ's Decision and Order and dismissed Barboza's complaint. *Id.*

SUMMARY OF ARGUMENT

This Court should affirm the ARB's final decision and order dismissing Barboza's Amended Complaint. To prevail on his claim, Barboza was required to establish a genuine issue of material fact regarding whether he suffered an adverse employment action within the limitations period. Both the Board and the ALJ correctly found Barboza failed to meet this burden. As required on a motion for summary decision, the ALJ admonished Barboza on his burden to establish a genuine issue of material fact. In reviewing the materials that Barboza and BNSF submitted, the ALJ made no credibility determinations, did not weigh the evidence, and drew all reasonable inferences in favor of Barboza, the non-moving party. Based on the submissions, the ALJ reached the conclusion that, as a matter of law, no reasonable fact-finder could find that Barboza suffered an adverse action within FRSA's 180-day statute of limitations. As a result, the ALJ correctly dismissed Barboza's FRSA complaint. The ARB properly adopted the ALJ's decision and affirmed the dismissal. This Court should affirm as well.

As the ALJ correctly explained, Barboza filed his FRSA whistleblower complaint with OSHA on March 16, 2017. To be timely, adverse actions alleged in the complaint would have had to occur within the 180 days prior to that date. In

other words, adverse actions occurring prior to September 17, 2016, would be untimely absent some demonstrated basis for tolling the statute of limitations. The ALJ examined five different potential adverse actions that Barboza alleged:

1. BNSF's initiation of a disciplinary investigation against Barboza on September 9, 2016;

2. Postponement of the disciplinary investigation on November 9, 2016 and January 6, 2017;

3. BNSF informing Barboza that it decided to drop the disciplinary investigation on January 12, 2017;

4. BNSF failure to remedy Barboza's internal retaliation complaint; and

5. BNSF's subjecting Barboza to harassment, intimidation, and a hostile work environment following his return to work on March 27, 2017.

First, the ALJ correctly held that Barboza's FRSA whistleblower complaint did not raise a timely alleged adverse action based on BNSF's initiation of the disciplinary investigation or failure to remedy Barboza's internal complaint of retaliation. BNSF informed Barboza that it was initiating a disciplinary investigation on September 9, 2016, outside of the statute of limitations. Similarly, BNSF's human resources manager communicated to Barboza that BNSF had concluded Barboza's internal retaliation claim was meritless on April 15, 2016. After Barboza expressed dissatisfaction with that conclusion, BNSF's Director of Human Resources reviewed the file and wrote to Barboza on August 29, 2016, affirming the conclusion that that there was no retaliation. Both of the

communications from BNSF's human resources department were discrete acts that occurred outside the applicable statute of limitations. Barboza's continued expression of disagreement with the decision did not restart a new statute of limitations related to his internal retaliation complaint.

Thus, the actions taken within the limitations period were limited to the postponements of the disciplinary investigation hearing, BNSF's ultimate decision to drop the disciplinary investigation, and the allegation that Barboza suffered harassment, intimidation and a hostile work environment upon his return to work in March 2017. The ALJ correctly reasoned that postponing Barboza's disciplinary investigation hearing based on agreement between BNSF and Barboza's union, which represented him in the hearing, was neither favorable nor adverse to Barboza, and thus the postponements were not cognizable adverse actions under FRSA. BNSF's ultimate decision to drop the disciplinary charges against Barboza was a decision favorable to Barboza, and thus was not an adverse action.

Barboza's allegation of harassment, intimidation, and hostile work environment following his return from medical leave was not supported by any evidence, not even a declaration from Barboza providing details of the alleged harassment, intimidation, and hostile work environment. As a result, the ALJ correctly held that by presenting only bare and general allegations, Barboza had

failed to establish a genuine issue of material fact regarding whether the alleged harassment actually occurred.

Finally, the ALJ did not abuse his discretion in declining to postpone ruling on BNSF's motion for summary decision until after the close of discovery. ALJs have wide latitude to manage their caseloads. In this case, the ALJ concluded Barboza had access to all facts necessary to raise a genuine issue of material fact regarding whether he had suffered an adverse action. As the ALJ explained, an employee who suffers an adverse action typically knows it occurred and can resist summary decision simply by submitting a declaration explaining what happened. This conclusion was reasonable and, consequently, the ALJ acted within his discretion in declining to defer ruling on BNSF's motion for summary decision.

ARGUMENT

I. THE ARB CORRECTLY AFFIRMED THE ALJ'S GRANT OF SUMMARY DECISION BECAUSE BARBOZA FAILED TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER BNSF TOOK AN ADVERSE ACTION AGAINST HIM WITHIN THE 180-DAY LIMITATIONS PERIOD.

A. Standard of Review

Judicial review of the ARB's final decision is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). *See* 49 U.S.C. § 20109(d)(4); 49 U.S.C. § 42121(b)(4)(A). Under this narrow and deferential standard, the ARB's decision must be sustained unless it is "arbitrary, capricious,

an abuse of discretion, or otherwise not in accordance with law." *Coppinger-Martin v. Solis*, 627 F.3d 745, 748 (9th Cir. 2010); *Calmat Co. v. U.S. Dep't of Labor*, 364 F.3d 1117, 1121 (9th Cir. 2004) (citing 5 U.S.C. § 706(2)); *Lockert v. U.S. Dep't of Labor*, 867 F.2d 513, 516-17 (9th Cir. 1989).

In this case, the Board upheld the ALJ's grant of summary decision. Analogous to summary judgment, summary decision is appropriate where "there is no genuine dispute as to any material fact" and therefore the moving party is entitled to judgment as a matter of law. 29 C.F.R. § 18.72(a); *see Kanj v. Viejas Band of Kumeyaay Indians*, ARB No. 06-074, 2007 WL 1266963, at *2 (ARB Apr. 27, 2007) ("The standard for granting summary decision in whistleblower cases is the same as for summary judgment under the analogous Fed. R. Civ. P. 56(e)."). A reviewing court must conduct a *de novo* review and "determine whether the evidence, viewed in light most favorable to the non-moving party, presents any genuine issues of material fact" and, if it does not, whether the Board properly granted judgment as a matter of law. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995); *see Demski v. U.S. Dep't of Labor*, 419 F.3d 488, 491-92 (6th Cir. 2005) (reviewing ARB decision affirming grant of summary decision *de novo*).

However, to the extent that Barboza argues that he was treated unfairly during the administrative proceedings because of the ALJ's decision not to

equitably toll the statute of limitations for several of his claims, the ALJ's decision to convert BNSF's motion to dismiss to a motion for summary decision, or the ALJ's decision not to postpone ruling on BNSF's motion until the close of discovery as Barboza requested, those decisions are reviewed for abuse of discretion. *See Sparre v. Dep't of Labor*, 924 F.3d 398, 401 (7th Cir. 2019) (reviewing the Board's decision to deny equitable tolling under FRSA for abuse of discretion); *see also* 29 C.F.R. § 1982.107(b) ("Administrative Law Judges have broad discretion to limit discovery in order to expedite the hearing"); *Saporito v. Cent. Location Servs., LTD and Asplundh Tree Expert Co.*, ARB No. 05-004, 2006 WL 535427, at *8 (ARB Sept. 29, 2004); *See United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th Cir. 2002) (reviewing a district court's decision to limit discovery under Fed. R. Civ. P. 56 for an abuse of discretion). ALJs exercise wide latitude to manage the hearing process. The abuse of discretion standard is deferential, and properly so, since the trial court needs the authority to manage the cases before it efficiently and effectively. *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005). A trial court "abuses its discretion if it reaches a result that is 'illogical, implausible, or without support in inferences that may be drawn from facts in the record.'" *United States v. Montes*, 628 F.3d 1183, 1187 (9th Cir. 2011) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc)). To establish an abuse of that discretion, in the context of

discovery, the moving party must, at a minimum, articulate what materials he hoped to obtain during discovery and how he expects those materials would have helped him avoid dismissal of his case. *See* 29 C.F.R. § 18.72(d); *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998) (applying the similarly worded provision under Fed. R. Civ. P. 56).

B. Barboza Failed to Raise a Genuine Issue of Material Fact that He Suffered an Adverse Employment Action within the Limitations Period.

Based on all of the evidence in the record, no reasonable fact-finder could conclude Barboza suffered an adverse employment action within the limitations period. The FRSA requires an employee who believes that he has suffered retaliation in violation of the Act to file a complaint with the Secretary of Labor (through OSHA) within 180 days of the alleged violation. 49 U.S.C. § 20109(d)(2)(A)(iii), 29 C.F.R. § 1982.103(d). Actions under the whistleblower provisions of the FRSA are governed by the legal burdens set forth in AIR 21, 49 U.S.C. § 42121(b)(2)(B), and the applicable regulations at 29 C.F.R. Part 1982. *See* 49 U.S.C. § 20109(d)(2); *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451 (9th Cir. 2018) (explaining the FRSA expressly invokes the AIR 21). To prevail on an FRSA claim, a complainant must prove by a preponderance of the evidence: (1) he engaged in protected activity; (2) the employer knew of the protected activity; (3) he suffered an adverse employment action; and (4) the protected activity was a contributing factor in the adverse employment action. *See Araujo*, 708 F.3d at 157;

see Tamosaitis, 781 F.3d at 481 (interpreting similarly structured whistleblower-protection provision in the Energy Reorganization Act). Only whether Barboza suffered an adverse employment action within the FRSA's 180-day statute of limitations is at issue in this appeal.

Barboza argues he suffered an adverse employment action after engaging in a protected activity. Barboza specifically alleges five potential adverse actions: (1) BNSF initiated a disciplinary investigation; (2) a hearing on that investigation was rescheduled multiple times by agreement of the parties; (3) BNSF dropped the disciplinary investigation; (4) BNSF did not remedy Barboza's internal HR complaint for retaliation; and (5) BNSF subjected Barboza to harassment, intimidation, and a hostile work environment after he returned to work. BNSF MTD 49-55, SER 032-038. Contrary to Barboza's position, not every unpleasant action by BNSF was a cognizable adverse action.

The FRSA whistleblower provision defines adverse employment action to include: discharging, demoting, suspending, reprimanding, or in any other way discriminating against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting or disciplining an employee. 49 U.S.C. § 20109(a); 29 C.F.R. § 1982.102(b)(2)(i). The Board and the courts have held adverse actions are deliberate actions taken by an employer that "would dissuade a reasonable employee from engaging in protected activity." *Menendez v.*

Halliburton, Inc., ARB Nos. 09-002, 09-003, 2011 WL 4915750, at *13 (ARB Sept. 13, 2011), *aff'd Halliburton v. Admin. Review Bd*, 771 F.3d 254 (5th Cir. 2014); *see Ray v. Henderson*, 217 F.3d 1234, 1240, 1243 (9th Cir. 2000) (construing adverse action in the context of Title VII). Further, a complaint *must* be brought within 180 days of a discrete adverse action. 49 U.S.C. § 20109(d)(2)(A)(ii); 29 C.F.R. § 1982.103(d) (emphasis added); *see Coppinger-Martin*, 627 F.3d at 749 (applying statute of limitations under analogous whistleblower provision in the Sarbanes-Oxley Act). Relief in the form of equitable tolling is reserved for "extreme cases," not present here. *Scholar v. Pac. Bell*, 963 F.2d 264, 267 (9th Cir. 1992).

None of potential adverse actions Barboza has put forth are cognizable because they fall outside the 180-day limitations period, are not "adverse", or are not supported by any evidence. Thus, the undisputed facts show Barboza failed to meet his burden to establish a genuine issue of material fact as to whether he suffered an adverse action within the limitations period. Accordingly, the Board properly affirmed summary decision for BNSF, and properly upheld the ALJ's dismissal of Barboza's complaint.

1. An alleged adverse action must occur within 180 days of the whistleblower complaint.

Barboza's complaint failed to raise a timely adverse action based on BNSF's initiation of the disciplinary investigation and failure to remedy Barboza's internal

complaint of retaliation. The undisputed facts establish BNSF's action of notifying Barboza of the disciplinary investigation and the results of the internal HR investigation occurred outside the statute of limitations and thus, as a matter of law, BNSF was entitled to summary decision as to these proposed adverse actions.

The FRSA whistleblower provision carries a limitations period of 180 days, meaning that, a complaint of unlawful retaliation must be filed within 180 days of a discrete adverse action. 49 U.S.C. § 20109(d)(2)(A)(ii); 29 C.F.R. § 1982.103(d). The limitations period begins to run on the date the complainant receives "final, definitive and unequivocal notice of an adverse employment decision." *Dugger v. Union Pac. R.R. Co.*, ARB No. 16-079, 2017 WL 3953479, at *1 (ARB Aug. 17, 2017); *accord Coppinger-Martin*, 627 F.3d at 749 (explaining that "a plaintiff's claim accrues when the plaintiff learns of the actual injury, i.e., an adverse employment action, and not when the plaintiff suspects a legal wrong, i.e., that the employer acted with a discriminatory intent") (internal citations and quotations omitted). "'Final' and 'definitive' notice is a communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. 'Unequivocal' notice means communication that is not ambiguous, i.e., free of misleading possibilities." *Dugger*, 2017 WL 3953479, at *1.

a. *Prior to September 17, 2016, Barboza received final, definitive, and unequivocal notice of BNSF's intent to conduct a disciplinary investigation and its determination he had not suffered retaliation.*

It is undisputed Barboza filed his OSHA complaint on March 16, 2017, establishing a limitations period starting September 17, 2016. OSHA Determ. at 1-6, SER 006-011. On August 29, 2016, BNSF's HR Director sent Barboza a letter in response to Barboza's dissatisfaction with the result of the internal HR investigation into alleged retaliation, finding there was no retaliation. BNSF MTD at 27, SER 025. The HR Director informed Barboza in this letter that he had reviewed the internal HR investigation, which had concluded on April 15, 2016, and found that the investigation was "sound." *Id.* And, on September 9, 2016, BNSF notified Barboza it would conduct a disciplinary investigation based on his untimely report of a workplace injury or illness that he sustained at least two years earlier. *Id.* at 28, SER 027. Because these actions occurred prior to September 17, 2016, they are time-barred.

As a matter of law, the notification from BNSF of the disciplinary investigation is outside the applicable statute of limitations. A letter informing an employee of a formal investigation raises a factual issue of whether an employee has suffered an adverse action. *Stallard v. Norfolk S. Ry. Co.*, ARB No. 16-028, 2017 WL 4466937, at *6-7 (Sept. 29, 2017). Nonetheless, in this case, that notification of a disciplinary investigation was received outside the limitations

period. This notification was a final and definitive notice that a disciplinary investigation of Barboza would begin. Therefore, as to the letter of a disciplinary investigation, there is no genuine issue of material fact that this employment action is time-barred.

Barboza's allegation that BNSF failed to remedy his internal HR complaint fails to create an issue of material fact sufficient to survive summary decision. Undoubtedly, an employer's unambiguous notification to an employee that his allegations of retaliation, harassment and mistreatment are unsubstantiated and that no further action will be taken can be an action adverse to the employee.[5] However, such notification is a discrete act. *Cf. Kaufman v. Perez*, 745 F.3d 521, 529 (D.C. Cir. 2014) (holding under analogous DOL-enforced environmental whistleblower statute that removal of duties was a discrete adverse action and failure to restore those duties in response to employee's protest was not a separate adverse action). Thus, in this case, BNSF's affirmative rejection of Barboza's allegations was the final notice of any adverse decision against Barboza. The limitations period began running on the day that Barboza received notification that BNSF rejected his allegations. Fatal to Barboza's complaint, this action took place

[5] In such a case, the employee would need to show (as is likely) that a reasonable employee in the same circumstances could be dissuaded from engaging in additional protected activity by the employer's refusal to address the alleged retaliation.

outside the limitations period and BNSF was entitled to judgment as a matter of law that this action is time barred.

b. Barboza's continued emails, if any, to BNSF Human Resources did not revive his claim that BNSF failed to properly address his internal complaint of retaliation.

Barboza alleged that he continued to email BNSF management, including the HR Director, in fall 2016 about his concerns regarding BNSF's handling of his internal HR complaint of retaliation. To the extent Barboza argues the limitations period was reset each time he emailed BNSF management, including the HR Director, to complain about the results of the investigation, his argument fails. First, there is no evidence in the record—declarations, discovery responses, stipulations, or any other document or material—that support Barboza continued to contact BNSF seeking a remedy for his HR complaint. Mere allegations, without some evidence, cannot establish an issue of fact sufficient to resist summary decision. *See* 29 C.F.R. § 18.72(c); *Williams v. Nat'l R.R. Passenger Corp.*, ARB No. 12-068, 2013 WL 6971139, at *1 (ARB Dec. 19, 2013); *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986) (to defeat summary judgment, a nonmoving party must respond with something more than conclusory allegations). But more importantly, even if Barboza could substantiate his claim, he cannot reset the limitations period by repeating the same challenge to BNSF's adverse decision and obtaining the same denial. *See Kaufman,* 745 F.3d at 529 (holding that employer's

refusals to reconsider removal of duties were "delayed, but inevitable, consequence[s]" of the decision . . . and thus not themselves actionable), quoting *Del. State Coll. v. Ricks,* 449 U.S. 250, 257–58 (1980); *Sweatt v. Union Pac. R.R. Co.*, No 14-CV-7891, 2016 WL 128036, at *3 (N.D. Ill. Jan. 12, 2016), *aff'd*, 678 F. App'x 423 (7th Cir. 2017) (stating the Title VII limitations period "would be meaningless" if an employee could reset it simply by repeating his request and the employer responding with the same denial). "When an initial discriminatory act is time-barred, a later related event is not actionable if it is merely a consequence of the first." *Brown v. Unified Sch. Dist. 501, Topeka Pub. Sch.*, 465 F.3d 1184, 1187 (10th Cir. 2006). Accordingly, even if Barboza had presented evidence that he continued to contact BNSF management seeking a remedy for his HR complaint, and BNSF failed to grant him the relief he sought, his claim is still time barred because each new request for a remedy would have been a consequence of the final notice the investigation found no retaliation. *See Brown*, 465 F.3d at 1188. Thus, the notice from the BNSF HR Director on August 29, 2016, the final and definitive notice of an adverse employment decision, is outside the limitations period and Barboza could not have reset the limitations period by continuing to challenge that decision.

c. The ALJ acted within his discretion in declining to equitably toll Barboza's claims.

Finally, while Barboza did not raise equitable tolling with the ALJ or the ARB, the ALJ considered whether equitable tolling was appropriate, and reasonably found that it was not.[6] Tolling of the statute of limitations is available in FRSA cases "for reasons warranted by applicable case law." 29 C.F.R. § 1982.103(d). In this Court, "[e]quitable tolling applies when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff's control made it impossible to file a claim on time," *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999), *see also Coppinger-Martin*, 627 F.3d at 750-752 (explaining and affirming Boards refusal to apply equitable tolling and equitable estoppel in Sarbanes-Oxley Act whistleblower case). Here, there are no facts in the record suggesting Barboza was prevented from asserting a claim or any circumstances that made it impossible to file a timely claim. Barboza had access to all of the facts necessary to file a whistleblower complaint when he received notice of the results of the BNSF internal HR investigation and again when BNSF opened a disciplinary investigation. Further, Barboza was represented by an attorney from the time of his OSHA complaint through the briefing of the summary decision motion.

[6] Barboza represents in his brief that he raised an equitable tolling argument with the ALJ. *See* Resp. Br. at 18. However, he did not. *See* ALJ Dec. at 13, SER 054.

Accordingly, there are no facts that could justify tolling the statutory deadline in this case.

2. BNSF's postponement and ultimate cancellation of Barboza's disciplinary hearing were not "adverse."

The remaining alleged actions within the limitations period include the postponements of the disciplinary investigation hearing, BNSF's ultimate decision to cancel the disciplinary investigation, and allegations of harassment. Two of those proposed alleged employment actions are not adverse as a matter of law and thus, cannot be used to support Barboza's whistleblower claim. The undisputed facts establish the joint agreement to postpone the investigatory hearing and BNSF ultimately cancelling the disciplinary investigation, were not adverse actions.

Under the FRSA, an adverse employment action includes discharging, demoting, suspending, reprimanding, or in any other way discriminating against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting or disciplining an employee. 49 U.S.C. § 20109(a); 29 C.F.R. § 1982.102(b)(2)(i). The Board has held in the context of an FRSA whistleblower action, adverse employment actions "refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Fricka v. Nat'l R.R. Passenger Corp.*, ARB No. 14-047, 2015 WL 9257754, at *3-4 (ARB Nov. 24, 2015). The Board and this Court have held an adverse action can include an action that "would dissuade a

reasonable employee from engaging in protected activity." *Menendez*, 2011 WL 4915750, at *10 (considering this additional factor when the unfavorable action does not include discipline or threatened discipline); *see also Ray*, 217 F.3d at 1237, 1240 (An adverse action is treatment that "is reasonably likely to deter employees from engaging in protected activity," and focuses on "disadvantageous changes in the workplace.").

The undisputed facts reveal BNSF rescheduled Barboza's investigatory hearing several times within the limitations period. BNSF MTD at 32-33; Barboza's Opp. at 30, SER 028-029, 041. These postponements were based on joint agreement between BNSF and Barboza, through his union, which represented him through the investigatory process. BNSF MTD at 31-33, 35, Barboza's Opp. at 30, SER 028-029, 031, 041. After Barboza clarified his claim of a workplace injury or illness, BNSF dropped the disciplinary investigation and cancelled the hearing. *Id.* Barboza has failed to present any evidence or argument how rescheduling a hearing or cancelling an investigation were unfavorable and non-trivial employment actions, or that those actions could reasonably deter employees from engaging in protected activity.

Contrary to Barboza's position, BNSF's actions were not adverse simply because he didn't like them. Neither of the above actions are adverse because they are in no way a disadvantageous change in the workplace nor could they

reasonably deter employees from engaging in protected activity. Postponing the investigatory hearing was neither positive nor negative, because it was by agreement of the parties and simply a change in the date for the investigative hearing. Further, cancelling the disciplinary investigation was *favorable* to Barboza, not adverse. There are no facts in the record describing how these actions are adverse, unfavorable, or could likely deter employees from engaging in protected activity. Because there are no genuine issues of material fact regarding whether these actions are adverse employment actions, BNSF was entitled to judgment as a matter of law.

Barboza summarily concludes in his opening brief that the hearing reschedule notice he received in January was an "adverse action" because it caused him distress. Resp. Br. at 15. But this stray comment is insufficient because he again fails to provide *facts* that the postponement was both *unfavorable* and *non-trivial*. Barboza's conclusory assertion is not enough to resist summary decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("there must be evidence on which the jury could reasonably find for the plaintiff" to resist summary judgment). Accordingly, the undisputed facts in the record support the finding that postponing the investigatory hearing was not an adverse action.

Barboza failed to meet his burden to put forth evidence to create a genuine issue of material fact as to whether the mutual agreement to postpone the

investigatory hearing and canceling the disciplinary investigation were adverse actions. Thus, BNSF was entitled to summary decision.

3. Barboza failed to produce evidence of ongoing harassment, intimidation, and a hostile work environment following his return from medical leave.

The ALJ and the Board correctly granted summary decision to BNSF on Barboza's allegation that after returning from medical leave he was subjected to harassment, intimidation, and a hostile work environment. Barboza provided no evidence supporting this allegation, not even a declaration from himself outlining the wrongful conduct. His naked assertion of harassment insufficient to overcome BNSF's motion for summary decision. Thus, the undisputed facts do not substantiate this allegation and BNSF was entitled to judgment as a matter of law.

Summary judgment is the "put up or shut up" moment in a lawsuit, meaning the nonmoving party faced with a summary judgment motion must advance some evidence to support his claims. *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003). At the summary judgment phase, a party cannot rely on his pleadings, but rather, must present "specific facts showing there is a genuine issue for trial." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Barboza failed to meet his burden to avoid summary decision. Barboza alleged that after returning from medical leave he was subjected to harassment, intimidation, and hostile work environment. BNSF MTD at 52, SER 035.

However, he failed to support this allegation with any evidence, not even a declaration from himself outlining the details of the alleged harassment, intimidation, and hostile work environment. *See* ALJ Dec. at 10, SER 051. His allegation alone is insufficient to generate a genuine issue of material fact. Without any evidence, his allegation is nothing more than speculation. Thus, BNSF was entitled summary decision because Barboza did not met his burden to produce evidence of harassment, intimidation or a hostile work environment.

II. THE ARB CORRECTLY AFFIRMED THE ALJ'S DECISION DECLINING TO DEFER RULING ON BNSF'S MOTION FOR SUMMARY DECISION BECAUSE IT WAS NOT AN ABUSE OF THE ALJ'S DISCRETION.

Barboza requested ALJ Berlin defer his ruling on BNSF's motion for summary decision until the close of discovery within his brief in opposition of that motion. ALJ Berlin denied that request because he found additional discovery on the issue of whether Barboza experienced an adverse action was unnecessary and because Barboza's request was procedurally deficient. ALJ Dec. at 12, SER 053. Because trial courts have wide latitude to manage discovery and to enforce court rules, ALJ Berlin acted well within his discretion when he denied Barboza's request to defer ruling on the summary decision motion and this Court should not disturb this decision.

A judge may defer his ruling on a motion for summary decision if the "nonmovant shows by affidavit or declaration that, for specified reasons, it cannot

present facts essential to justify its opposition," to the motion. 29 C.F.R. § 18.72(d). A court does not abuse its discretion when it denies a request under § 18.72(d) when the moving party fails to satisfy the procedural requirements of the rule. *See Tatum v. City and Cnty. of S.F.*, 441 F.3d 1090, 1100 (9th Cir. 2006) (applying the analogous rule of what was then Fed. R. Civ. P. 56(f)). This is because trial court judges are granted wide latitude to control their dockets and enforce procedural rules. *Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998) (There is a "well established" principle that trial courts "have inherent power to control their dockets.").

As ALJ Berlin correctly pointed out, the only issue at summary decision was whether Barboza experienced an adverse action. ALJ Dec. at 12, SER 053. Barboza would be keenly aware of whether an adverse action had taken place, and as such, discovery on that issue was not necessary, or if necessary, would not be complex or time-consuming. In order to avoid summary decision, Barboza could have easily submitted an affidavit setting forth the material facts of the adverse actions, thereby creating a genuine dispute. He failed to do so, and as such, ALJ Berlin correctly found deferring his ruling on BNSF's motion was unnecessary.

Further, ALJ Berlin denied Barboza's request to defer ruling on BNSF's motion because Barboza failed to comply with the procedural requirements under 29 C.F.R. § 18.72(d). This reason alone fully supports ALJ Berlin's decision to

deny the request. *See Tatum,* 441 F.3d at 1100; *Atchison, Topeka & Santa Fe Ry. Co.*, 146 F.3d at 1074. Barboza did not attach the required affidavit or declaration to his request to defer ruling on the summary decision motion. Nor did he state any facts or argument in his response brief providing reasons why he could not present the necessary facts of his case. As ALJ Berlin observed, BNSF had responded to all discovery requests, there were no outstanding motions to compel, and Barboza did not identify what discovery was necessary in order to obtain the evidence he needed to oppose the motion. ALJ Dec. at 12-13, SER 053-054. ALJ Berlin also noted Barboza failed to explain what additional discovery he needed, which he believed indicated Barboza lacked a basis for his request to defer ruling. Thus, ALJ Berlin acted within his discretion to deny the request to defer ruling on the motion. The Court should affirm the ARB's decision affirming ALJ Berlin's decision.

Finally, Barboza seems to argue generally that he was disadvantaged or mistreated in the proceedings below because the ALJ decided his case through summary decision. Such argument should be summarily dismissed.

Barboza was well informed and understood his burden at summary decision. After BNSF filed a motion to dismiss and attached 24 exhibits, ALJ Berlin held a telephone conference informing the parties he would treat the motion as one for summary decision, pursuant to 29 C.F.R. § 18.72, because the facts asserted may not have been in dispute and the motion relied on exhibits that were outside the

pleadings. ALJ Dec. at 1-2, SER 042-043; *see* 29 C.F.R. § 18.72(d). Barboza, through his attorney, filed his response to the motion acknowledging the motion had been converted to one for summary decision, and attached three exhibits. *Id.* Thus, Barboza was well informed of his burden to present evidence to create a genuine dispute of the material facts in order to avoid judgment for BNSF. ALJ Berlin acted well within his discretion, and within the procedural rules governing this proceeding.

CONCLUSION

The ALJ and the ARB correctly dismissed Barboza's complaint because he failed to produce evidence of an essential element of this case, an adverse employment action. For this and all of the foregoing reasons, this Court should affirm the Board's Final Decision and Order dismissing Mr. Barboza's complaint.

Respectfully Submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

SARAH K. MARCUS
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

/s/ Elaine M. Smith
ELAINE M. SMITH

Attorney
U.S. Department of Labor
2300 Main Street, Suite 1020
Kansas City, MO 64108
(816) 285-7262

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the Secretary of Labor is unaware of any related cases pending in this court.

Date: September 9, 2020

s/ Elaine M. Smith
ELAINE M. SMITH
Attorney
Office of the Solicitor
U.S. Department of Labor
2300 Main Street
Suite 1020
Kansas City, MO 64108
(816) 285-7262
smith.elaine@dol.gov

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORM 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s): 20-70363

I am the attorney or self-represented party.

This brief contains 8418 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated_____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Elaine M. Smith **Date** 9/9/20

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2020, a true and correct copy of the foregoing Brief for the Secretary of Labor was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and that service on the parties/counsel of record will be accomplished by this system upon the following:

Date: September 9, 2020

/s/ Elaine M. Smith
ELAINE M. SMITH
Attorney
Office of the Solicitor
U.S. Department of Labor
2300 Main Street
Suite 1020
Kansas City, MO 64108
(816) 285-7262
smith.elaine@dol.gov