UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

HUGH B. KAUFMAN, Complainant v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	Administrative Law Judge Thomas M. Burke

COMPLAINANT'S REPLY TO OPPOSITION TO MOTION TO AMEND AND SUPPLEMENT HIS COMPLAINT

On November 21, 2007 Complainant Mr. Kaufman filed a *Motion for Leave to File An Amended And Supplemented Complaint* ("*Motion*") with an attached proposed amended complaint.[1] After obtaining several unopposed extensions of time to file, on December 11, 2007 Respondent Environmental Protection Agency ("Agency") filed its *Opposition to Complainant's Motion to Amend* ("*Opposition*").[2]

Upon filing an unopposed request, on December 13, 2007 Mr. Kaufman was granted leave to file a reply to the *Opposition* on or before January 2, 2008.[3]

[1] *Complainant's Motion for Leave to File An Amended And Supplemented Complaint,* served November 21, 2007.

[2] *Respondent's Opposition to Complainant's Motion to Amend,* served December 11, 2007.

[3] *Order Granting Extension of Time,* dated December 13, 2007.

ARGUMENT

Here, Mr. Kaufman provides his reply, in which he will make six points illustrating why the *Opposition* fails to show that the *Motion* should be denied, and fails to meet its burden that it will be prejudiced if the *Motion* is granted. First, Mr. Kaufman would like to reassert all the reasons listed in the *Motion* as to why leave should be granted, and refers the tribunal to that brief. In summary, Mr. Kaufman believes the *Motion* should be granted because:

1) each of the eleven claims in the proposed amended complaint ("Amended Complaint") relate to the initial 2001 complaints, Attachment One, Complaints dated April 6, 2001, April 30, 2001, and May 2, 2001 ("Complaints"), in that they uniformly relate to charges of the Agency's improper hindering, impeding, and obstructing Ombudsman investigations under the applicable whistleblower acts;

2) the seven distinct acts forming the amended claims either directly appear in the Complaints, or relate directly to the Agency's removal or failure to promote Mr. Kaufman to perform the Ombudsman duties which were removed, duties at the heart of this litigation;[4]

3) the two supplemental claims relate directly to the transfer of the Ombudsman function to the Office of Inspector General, on which discovery was deemed proper after aggressive opposition by the Agency, and on which discovery was pursued, or could have been pursued;

4) the two systemic claims of a hostile work environment and systematic policy of discrimination again relate to the preclusion of Mr. Kaufman's Ombudsman duties, one on a

[4] The claim i regarding the December 14, 2000 preclusion of duties, Amended Complaint 107-08, forms the heart of the Agency's defense – that no adverse action occurred after that preclusion. As to the April 16, 2001 failure to promote claim, the Agency admits this specific failure to promote in its response to the initial complaints on June 7, 2001. *See* Attachment Two, June 7, 2001 Agency Answer without Enclosures, Bates No. 50185-86. The failure to promote him under the Claim iii, Amended Complaint pp. 109-110, continues through January 12, 2002, and as such could be construed as a supplemental claim.

personal level, and one related to the Ombudsman function more broadly, which until the spring of 2001 had only two professional employees; [5]

5) discovery has been pursued on all of these issues, and should further discovery be necessary, Mr. Kaufman does not object to it; and

6) Mr. Kaufman has been significantly prejudiced in this litigation by the Agency's stalling and failure to preserve documents which, though it resulted in the sanction of restoring and searching the Landmark Litigation Tapes, prevented him from properly pursuing his claim with all evidence and in a methodical manner.

The six points Mr. Kaufman makes in reply to the *Opposition* are as follows:

1. The Agency Failed to Identify Case Law Supporting Its Position of Improper Delay

The Agency argues strenuously that the *Motion* should be denied because of Mr. Kaufman's "undue delay" in making the request. It asserts that the leave requested "has frequently been denied because of delay" (emphasis added). *Opposition*, pp. 8-9.[6]

Upon review of the Agency's authority on the issue of delay, it is clear the accurate view is not that view presented in the *Opposition*, but is rather that view appearing in the ample case

[5] These two claims are amendments to the extent they address acts prior to the filing of the Complaints, and supplements to the extent they relate to acts occurring thereafter.

[6] A "speedy" resolution of litigation, as argued by the Agency and which Mr. Kaufman favors, is typically associated with a Constitutional right in a criminal trial. *Hobson v. Brennan,* 637 F. Supp. 173, 175 (D.D.C. 1986) (citing the federal government contrasting the 6th and 7th Amendments). Mr. Kaufman believes the prejudice he will suffer if the *Motion* is not granted outweighs any preference for a speedy resolution.

law cited by Mr. Kaufman in the *Motion*. In fact, leave to file amendments and supplements is proper and liberally granted.[7]

Not a single one of the ten cases the Agency cites to support its legal argument regarding delay are administrative cases.[8] Further, only four of the ten, which span the federal circuits nationwide, were decided within the past two decades. Beyond these shortcomings, the rulings present extenuating factors not present here: the motion for leave was filed after a ruling on summary judgment completely dismissing the litigation;[9] the motion was filed days before trial, and in one instance after plaintiff's counsel asserted that he was prepared to go to trial and subsequently raised "novel" legal theories; the new claims arose under different laws than those in the original complaint and against new defendants; the new claims were already being pursued in other litigation; new claims raised when there was "no hint" they would be raised earlier in the proceedings; the new claims would require development of facts occurring more than 13 years prior; and leave sought after two amended complaints and additional changes had already been permitted. The ten cases are as follows.

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[7] "The general rule that amendment is allowed absent undue surprise or prejudice. . . is widely adhered to by our sister courts of appeals." *Jackson v. Rockford Housing Authority*, 213 F.3d 389 (7th Cir. 2000). Amendments to the pleadings to raise unpleaded issues may be made upon motion of any party at any time, even after judgment. *Ruud v. Westinghouse Hanford Co.*, 88-ERA-33. **18-19 (ARB Nov. 10, 1997). *See generally*, *Motion* at 14-15.

[8] As stated in the *Motion*, an administrative law judge is not bound by the legal theories of any party in determining whether a violation of the whistleblower acts has occurred once the complaint is filed. *Chase v. Buncombe County*, 85-SWD-4, *3 (Sec'y, Nov. 3, 1986) (Secretary read complaint charging violation of a settlement agreement to include a new complaint of discrimination).

[9] The general rule is that federal courts terminate a plaintiff's ability to amend once a case has been dismissed. *See, e.g. Ciralsky v. CIA*, 355 F.3d 661, 672 (D.C. Cir. 2004) (once judgment is entered, ability to amend is terminated unless party can re-open judgment pursuant to Fed. R. Civ. Pro. 59(e)).

Requests to Amend a Complaint in Federal Court

- *Atchinson v. District of Columbia*, 73 F.3d 418, 427-28 (D.C. Cir. 1996) (not an abuse of discretion to deny leave to add a new plaintiff when district court found "At no time has plaintiff even so much as hinted of his intention to sue Officer Collins in his individual capacity," and because the need for the new plaintiff was jurisdictional and jurisdiction was otherwise granted.)
- *Williamsburg Wax Museum , Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 247-48 (D.C. Cir. 1987) (not abuse of discretion to deny amendment filed seven years after initial complaint that would raise "an entirely new issue" following a grant of summary judgment in favor of defendants on all claims and counterclaims).
- *Isaac v. Harvard University*, 769 F.2d 817, 829 (1st Cir. 1985) (not abuse of discretion to deny adding new breach of contract claim four years after existing Civil Rights complaint filed because the new claim would "very materially change the nature of the complaint" and when the contract claim would require development of statements made 13 years before the proposed amended complaint was filed).
- *Nilsen v. Moss Point*, 621 F.2d 117, 122 (5th Cir. 1980) (not abuse of discretion to deny leave to add new federal and Constitutional claims to gender discrimination complaint after a motion for summary judgment was granted to defendants dismissing all claims).
- *Debry v. Transamerica Corp.*, 601 F.2d 480, 492 (10th Cir. 1979) (not an abuse of discretion to deny leave to file a amended complaint in corporate fraud case after separate leave was already granted to file first and second amended complaints and when leave had further been granted to make changes to jurisdiction paragraph through interlineation).

- *Bradick v. Israel,* 377 F.2d 262, 263 (2d Cir. 1967) (not abuse of discretion to deny leave to amend complaint for malicious prosecution on the eve of trial more than four years after filing the original complaint when plaintiff attorney had already represented to the court that the case was ready for trial, when the amendment consisted of "novel theories of law with new problems of proof.")

Requests to Supplement a Complaint in Federal Court

- *Walker v. UPS, Inc*. 240 F.3d 1268,1278-79 (10th Cir. 2001) (not an abuse of discretion to deny supplement when "proposed new claim would have required additional discovery and precluded the entry of a final judgment order, when the original claims had been resolved via summary judgment or trial" and the new claim of constructive discharge arose after pre-trial conference, and when plaintiff already received another right-to-sue letter from the EEOC and filed a separate suit alleging the identical constructive discharge claim sought in the supplement)(emphasis added);
- *Glatt v. Chicago Park District,* 87 F.3d 190, 193 (7th Cir. 1996) (not abuse of discretion to deny leave to file supplemental pleading when it was filed after existing claims were dismissed, and plaintiff sought to add charge that dismissal itself was an adverse action in violation of the U.S. Constitution, in what appeared to be a belated effort to complicate and prolong the litigation).
- *Twin Disc, Inc., V. big Bud Tractor, Inc.*, 772 F.2d 1329, 1338 (7th Cir. 1985) (not an abuse of discretion to deny supplement of existing contract claim to add a later alleged contract violation when requested seven days before trial was to begin).
- *Sidari v. Orleans County,* 169 F.Supp. 2d 158, 162 (W.D. N.Y. 2000) (magistrate judge did not err by denying motion for leave to supplement Title VII complaint three

years after initial complaint filed when supplement would add five new defendants and new Title VII claims and claims of union violations of duty of fair representation and defamation, when some of the claims had already been dismissed, some were being heard before a different judge, and some were deemed unrelated to existing claims, and where plaintiffs had not exhausted their administrative remedies with respect to the Title VII claims against the new defendants).[10]

Mr. Kaufman notes that none of these cases involved a cause of action where there were broad public policy concerns as exist in whistleblower claims, and none involved a situation where the plaintiff was prejudiced by the defendants violation of procedural rules, as is true here.[11] Both of these distinctions encourage a more favorable view of Mr. Kaufman's *Motion*.

2. The Agency Improperly Shifts the Burden to Mr. Kaufman

The Agency claims Mr. Kaufman has not proposed a proper reason to amend, but the burden is on the Agency, not Mr. Kaufman to show prejudice.[12] *Ruud v. Westinghouse Hanford Co.*, 88-ERA-33 at *18 (the opposing party must demonstrate that "the detrimental effect cannot

[10] *Opposition*, p. 8.

[11] *See Order Denying Default Judgment and Granting Request for Backup Tapes*, December 8, 2005, requiring the Agency to expend what amounted to more than $500,000 to restore computer backup tapes upon, *inter alia*, failing to preserve documents, prejudicing Mr. Kaufman by causing delay and denying him key documents. Except for several miscellaneous documents, the documents from the tapes were dated February 2, 2001or earlier. The adverse actions described in the original Complaint occurred in March and April 2001.

[12] "Complainant has makes no effort to demonstrate that he was unable to seek leave to amend until after he received documents obtained from the backup tapes." *Opposition* at 15, fn. 9.

be cured by a continuance or the imposition of some other condition on allowing the amendment").[13] The Agency has not met this burden to prove prejudice, as described *infra.*

3. Agency Improperly Portrays Mr. Kaufman's Diligent Discovery As "New" Facts

A foundation of the Agency's argument in the *Opposition* is that Mr. Kaufman has added "newly-alleged factual contentions" in the Amended Complaint, largely without providing any specificity as to what is new. *Opposition* at 6. As such, if the *Motion* is granted, the Agency argues, "It is probable that further discovery will be necessary." *Opposition* at 11. This will impose "magnified" prejudice on the Agency, *Opposition* at 13, and therefore the Agency urges that the *Motion* be denied.

It is simply not true that the Amended Complaint contains "new" facts of which the Agency lacked notice. What is true is that the Agency stopped pursuing discovery in December 2002, *Opposition* at 4, and now may be alarmed to see the fruits of Mr. Kaufman's more diligent discovery efforts. Alternatively, the Agency is feigning such alarm in a desperate effort to defeat the *Motion*. Consider the following quotes from the *Opposition* that "new" facts and claims are presented:

- "Complainant describes, at length, various alleged "protected activities," many of which were not asserted" in the Complaints.[14] The Agency cannot point to a single instance described in the Amended Complaint that is not described in the five

[13] Amendment is allowed if it is reasonably within the scope of the original complaint, will facilitate a determination of a controversy on the merits of the complaint, and if it will not prejudice the public interest and the rights of the parties. *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ARB 2005); 29 C.F.R. 18.5(e); *Jackson v. Rockford Housing Authority*, 213 F.3d 389 (7th Cir. 2000) ("The general rule that amendment is allowed absent undue surprise or prejudice. . . is widely adhered to by our sister courts of appeals.")

[14] *Opposition*, p. 5.

categories of protected activities listed in the Complaints (e.g. "Providing information to Congress;. . . . Objecting to improper management conduct which was harming the environment and violating environmental and criminal law; Conducting proceedings under the environmental laws in my capacity as Principal Investigator; Providing information to the news media regarding EPA wrongdoing").[15] The Agency has been on notice from the onset of the administrative proceeding the time frame of Mr. Kaufman's protected activities span as early as January 1999. See Attachment Three, September 20, 2002 Letter from Charles Starrs to Hugh Kaufman (Agency agrees to provide documents for the period January 1999 – May 2001).

- The Amended Complaint contains "significant new claims and allegations."[16] However, the Agency cannot show that each and every claim does not relate back to a charge of "generally hindering, impeding, and obstructing Ombudsman investigations," in violation of one or more of the originally cited whistleblower acts. [17]

[15] See Attachment One, Complaints, p. 2.

[16] *Opposition*, p. 11.

[17] As described in the Complaints, Attachment One, p. 1. The Agency makes great effort to show the eleven claims are not "reasonably within the scope of the original complaint," the standard for amended and supplemented complaint. *Opposition,* pp. 17-18; 29 C.F.R. § 18.5(e). It turns to the comparable standard in the Fed. R. of Civ. Pro 15(c), *Opposition* at 18, to make its argument, but its case authority does not help. In that case, Justice Ginsberg, denies an amendment based on the standard for amending habeas corpus actions, which the opinion writes is interpreted "less broadly" than in typical civil actions. *Mayle v. Felix*, 545 U.S. 644, 657 (2005) (narrower standard requires the new claims to arise from the "same core facts as the timely filed claims, and not when the new claims depend upon events separate in 'both time and type' from the originally raised episodes"). Even under that less broad interpretation, Mr. Kaufman believes his claims rely on the same core facts as the original complaint, and therefore "relate back" under the federal rules.

- "The further delay and complication. . . may be particularly severe in light of Complainant's new allegations and claims that relate to the EPA's Office of Inspector General. . . for example, makes allegations about meeting and communications with "OIG representatives. . . claims that the decision to transfer the ombudsman function was retaliatory and that he was "barred" from working in the OIG."[18] The Agency ignores Mr. Kaufman's repeated assertions that the transfer was a retaliatory act, and his successful efforts to establish the transfer is a proper subject of discovery, e.g. in the September 06, 2002 brief, the briefs leading up to the August 8, 2003 Order permitting discovery on the transfer, its production of documents from the OIG[19] and its answers to interrogatories related to the Transfer, and the December 8, 2005 Order restating that finding. *See Motion*, pp. 8-10.

Reversal on Whitman Role

In the most starling assertion in the *Opposition*, the Agency emphasizes that "Many of Complainant's new allegations and claims are directed at very high ranking former EPA officials, including former EPA Administrator Christine Todd Whitman. Mr. Whitman, as well as her former Chief of Staff, Eileen McGinnis, and former Deputy Administrator Linda Fisher, are all on longer EPA employees,"[20] and that will be prejudiced that "may not be readily

[18] *Opposition*, p. 12.

[19] Though the Agency has still failed to produce documents from the EPA headquarters related to the Transfer.

[20] Also, "a number of important witnesses or persons with knowledge relating to the broader, expanded claims. . . either moved into new positions with significantly different responsibilities or have left the Agency altogether." *Opposition*, p. 14 "It may be that, upon further review and discovery, the Agency will identify additional potential witnesses who are no longer EPA employees and who may not be readily available for examination or testimony."

available for examination or testimony." *Opposition*, pp. 13,14, fn 8. This is remarkable because the Agency has strenuously and consistently argued that these officials had nothing to do with the charged retaliation against Mr. Kaufman,[21] and in fact interviewed Ms. Whitman regarding them:

- Ms. Whitman "does not have any apparent connection to Complainant's principle allegations."[22]
- "[T]he EPA Administrator has not been involved in any Agency actions or decisions concerning Complainant, including any decisions regarding the Complainant's performance of ombudsman-related work. The Administrator does not recall participating in any EPA meetings in which Complainant's performance of ombudsman-related duties was discussed."[23]

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[21] The Agency moved for a protective order for former Administrator Whitman, her Deputy Administrator Linda Fisher, and her Chief of Staff Eileen McGinnis to prevent Mr. Kaufman's pursuit of discovery with them. It prevailed with regards to Ms. Whitman and Ms. Fisher. Mr. Kaufman was denied enforcement of a subpoena for Ms. McGinnis in federal court. Given the Agency's new stated position that Ms. Whitman and Ms. Fisher have information relevant to this proceeding based on the "new" facts alleged, Mr. Kaufman must consider moving to lift those protective orders. Further, should the Agency subpoena any former Agency employees, Mr. Kaufman expects to receive proper notice and will prepare his own questions for them.

[22] *Respondent's Motion for Protective Order*, p. 6, served September 20, 2002.

[23] *Respondent's Answers and Objections to Complainant's First Set of Interrogatories,* Answer 5, served January 10, 2003 (provided as an attachment to *Complainant's Fifth Motion to Compel Discovery Associated with His First Set of Interrogatories and The Litigation Backup Tapes and Thirteenth Declaration of Hugh B. Kaufman,* served April 1, 2004.

Similarly, EPA has argued Mr. Kaufman "can make no showing" that Ms. Fisher and Ms. McGinnis have "personal information" regarding discoverable matters in this proceeding.[24]

EPA does not specify which "allegations and claims" that are "directed at" these three officials are of concern to them, and it fails to bear its burden that it lacked notice of them so as to cause prejudice. The record shows Mr. Kaufman argued "McGinnis, as the Administrator's Chief of Staff, was personally assigned the "Kaufman matter" and had unique knowledge as Ms. Whitman's confidante, and that "Fisher was at the fulcrum of these efforts to close the OSWER National Ombudsman function."[25] Importantly, given that Mr. Kaufman was prevented from deposing these two former officials, the facts related to them appearing in the Amended Complaint were clearly provided to Mr. Kaufman exclusively by the Agency.[26]

Similarly, the Agency worries that former Superfund director Stephen Luftig and its former employee Laurie May have facts that the Agency may not be able to explore. *Opposition,* pp. 14-15. But the Complaints clearly enunciated that Mr. Luftig was involved in the illegal retaliation, see Attachment One, Complaints, in the chronology, No. 8, and the references to Mr. Luftig in the Amended Complaint refer to Agency documents that speak for themselves. As to

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[24] *Respondent's Motion for Protective Order Concerning Fisher and McGinnis Deposition Notices,* p. 5, served January 24, 2003. It was held that McGinnis may have knowledge but that Mr. Kaufman did not establish the Ms. Fisher had knowledge. *Order Denying Complainant's Motion for Reconsideration Regarding Vacating the Protective Order for Linda Fisher,* August 8, 2003.

[25] *Memorandum in Support of Motion for Reconsideration of the January 31, 2003 Discovery Order,* pp. 21, 26, served February 14, 2003.

[26] All Bates numbers above 9999 referenced in the Amended Complaint indicate documents obtained from the Agency. Even if there were new facts presented, Mr. Kaufman believes the e-mails and Agency documents cited in the Amended Complaint speak for themselves, and will not necessitate laborious new discovery on the part of the Agency.

Laurie May, she was deposed twice by Mr. Kaufman with Agency counsel present. [27] Further, Mr. Fields' role in this matter form the crux of the Agency's defense. See Attachment Two, Agency June 7, 2001, cited infra. The Agency had adequate notice of his involvement.[28]

Broadly, the *Opposition* fails to outline how the Amended Complaint will prejudice the Agency, other than it may require more discovery and that witnesses may have moved to other positions and their recollections may be dimmer.[29] Mr. Kaufman believes the Agency has had ample notice of all the facts in the Amended Complaint, as described *supra*, but will not object to additional discovery by the Agency, if he is granted the same.[30] As to the witnesses being forgetful, Mr. Kaufman will face the same issue, and, Mr. Kaufman asserts, it has resulted from the Agency's intransigent stance regarding Mr. Kaufman's discovery efforts. [31] The Agency's

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[27] The Agency names at least seven current or former EPA employees that it suggests it will need to interview if the Amended Complaint is filed. For years, the Agency has argued that the eight depositions taken by Mr. Kaufman were excessive. *E.g. Respondent's Opposition to Complainant's Motion for Default Judgment and For Sanctions*, dated May 13, 2005, p. 5. In actuality, five of those were confined to the issues of the Agency's discovery compliance, which proved fruitful in identifying the Agency's discovery violations. These were deposed as per the *Order Denying Motion for Protective Order*, dated May 9, 2003. This is further evidence of the Agency's opportunistic and inconsistent litigation approach, which raises attorney ethical issues.

[28] Mr. Kaufman does not argue that either Ms. May or Mr. Luftig were responsible for the removal or preclusion of his Ombudsman duties. *See* Amended Complaint, generally.

[29] *Opposition*, pp. 13. The Agency also claims it is surprised that Mr. Kaufman is seeking punitive damages, *Opposition* at 6, but cannot show how this is prejudicial, and in fact in his interrogatory answers dated November 14, 2002 he states he may seek exemplary damages, as verified by the undersigned.

[30] The *Order Granting Respondent's Motion for Protective Order and Denying Complainant's Motion to Continue Discovery*, dated November 29, 2007 limited continuation of discovery to interrogatories and requests for admissions. Mr. Kaufman believes he is prejudiced by this ruling in being forced to litigate the issues of the Agency's discovery violations rather than pursue methodical discovery.

[31] Mr. Kaufman takes strong exception any holding that the delay in this proceeding is due in any manner to his own lack of diligence, and preserves his right to appeal any holding to that effect.

attempt to manufacture "prejudice" from his methodical presentation of allegations in the Amended Complaint is a desperate attempt to block it. No prejudice exists as the result of a party having to defend against new and better pleaded claims.

4. Notice is Significant Factor in Amendment

Further, the Agency is incorrect that Mr. Kaufman's assertion that it is inconsequential, even if true, that it had notice of the alternative claims in the Amended Complaint.[32] Notice is a touchstone of the standard for properly pled claims, even regarding challenges made in litigation at a much later stage then the present litigation. In determining whether and amended complaint relates back to the original complaint, "courts inquire into whether the opposing party has been put on notice regarding the claim." *Jones v. Greenspan*, 445 F. Supp. 2d 53, 56-57 (D.D.C. 2006) (retaliation claim relates back to discrimination claim).[33]

In federal court, it is sufficient for a complaint to describe a single instance of official misconduct to put a government defendant on notice of the nature and basis of a plaintiff's claim; alleging an additional instances would not necessarily improve the notice. *Atchinson v. District of Columbia*, 73 F.3d 418, 423 (D.C. Cir. 1996) (complaint failing to state with specificity which unconstitutional policy, custom, or procedure of municipality was responsible for alleged injuries in §1983 action is sufficient to include multiple instances).

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[32] "Complainant seeks to claim a fait accomplice, arguing that he should be granted leave to amend because he has somehow previously told the Agency that he intended to make some such claims." *Opposition* at 15.

[33] Cf. *Empagran S.A. v. F. Hoffman-Laroche, Ltd.*, 388 F.3d 337, 340-45 (D.C. Cir. 2005) (antitrust defendant waived objection to an alternative claim, focusing on the domestic effects of foreign anti-competitive behavior in contrast to the foreign effect pled in the original complaint, by failing to raise objection when raised in the opposition to motion to dismiss and later).

5. Systemic Claims Not Outside the Scope of the Original Complaint

Though both distinct and systematic claims were described in the Complaint, the Agency attempts to disqualify the systemic claims by distinguishing them from distinct claims. *Opposition*, p. 19. That distinction, however, does not detract from the validity of Mr. Kaufman's *Motion*.

In the case cited in the *Opposition* to support this theory, a request for leave to amend to add a hostile work environment based on sexual discrimination was not allowed where 1) the proposed amendment on its face did not comprise a hostile work environment claim but rather distinct claims, and 2) no instance of such sexual harassment was initially charge. *Sivulich-Boddy v. Clearfield City*, 365 F.Supp. 2d 1174, 1181 (D. Utah 2005). In contrast, 1) Mr. Kaufman's Amended Complaint does charge acts that if true would comprise a hostile work environment, and 2) Mr. Kaufman initially did charge retaliation under the same whistleblower statutes. An administrative law judge has leeway to find a cause of action that has not been included in the complaint. *Chase v. Buncombe County*, 85-SWD-4, at 3, *supra.*

6. Mr. Kaufman's Claims Are Not Futile

The Agency does not argue successfully that Mr. Kaufman's claims are futile. *Opposition*, at pp. 20-23. The claims are not time-barred if they relate back, which is true for the supplemental claims in the Amended Complaint, as described *supra*.

As to the December 14, 2000 Claim i that preceded the Complaints, *Opposition* at 23, Mr. Kaufman believes that if that claim is found to be a valid claim absent any filing deadline concern, he can show that his claim was in fact timely despite his initial filing date of April 2, 2001. He can show that Agency officials gave him the impression that the adverse action was not and would not be enacted. This is because, for instance, the Agency did not file a Form 52

eliminating his Ombudsman duties even to the present day, and did not remove reference from his Ombudsman duties until March 2001. *See* Amended Complaint, ¶¶ 94, 95, 96, 151, 176, 187, 232. Such failure of to provide a final, definitive and unequivocal notice of an adverse action will postpone the beginning of the clock for tolling the filing deadline. *See*, *Order Granting Partial Summary Decision*, September 20, 2002, pp. 7-10, citing *Overall* v. *Tennessee Valley Authority*, ARB No. 98-111 at *34, ALl No. 1997-ERA-00053 (ARB Apr. 20, 2001).

As to the sovereign immunity issue, *Opposition* at 20, the tribunal ruled on September 30, 2002 that claims under the ERA and the TSCA were not proper, based on an assertion of sovereign immunity. However, Mr. Kaufman asserts it is proper that he preserve his claims under these statutes for appeal. Given that he has valid claims under statutes in which the Agency's sovereign immunity claim was found invalid, Mr. Kaufman should be permitted to preserve the ERA and TSCA claims, especially given that the law in this area is not settled. *See* p. 24, fn. 39 in *Motion.*

CONCLUSION

For all these reasons, and the reasons in the *Motion*, the *Opposition* fails and the *Motion* should be granted.

Respectfully submitted,

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Attachments:
1. Complaints dated April 6, 2001, April 30, 2001, and May 2, 2001.
2. June 6, 2001 Agency Answer without Enclosures
3. September 20, 2002 Letter from Charles Starrs to Hugh Kaufman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document **COMPLAINANT'S REPLY TO OPPOSITION TO MOTION TO AMEND AND SUPPLEMENT HIS COMPLAINT** was served by facsimile and first class mail upon the office of:

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By:_____

Regina Markey, Esq.