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April 7, 2010

VIA HAND DELIVERY

Honorable Ronald M. George, Chief Justice
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Kevin Murray v. Alaska Airlines, Inc.*, Case No. S162570—
Supplemental Letter Brief

To the Honorable Chief Justice and Associate Justices of the Supreme Court of California:

Alaska Airlines, Inc. respectfully submits this supplemental brief, pursuant to Rule 8.520(d), to apprise the Court of a relevant opinion issued by the United States District Court for the Southern District of New York after briefing in this case was completed. As explained in more detail below, the District Court in that recent case—faced with a virtually identical statutory scheme and strikingly similar factual situation—dismissed a complaint that had been filed after the Secretary's unfavorable decision had become final. In so doing, the District Court embraced the argument, made by Alaska Airlines in this case, that courts asked to review whistle-blower claims should respect the principles of finality and efficiency that underlie 49 U.S.C. §42121(b), and provided additional support for Alaska Airlines' position that courts should give collateral estoppel effect to final decision of the Secretary of Labor.

Lebron v. American International Group, Inc., No. 09 Civ. 4285, 2009 WL 3364039 (S.D.N.Y. Oct. 19, 2009) (attached hereto as Exhibit A), involved an allegedly unlawful retaliatory termination in violation of Title VIII of the Sarbanes-Oxley Act of 2002 ("SOX"). The plaintiff, Kimberly Lebron, was a Compliance Manager in the Legal and Compliance Department of AIG Investments ("AIG"). *Id.* at *1. In June 2008, Lebron developed concerns that AIG was violating the Foreign Corrupt Practices Act. She reported her concerns to AIG's Global Anti-Corruption Officer, who proceeded to report Lebron's concerns up the chain of command. *Id.* A month later, Lebron—who

had "never received any complaints regarding her job performance or work ethic"—was terminated. *Id.*

Lebron filed a complaint with the Occupational Safety and Health Administration of the United States Department of Labor ("OSHA") alleging violations of the anti-retaliation provisions of SOX. An OSHA Regional Administrator, acting on behalf of the Secretary of Labor, issued preliminary findings dismissing Lebron's complaint on technical procedural grounds. Specifically, the Regional Administrator found that "Lebron failed to name AIG Global Real Estate Investment Corp. . . . Lebron's direct employer, as a respondent," and also concluded that "neither AIG Global Real Estate nor the two AIG subsidiaries Lebron named—AIG Global Asset Management Holding, Corp. and AIG Global Investment Corp.—were covered under SOX." *Id.*

The same rules and procedures that govern whistle-blower claims under AIR21 also govern whistle-blower actions under SOX. *See* 49 U.S.C. §42121(b). Accordingly, Lebron (like Mr. Murray in this case) had 30 days in which to file objections to the Secretary's preliminary order and request a hearing before an Administrative Law Judge. Lebron (like Mr. Murray) failed to do so. As a result, on March 25, 2009, the preliminary ruling dismissing Lebron's complaint on procedural grounds was converted into a final order that was "not subject to judicial review." *Id.* §42121(b)(4)(B); *Lebron*, 2009 WL 3364039, at *3.

Over a month later, Lebron filed a lawsuit in the Southern District of New York alleging unlawful retaliatory termination in violation of SOX. The District Court dismissed her complaint. *Lebron*, 2009 WL 3364039, at *8. Even though the Secretary's final order was not issued within the 180-day period required by statute, and even though there had *never* been a substantive determination of the merits of Lebron's compelling retaliation claim, the Court held that it lacked jurisdiction over Lebron's claim. The Court explained:

> Lebron filed her complaint in this Court more than a month after the preliminary findings and order became final under section 42121(b) and the implementing DOL regulations. If the Court were to adopt Lebron's reading of sections 1514A and 42121(b), there is nothing to prevent a future plaintiff in a similar case from filing his or her claims for *de novo* review with the district court several months, or even years, after allowing a preliminary order to become final. In this situation, the concept of finality would be ephemeral. This is an absurd result in light of the important interest in finality of judgments and the specific thirty day appeals limit in section 42121(b) that demonstrates Congress's intent that finality be achieved when a party fails to assert his or her rights expeditiously. (*Id.* at *6)

In other words, the District Court embraced the argument, set forth in Alaska Airlines' briefs in this case, that courts asked to review whistle-blower claims should respect the strong federal policies of finality and efficiency embodied in 49 U.S.C. §42121(b). As explained in Alaska Airlines' briefs, application of collateral estoppel to final decisions of the Secretary is necessary to further these important policies. *See* Alaska Airlines' Opening Brief on the Merits at 18-20; Alaska Airlines' Reply Brief on the Merits at 7-9. As a result, *Lebron v. American International Group, Inc.*, provides further support for the proposition that collateral estoppel applies to the Secretary of Labor's decision in this case that there was no causal link between Plaintiff Murray's whistle-blowing activities and his subsequent termination.

Sincerely,

David J. Reis
Attorney for Alaska Airlines, Inc.

cc: James P. Stoneman II (Proof of Service attached)

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(Cite as: 2009 WL 3364039 (S.D.N.Y.))

C

United States District Court,
S.D. New York.
Kimberly LEBRON, Plaintiff,
v.
AMERICAN INTERNATIONAL GROUP, INC., a/k/a AIG Investments, AIG Global Investments Corp. and AIG Global Asset Management Holdings Corp., Defendants.
No. 09 Civ. 4285(SAS).

Oct. 19, 2009.

West KeySummary
Labor and Employment 231H 854

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(B) Actions
231Hk854 k. Exhaustion. Most Cited Cases
Terminated employee failed to exhaust all administrative remedies prior to filing suit against employer as required to sustain a claim for unlawful retaliatory termination in violation of Title VIII of the Sarbanes-Oxley Act (SOX). Thus, the federal district court lacked subject matter jurisdiction over her SOX whistleblower claim. Employee failed to appeal the preliminary findings of the administrative law judge (ALJ) or initiate a claim with the district court, as required by SOX, even after notification that the preliminary findings would become final after 30 days if no action was taken. 49 U.S.C.A. § 42121(b); ; 18 U.S.C.A. § 1514A.

Jonathan Scott Sack, Esq., Sack & Sack, LLP, New York, NY, for Plaintiff.

James G. Murphy, Esq., Drinker, Biddle & Reath, LLP, New York, NY, Michael J. Sheehan, Esq., Drinker Biddle & Reath, LLP(Ill.), Chicago, IL, for Defendants.

OPINION AND ORDER

SHIRA A. SCHEINDLIN, District Judge.

I. INTRODUCTION

***1** Kimberly Lebron brings this action against AIG, Inc. and its subsidiaries AIG Global Investment Corp. and AIG Global Asset Management Holdings (collectively "AIG"), alleging unlawful retaliatory termination in violation of Title VIII of the Sarbanes-Oxley Act of 2002 ("SOX"). AIG now moves to dismiss the Complaint with prejudice under Federal Rule of Civil Procedure 12(b) (1) on the ground that this Court lacks subject matter jurisdiction and under Rule 12(b)(6) on the ground that Lebron failed to state a claim upon which relief can be granted. For the reasons stated below, I conclude that this Court lacks subject matter jurisdiction over Lebron's claims. Because AIG's motion to dismiss under Rule 12(b)(1) is granted, AIG's motion under Rule 12(b)(6) is not addressed.

II. BACKGROUND

A. Factual Background

The following facts are undisputed for the purposes of this motion. AIG Inc., together with its wholly owned business segment, AIG Investments, provides insurance, financial, and investment products to businesses and individuals. [FN1] Beginning on June 26, 2006, Lebron was employed as a Compliance Manager in the Legal and Compliance Department of AIG Investments.[FN2]

FN1. *See* Complaint ("Compl.") ¶ 2.

FN2. *See id.* ¶ 24.

On June 26, 2008, Lebron attended a meeting where she learned that AIG might have been violating the Foreign Corrupt Practices Act ("FCPA") as well as AIG's FCPA Travel and Gift Policy.[FN3] Lebron reported her concerns to AIG's Global Anti-Corruption Officer, Kevin Rooney, after she learned that AIG's Global Real Estate's General Counsel, Richard D'Alessandri, who was also present at the meeting, purposely did not report all the relevant facts about the possible violation to Rooney.[FN4]

FN3. *See id.* ¶ 30.

FN4. *See id.* ¶¶ 30, 45, 47.

After several follow-up conversations with Lebron, Rooney, in accordance with AIG's protocol, reported the possible FCPA violation to his supervisor, Kate Jones Troy.[FN5] Troy reported the issue to AIG's Chief Compliance Officer, Kathleen Chagnon.[FN6] On July 11, 2008, Lebron learned that Rooney told Jeffrey Hurd, the head of Lebron's Compliance Department, that she reported the possible FCPA violation.[FN7] On July 12, 2008, Chagnon called a meeting to discuss the possible FCPA violation with D'Alessandri, Hurd, and Joseph Guarino, the person to whom Lebron directly reported.[FN8] Lebron was excluded from the meeting.[FN9]

FN5. *See id.* ¶ 53.

FN6. *See id.*

FN7. *See id.* ¶ 56.

FN8. *See id.* ¶ 58.

FN9. *See id.*

On July 14, 2008, James Toms, AIG's Global Real Estate Human Resources Representative, called Lebron into a meeting with himself and Guarino. [FN10] During this meeting Lebron's employment with AIG was terminated. [FN11] Prior to her termination, Lebron never received any complaints regarding her job performance or work ethic.[FN12]

FN10. *See id.* ¶ 60.

FN11. *See id.*

FN12. *See id.* ¶ 26.

B. Procedural Background

On September 23, 2008, Lebron filed a complaint with the Occupational Safety and Health Administration of the United States Department of Labor ("OSHA") alleging violations of the anti-retaliation provisions of SOX.[FN13] On February 19, 2009, the OSHA Regional Administrator, acting on behalf of the Secretary of Labor ("Secretary"), issued preliminary findings.[FN14] The Regional Administrator found that Lebron failed to name AIG Global Real Estate Investment Corp. ("AIG Global Real Estate"), Lebron's direct employer, as a respondent.[FN15] The Regional Administrator additionally concluded that Lebron's claim would fail even if Lebron had named AIG Global Real Estate because neither AIG Global Real Estate nor the two AIG subsidiaries Lebron named-AIG Global Asset Management Holding, Corp. and AIG Global Investment Corp.-were covered under SOX.[FN16] Although AIG, Inc. is a publicly traded company covered under SOX, its subsidiaries are not themselves publicly traded companies and the Regional Administrator found that AIG, Inc. and its subsidiaries did not constitute an integrated employer.[FN17]

FN13. *See id.* ¶ 61.

FN14. *See* 2/19/09 Findings and Order Letter from Regional Administrator Robert D. Kulick to Kimberly Lebron, Ex. A to 8/3/09 Affidavit of Ethan G. Zelizer, Counsel to AIG ("Zelizer Aff").

FN15. *See id.*

FN16. *See id.*

FN17. *See id.* Given the other grounds for deciding this motion, I do not address the question of whether the named defendants are covered under SOX.

***2** The Regional Administrator issued an order dismissing Lebron's complaint.[FN18] The letter containing the findings and order stated that Lebron had thirty days from the receipt of the findings to file objections and request a hearing in front of an Administrative Law Judge ("ALJ").[FN19] The letter outlined the procedure for filing objections and warned that if Lebron did not file an objection, the findings would become "final and not subject to judicial review." [FN20]

FN18. *See id.*

FN19. *See id.*

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FN20.*Id.*

Lebron received the Regional Administrator's preliminary findings on February 23, 2009.[FN21] On February 27, 2009, Lebron sent a letter to the Regional Administrator asking him to accept the letter as Lebron's "objection to [the Regional Administrator's] Order of Dismissal and [Lebron's] request for a hearing before an administrative law judge." [FN22] The letter stated that Lebron copied the ALJ on the letter, but in fact Lebron failed to send the letter to the ALJ.[FN23] Lebron did not take any other steps to appeal the preliminary findings and order. Without further notice, Lebron filed her action in this court on May 1, 2009.

FN21.*See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Opp.Mem.") at 4.

FN22.*See* 2/17/09 Letter from Jonathan Sack, Counsel for Lebron, to Robert D. Kulick, Regional Administrator for OSHA, Ex. B to Zelizer Aff.

FN23.*See id.;* 7/14/09 Letter from John M. Vittone, Chief Administrative Law Judge, to Ethan G. Zelizer, Counsel to AIG, Ex. D to Zelizer Aff. (confirming that the Office of Administrative Law Judges has no record of an appeal filed by Lebron).

III. APPLICABLE LAW

A. Motion to Dismiss

Under Federal Rule of Civil Procedure Rule 12(b)(1), a complaint must be dismissed if the court lacks subject matter jurisdiction to hear the claim. Federal courts "are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute ." [FN24] Statutory authorization is required even when the exercise of "[federal] judicial powers is desirable or expedient. And this is especially true where the case involves ... federal ... courts and administrative agencies with separate and clearly defined powers." [FN25]

FN24.*Exxon Mobil Corp. v. Allapattah Serv., Inc.*, 545 U.S. 546, 552, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005) (internal quotations and citations omitted).

FN25.*United States v. North Hempstead*, 610 F.2d 1025, 1029 (2d Cir.1979).

B. Sarbanes-Oxley

The legislation implementing SOX, section 1514A of Title 18 of the United States Code, provides "[w]histleblower protection for employees of publicly traded companies." [FN26] A whistleblower who alleges unlawful discharge or discrimination may seek relief by either "filing a complaint with the Secretary of Labor" within ninety days of the alleged violation, or "if the Secretary has not issued a final decision within 180 days of the filing of the complaint ... bringing an action at law or equity for *de novo* review in the appropriate district court of the United States which shall have jurisdiction over such an action without regard to the amount in controversy." [FN27]

FN26.18 U.S.C. § 1514(a)

FN27.*Id.*§ 1514A(b).

The rules and procedures for whistleblower actions are governed by section 42121(b) of Title 49 of the United States Code, which states, in pertinent part:

> Not later than 60 days after the date of receipt of a complaint ... the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation ... of the Secretary's findings.

The Secretary may also include a preliminary order based on the findings. [FN28] Within thirty days of notification of the findings, either party can appeal the findings or preliminary order by "fil[ing] objections to the findings or preliminary order, or both, and request[ing] a hearing on the record." [FN29]

FN28.*See*49 U.S.C. § 42121(b).

FN29.*Id.*

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***3** If a hearing is not requested within thirty days, "the preliminary order shall be deemed a final order that is not subject to judicial review." FN30

FN30.*Id.*

In addition to sections 1514A and 42121(b), SOX is governed by administrative regulations promulgated by the Department of Labor ("DOL"). Pursuant to the DOL rules, when a complaint is filed with the Secretary, the Assistant Secretary investigates the claims.FN31 After collecting and considering all the relevant information, "the Assistant Secretary shall issue, within 60 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the named person has discriminated against the complainant in violation of [SOX]." FN32 If the Assistant Secretary finds reasonable cause to believe that a SOX violation occurred, "he or she shall accompany the findings with a preliminary order providing relief to the complainant." FN33 However, "[i]f the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding." FN34 In a letter accompanying the findings and order, the Assistant Secretary must "inform the parties of their right to file objections and to request a hearing." FN35 "The findings and preliminary order will be effective 30 days after receipt ... unless an objection and a request for a hearing has been filed as provided at [section 1980.106 to Title 29 of the Code of Federal Regulations]." FN36

FN31.*See*29 C.F.R. § 1980.104.

FN32.*Id.* § 1980.105(a).

FN33.*Id.*

FN34.*Id.*

FN35.*Id.* § 1980.105(b).

FN36.*Id.* § 1980.105(c).

Section 1980.106 provides that "[a]ny party who desires review, including judicial review, of the findings and preliminary order ... must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and preliminary order." FN37 "Objections must be filed with the Chief Administrative Law Judge." FN38 "If no timely objection is filed with respect to either the findings or the preliminary order, the findings or preliminary order, as the case may be, shall become the final decision of the Secretary, not subject to judicial review." FN39

FN37.*Id.* § 1980.106(a).

FN38.*Id.*

FN39.*Id.* § 1980.106(b).

The DOL also promulgated regulations concerning the federal district courts' jurisdiction over whistleblower claims under SOX. These regulations state,

> (a) If the [Administrative Review] Board FN40 has not issued a final decision within 180 days of the filing of the complaint ... the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy.
>
> FN40. The DOL delegated to the Administrative Review Board "the authority to act for the Secretary and issue final decisions." 29 C.F.R. § 1980.110.
>
> (b) Fifteen days in advance of filing a complaint in federal court, a complainant must file with the administrative law judge or the [Administrative Review] Board, depending upon where the proceeding is pending, a notice of his or her intention to file such a complaint.FN41

FN41.*Id.* § 1980.114.

IV. DISCUSSION

A. The Secretary Did Not Issue a Final Order Within 180 Days

***4** To determine whether this Court has jurisdiction to hear Lebron's claims, the Court must consider whether the Secretary issued a final decision within 180 days of the time Lebron filed her case with OSHA. Lebron filed her complaint on September 23,

2008. Thus, the Secretary had until March 22, 2009 to issue a final decision. On February 19, 2009, the Regional Administrator, acting on behalf of the Secretary, issued a preliminary decision.[FN42] Lebron received that decision on February 23, 2009 and the decision become the final decision of the Secretary thirty days later on March 25, 2009. Accordingly, the Secretary did not issue a final decision within 180 days of Lebron filing her administrative complaint.

FN42. For purposes of jurisdiction, a preliminary decision is not equivalent to a final decision of the Secretary. *See Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469 (2d Cir.2006) (each judge of the panel acknowledged that section 42121(b) distinguishes between the district courts' jurisdiction over preliminary and final orders); *see also Welsh v. Cardinal Bankshares Corp.*, 454 F.Supp.2d 552, 556 (W.D.Va.2006) (concluding that a district court cannot enforce a preliminary order because "the statutory grants of jurisdiction in 49 U.S.C. § 42121(b)(5) and 49 U.S.C. § 42121(b) (6) clearly fail to grant jurisdiction to [district courts] over preliminary orders ... the plain language of the statute grants jurisdiction to [district courts] solely over a final order of the [Administrative Review Board]").

B. Lebron's Failure to Comply with Section 1980.114(b) Does Not Prevent the Court from Exercising Jurisdiction

AIG argues that even though the Secretary did not issue a final decision within 180 days of the date that Lebron filed her complaint, the Court lacks jurisdiction to hear Lebron's claims because Lebron failed to comply with section 1980.114(b) of Title 29 of the Code of Federal Regulations, which requires fifteen days notice to the ALJ before a federal court assumes jurisdiction.[FN43] Lebron admits that she never notified the ALJ of her intent to remove her case to federal court.[FN44] Thus, the Court must determine whether Lebron's failure to comply with an administrative regulation prevents the Court from exercising jurisdiction.

FN43.*See* Memorandum of Law in Support of Defendants' Motion to Dismiss ("Def.Mem.") at 7.

FN44.*See* Opp. Mem. at 10.

It is well settled, under *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, that courts must give deference to administrative regulations.[FN45] Administrative regulations "qualif[y] for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in exercise of that authority."[FN46] A reviewing court must defer to the agency's rules, even when an agency only has implied authority to promulgate rules, "if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable."[FN47] However, administrative regulations purporting to regulate statutory grants of jurisdiction to district courts are not entitled to *Chevron* deference.[FN48] Moreover, the Second Circuit has not deferred to the DOL's SOX regulations that modify Congress's grant of jurisdiction to district courts in sections 1514A and 42121(b).[FN49]

FN45.*See* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *see also United States v. Mead Corp.*, 533 U.S. 218, 227-31, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (explaining when an administrative regulation is entitled to Chevron deference); *Day v. Staples, Inc.*, 555 F.3d 42, 54 (1st Cir.2009) (stating that Department of Labor regulations are "entitled to *Chevron* deference").

FN46.*Mead*, 533 U.S. at 226.

FN47.*Id.* at 229.

FN48.*See Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990) (concluding that a congressional delegation of power to the Department of Labor "does not empower the Secretary to regulate the scope of the judicial power vested by the statute"); *Verizon Maryland, Inc. v. Global Naps, Inc.*, 377 F.3d 355, 383 (4th Cir.2004) ("*Chevron* deference is not required when the ultimate question is about federal jurisdiction."); *Murphy Exploration & Prod. Co. v. U.S.*

> *Dep't of the Interior,* 252 F.3d 473, 478 (D.C.Cir.2001) (*"Chevron* does not apply to statutes that ... confer jurisdiction on the federal courts. It is well established that [i]nterpreting statutes granting jurisdiction to Article III courts is exclusively the province of the courts.") (internal quotations omitted); *Welch,* 454 F.Supp. at 557 (applying "the principle that an agency does not have the power to interpret a statute establishing federal court jurisdiction").
>
> FN49.*See Bechtel,* 448 F.3d. at 469. In *Bechtel* the Second Circuit determined that, in a whistleblower case under SOX, the district court could not enforce a preliminary order by the Assistant Secretary reinstating the plaintiff to the position from which the Assistant Secretary determined the plaintiff was unlawfully discharged. The court reached this conclusion despite an administrative regulation promulgated by the DOL that conferred jurisdiction to enforce preliminary orders on the district court. Although the judges did not reach a majority opinion as to why the district court could not enforce the preliminary order at issue, all three judges agreed that the DOL regulation was *not* binding on the court.

Neither section 1514A nor section 42121(b) conditions the district courts' jurisdiction on fifteen days notice to the ALJ of the complainant's intent to remove the case to federal court. Because deference is not given to administrative regulations that narrow Congress's statutory grant of jurisdiction to district courts, a district court can properly exercise jurisdiction over a whistleblower claim under SOX even when no notice is given to the ALJ in contravention of the DOL's fifteen-day notice requirement. Accordingly, Lebron's failure to comply with section 1980.114(b) does not prevent this Court from exercising jurisdiction over Lebron's claims.

C. Section 42121(b) Limits Section 1514's Grant of Jurisdiction to District Courts

***5** AIG also argues that Lebron's claims are not subject to *de novo* review in the district court because Lebron failed to file objections with the ALJ within thirty days of receiving the preliminary findinds and order. Under section 42121(b) and the implementing DOL regulations, failure to file objections with the ALJ within thirty days converts the preliminary findings and order into a "final order that is not subject to judicial review." [FN50] Thus, the issue before this Court is whether preliminary findings and orders that are not appealed within thirty days become final and not subject to judicial review if the Secretary failed to issue a final order within 180 days of the filing of the complaint.

> FN50.*See* Def. Mem. at 5-6.

Lebron relies on *Hanna v. WCI Communities, Inc.* to argue that she is allowed to file her claims in the district court, despite her failure to appeal the findings to the ALJ, because the preliminary findings did not become final prior to section 1514A's 180-day limit .[FN51] In Hanna, the plaintiff gave the ALJ fifteen days notice of his intent to file claims with the district court after the Assistant Secretary failed to issue preliminary findings within 180 days of the date the plaintiff filed his administrative complaint. [FN52] Although the Assistant Secretary issued preliminary findings prior to the date the plaintiff actually filed claims in the district court, and the plaintiff did not appeal the Assistant Secretary's preliminary findings to the ALJ, the *Hanna* court determined that it could hear the merits of the plaintiff's claims because 180 days had passed without a final decision from the Secretary.[FN53]

> FN51.*See* Opp. Mem. at 7. Lebron does not argue that her February 27, 2008 letter to the Regional Administrator constituted a proper objection to the preliminary findings or a request for a hearing before the ALJ.
>
> FN52.*See*348 F.Supp.2d 1322, 1324 (S.D.Fla.2004).
>
> FN53.*See id.* at 1329-30.

Lebron's reliance on *Hanna* is misplaced. In *Hanna,* the plaintiff filed his case in the district court before the thirty day period for objecting to the preliminary findings had elapsed.[FN54] The *Hanna* court was not asked to hear the merits of a case in which the preliminary order became a "final order not subject to judicial review" under section 42121(b)*prior* to the plaintiff filing a claim in the district court, which is

precisely what Lebron urges this Court to do. In fact, the *Hanna* court acknowledges that there are circumstances where applying section 1514A's grant of jurisdiction according to its plain meaning might lead to absurd results.[FN55]

FN54.*See id.* at 1329.

FN55.*See id.* at 1328 (noting that "Mr. Hanna's case does not present the egregious factual scenario" in part because "Mr. Hanna filed his district court complaint before the time had elapsed for seeking review of OSHA's preliminary findings in front of an administrative law judge.").

In determining whether this Court may hear Lebron's claims, the Court must first consider the plain language of sections 1514A and 42121(b). [FN56] However, the Court "must 'interpret [a] specific provision in a way that renders it consistent with the tenor and structure of the whole act or statutory scheme of which it is a part .' " [FN57] Furthermore, "an ambiguous statute must be construed to avoid absurd results." [FN58]

FN56.*See Lamie v. U.S. Trustee,* 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) ("The starting point in discerning congressional intent is the existing statutory text.").

FN57.*United States v. Pacheco,* 225 F.3d 148, 154 (2d Cir.2000) (quoting *United States v. Bonanno Organized Crime Family of La Casa Nostra,* 879 F.2d 20, 24 (2d Cir.1989)).

FN58.*Troll Co. v. Uneeda Doll Co.,* 483 F.3d 150, 160 (2d Cir.2007).

Here, the Secretary failed to issue a final order within 180 days of Lebron's complaint, but the preliminary findings became final and not subject to judicial review after the 180-day mark. Therefore, under the facts of this case, a plain reading of the text indicates that both section 1514A's authorization of district courts to review a whistleblower's claims *de novo* when the Secretary has not issued a final opinion within 180 days of the filing of the administrative complaint and section 42121(b)'s prohibition against judicial review of a final order apply. This constitutes an ambiguity in the statute-a district court cannot simultaneously review a litigant's claims *de novo* yet not have the power to review the Secretary's final order. However, this ambiguity can be resolved by considering the statutory scheme as a whole and construing the statute to avoid absurd results.

***6** Under Lebron's construction, section 1514A's grant of jurisdiction trumps section 42121(b)'s prohibition against judicial review of final orders. In other words, if the Secretary fails to issue a final order within the 180-day limit, any order the Assistant Secretary ultimately issues can never become a final order not subject to judicial review because the complainant has an unconditional right to *de novo* judicial review in a district court. This interpretation forecloses any administrative finality when the Secretary does not issue a final order within the 180-day limit.

Lebron filed her complaint in this Court more than a month after the preliminary findings and order became final under section 42121(b) and the implementing DOL regulations. If the Court were to adopt Lebron's reading of sections 1514A and 42121(b), there is nothing to prevent a future plaintiff in a similar case from filing his or her claims for *de novo* review with the district court several months, or even years, after allowing a preliminary order to become final. In this situation, the concept of finality would be ephemeral. This is an absurd result in light of the important interest in finality of judgments and the specific thirty day appeals limit in section 42121(b) that demonstrates Congress's intent that finality be achieved when a party fails to assert his or her rights expeditiously. [FN59]

FN59.*See Sanches-Llamas v. Oregon,* 548 U.S. 331, 356, 126 S.Ct. 2669, 165 L.Ed.2d 557 (2006) ("Procedural default rules are designed to encourage parties to raise their claims promptly and to vindicate 'the law's important interest in the finality of judgments.' " (quoting *Massaro v. United States,* 538 U.S. 500, 504, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003))).

Instead, section 42121(b)'s prohibition on judicial review of final orders must be read as a limit on Congress's grant of jurisdiction to the district courts under

section 1514A. Under this reading, if the Secretary does not issue a final order within 180 days of the filing of the administrative complaint, the complainant has thirty days from receiving a preliminary order to either file a claim in a district court or appeal the preliminary order to the ALJ and thereby preserve the option to file a district court claim at a later time. If the complainant, like Lebron, takes no action within thirty days, the preliminary order becomes final and the district court no longer has jurisdiction to review the claims *de novo.*

D. OSHA'S Failure to Issue Written Findings Within Sixty Days Does Not Excuse Lebron's Failure to Follow the Procedural Requirements for Bringing Claims in Federal Court

Lebron argues that any failure on her part to follow the procedural requirements for bringing her claim in federal court is excused because OSHA failed to follow its own procedures. Specifically, OSHA violated sections 1514A and 1980.105(a) of Title 29 of the Code of Federal Regulations by failing to issue "written findings as to whether or not there is reasonable cause to believe that [AIG] has discriminated against [Lebron] in violation of [SOX]" within sixty days of the filing of Lebron's complaint.[FN60]

> FN60.*See* Opp. Mem. at 9. Lebron argues that OSHA failed to comply with this requirement in two ways. *First,* OSHA failed to meet the sixty day requirement and second, the written findings that were ultimately issued by the Regional Administrator fail to state "whether or not there is reasonable cause to believe that the [AIG] has discriminated against [Lebron] in violation of [SOX]." The second argument makes no sense. The Regional Administrator issued findings that Lebron did not work for a publicly traded company-the only type of company that SOX's whistleblower provisions regulate. This is equivalent to finding that Lebron's employer did not discriminate against her *in violation of SOX.*

The only case directly addressing the sixty-day requirement is *Wingard v. Countrywide Home Loans, Inc.*[FN61] In Wingard, the plaintiff argued that he was allowed to bring his claims in federal court, notwithstanding a final decision the Secretary issued within 180 days of the date the complaint was filed, because the Assistant Secretary failed to issue written findings within sixty days of the date the complaint was filed.[FN62] The *Wingard* court found the plaintiff's proposed reading of the statute "would vitiate the statutory provision" that only allows for removal of claims to district court when the Secretary has not entered a final decision within 180 days.[FN63]

> FN61.*See*No. 07 Civ. 904, 2008 WL 4277982, at * 1 (M.D.Ala. Sept. 18, 2008).
>
> FN62.*See id.*
>
> FN63.*See id.*

*7 This decision is sound. If Congress intended for district courts to review whistleblower claims when the Secretary failed to issue written findings within sixty days of the time the complaint was filed, Congress would have made that clear.[FN64] Because Congress did no such thing, access to the district courts is not a remedy when OSHA fails to issue written findings within sixty days of the filing of the complaint.

> FN64. Congress did exactly that in section 1514A when it conferred jurisdiction over whistleblower claims on the district court if the Secretary fails to issue a final decision within 180 days of the filing of the complaint.

E. The Futility of an Appeal to the ALJ Is Irrelevant

Lebron claims that appealing the preliminary findings and order to the ALJ would have been futile.[FN65] She argues this excuses her failure to exhaust her administrative remedies. Whether appealing the preliminary findings and order to the ALJ would have been futile is irrelevant. Appealing to the ALJ was not Leborn's only option. Lebron had the alternative option of filing a complaint for *de novo* review in a district court when 180 days had passed without a final decision from the Secretary.

> FN65. Opp. Mem. at 10.

Under section 1514A, OSHA has exclusive jurisdiction over SOX whistleblower claims for 180 days. If

the Secretary fails to issue a final order within 180 days, the complainant may file suit in the district court. However, when the Secretary issues preliminary findings, section 42121(b) obligates the complainant to appeal to the ALJ within thirty days of receiving notice of the preliminary findings or the preliminary findings become final and not subject to judicial review. In a scenario where the preliminary findings would not become final until after the 180-day period of OSHA's exclusive jurisdiction expires, the complainant must file suit in the district court within thirty days of receiving notice of the preliminary findings. If the complainant fails to either appeal to the ALJ or file suit in federal court within the thirty-day period, the preliminary findings become final and not subject to judicial review.

Lebron received the Regional Administrator's preliminary findings and order 153 days after filing her administrative complaint with OSHA. The preliminary findings became final thirty days later. Thus, the preliminary findings and order were not final until after OSHA's 180 days of exclusive jurisdiction had expired. However, despite the Regional Administrator's warning that if Lebron did not act within thirty days the preliminary findings and order would become final and not subject to judicial review, Lebron failed to either appeal the preliminary findings and order to the ALJ or file a claim for *de novo* review in the district court within thirty days of receiving the preliminary findings and order. Lebron's failure to act promptly allowed the preliminary findings and order to become a final order of the Secretary that is not subject to judicial review. Consequently, Lebron forfeited her right to appeal the preliminary findings and order to the ALJ as well as her right to assert her claims *de novo* in the district court.

V. CONCLUSION

***8** For the reasons set forth above, AIG's motion to dismiss is hereby granted. The Clerk of the Court is directed to close this motion (docket # 09 Civ 4285) and this case.

SO ORDERED.

S.D.N.Y.,2009.
Lebron v. American Intern. Group, Inc.
Slip Copy, 2009 WL 3364039 (S.D.N.Y.), 92 Empl. Prac. Dec. P 43,713, 29 IER Cases 1558

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PROOF OF SERVICE BY MAIL

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is Three Embarcadero Center, Seventh Floor, San Francisco, California 94111-4024.

I am readily familiar with the practice for collection and processing of documents for mailing with the United States Postal Service of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, and that practice is that the documents are deposited with the United States Postal Service with postage fully prepaid the same day as the day of collection in the ordinary course of business.

On April 7, 2010, I served the following document(s) described as **SUPPLEMENTAL LETTER BRIEF** on the persons listed below by placing the document(s) for deposit in the United States Postal Service through the regular mail collection process at the law offices of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, located at Three Embarcadero Center, Seventh Floor, San Francisco, California, to be served by mail addressed as follows:

James P. Stoneman, II
Law Offices of James P. Stoneman, II
100 West Foothill Boulevard
Claremont, CA 91711

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed at San Francisco, California on April 7, 2010.

Jill Hernandez

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