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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARY ROSE DIEFENDERFER,

Plaintiff,

v.

MARY E. PETERS, Secretary of U.S.
Department of Transportation,¹

Defendant.

C08-958Z

ORDER

15 THIS MATTER comes before the Court on Defendant's Motion to Dismiss
16 Whistleblowing and Constructive Discharge Claims, docket no. 12. Having considered the
17 pleadings and declarations in support of and in opposition to the motion, and having heard
18 oral argument on June 22, 2009, the Court enters the following Order.

19 **I. BACKGROUND**

20 Plaintiff Mary Rose Diefenderfer worked for the United States Department of
21 Transportation's Federal Aviation Administration ("FAA") from July 17, 1988, until she
22 resigned on November 16, 1999. Compl., docket no. 1, ¶ 4; Diefenderfer Decl., docket no.
23 19, Ex. B (Resignation Letter). Plaintiff was hired by the FAA as an air carrier operations
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25 ¹ Pursuant to Fed. R. Civ. P. 25(d), Ray LaHood, the newly appointed Secretary of the
26 United States Department of Transportation, is automatically substituted for Mary E. Peters
as the Defendant in the case.

1 safety inspector in 1988, and worked her way up to principal operations inspector.
2 Diefenderfer Decl. at 2-3. Between September 8, 1997 and November 13, 1999, Plaintiff
3 filed nine Equal Employment Office (“EEO”) complaints, alleging sex discrimination,
4 retaliation for whistleblowing, and retaliation for filing EEO complaints. Lonquist Decl.,
5 docket no. 22, Exs. A-I. Plaintiff’s EEO complaints challenged a reassignment from her
6 position as principal operations inspector, the non-selection for six positions for which she
7 applied, a letter of reprimand, revoked access to a database, being placed on AWOL status,
8 and a proposed suspension. See id.; Diefenderfer Decl. at 4:14-21. Plaintiff does not dispute
9 Defendant’s contention that she did not file an EEO complaint or amend an existing EEO
10 complaint to allege that her resignation on November 16, 1999 constituted constructive
11 discharge.

12 On March 7, 2007, an Administrative Law Judge (“ALJ”) for the United States Equal
13 Employment Opportunity Commission (“EEOC”) issued a Hearing Order, directing Plaintiff
14 to establish a legal basis for claiming constructive discharge. Mittet Decl., docket nos. 12
15 and 13, Ex. A at 2.² On or about March 5, 2008, the EEOC dismissed Plaintiff’s EEO
16 complaints. Id., Ex. B (the “EEOC Order”). The EEOC Order stated the following with
17 respect to Plaintiff’s resignation and her constructive discharge “claim:”

18 On November 16, 1999, the Complainant submitted a letter of resignation,
19 effective immediately, advising the Agency that she had obtained a position in
20 private industry. At no time within the requisite 45 days following her
21 resignation did the Complainant file a charge of constructive discharge with the
22 EEO counselor. The Complainant’s resignation letter cannot be said to have
23 given the requisite notice to the Agency that a constructive discharge claim was
24 being alleged. Nor can there be any question that the Complainant was not
25 sufficiently aware of the EEO complaint process. Indeed, the Complainant
26 appears to have the benefit of counsel from the onset of her litigious
relationship with the FAA and had already filed numerous EEO complaints by

24 ²The ALJ ordered Plaintiff, in pertinent part, to file a brief to establish the “legal
25 basis for urging the acceptance (by this administrative judge) of the Complainant’s
26 constructive discharge claim in the instant EEOC administrative hearings” and the “basis of
any prior EEO allegation or filing of a formal or informal complaint alleging constructive
discharge.” Mittet Decl., Ex. A at 2.

1 the time she tendered her resignation letter. Nevertheless, assuming, *arguendo*,
2 the procedural posture of this claim was valid for purposes of finality and in the
3 interest of judicial and resources economy, the undersigned Administrative
Judge has considered the Complainant’s constructive discharge claim *on its*
merits and found it failing.

4 *Id.*, Ex. B at 57-58 (emphasis in original). The EEOC found that “the Complainant’s
5 resignation was voluntary” and concluded that her constructive discharge claim failed both
6 procedurally and on the merits. *Id.*, Ex. B at 59. On April 7, 2008, Defendant issued its
7 Final Order in the EEO case, accepting the EEOC’s no discrimination finding, and providing
8 notice to Plaintiff of her right to file a civil suit in the appropriate United States District Court
9 within ninety days. Compl. ¶ 80, Ex. A. Plaintiff timely filed the instant Complaint.

10 While pursuing her sex discrimination and retaliation claims before the EEOC,
11 Plaintiff engaged in parallel administrative proceedings on her whistleblowing claims before
12 the Office of Special Counsel (the “OSC”) and the Merit Systems Protection Board
13 (“MSPB”).³ On or about May 5, 2000, Plaintiff filed a whistleblower complaint with the
14 OSC. Compl. ¶ 64. Plaintiff requested that the OSC consolidate the EEO and
15 whistleblowing matters for investigation by the OSC. *Id.* On March 31, 2003, the OSC
16 “clos[ed] its inquiry” without taking any action and advised Plaintiff that “she had the right
17 to seek corrective action from the MSPB.” Compl. ¶ 68.

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23 ³ The OSC and MSPB are related agencies. Relevant to the instant case, “[p]ursuant to
24 5 U.S.C. § 1221, current or former federal employees and applicants who allege that they were
25 subjected to any personnel action because of whistleblowing may seek corrective action in an
26 appeal to the MSPB. Such an appeal is known as an ‘individual right of action’ (IRA). By law,
the employee or applicant must seek corrective action from the OSC before filing an IRA.” U.S.
Office of Special Counsel: “Prohibited Personnel Actions” at <http://www.osc.gov/ppp.htm>; see
also 5 C.F.R. § 1209.2(b)(1) (defining IRA appeals and providing that “[i]f the action is not
otherwise directly appealable to the Board, the appellant must seek corrective action from the
Special Counsel before appealing to the Board.”).

1 On May 29, 2003, Plaintiff filed an individual right of action (“IRA”) appeal with the
2 MSPB.⁴ Diefenderfer Decl. Ex. C (Appeal Form);⁵ see Diefenderfer v. Dep’t of Transp., 108
3 M.S.P.R. 651, 652 (May 13, 2008) (referring to Plaintiff’s appeal – after the OSC terminated
4 its investigation of her complaint – as an “individual right of action (IRA) appeal.”). On
5 October 12, 2005, the ALJ for the MSPB, ALJ Cassidy, issued an Order declining
6 jurisdiction over Plaintiff’s EEO complaints. Lonnquist Decl., docket no. 18, Ex. B at 3
7 (ALJ Cassidy does “not consider EEO matters to come within the purview of this IRA
8 appeal”). ALJ Cassidy reasoned, in part, that “[i]t is well-established an appellant cannot
9 raise a claim of prohibited discrimination in an IRA appeal.” Id., Ex. B at 2. Plaintiff did not
10 appeal ALJ Cassidy’s Order declining jurisdiction over Plaintiff’s EEO complaints. The
11 parties litigated Plaintiff’s whistleblowing claims before ALJ Cassidy. On July 23, 2007,
12 ALJ Cassidy dismissed Diefenderfer’s whistleblower claims. Compl. ¶ 78. Plaintiff
13 appealed ALJ Cassidy’s decision to the full board of the MSPB; on May 18, 2008, the MSPB
14 affirmed in part, vacated and remanded in part. Diefenderfer v. Dep’t of Transp., 108
15 M.S.P.R. 651, 662-66 (May 13, 2008). On remand, it appears possible that Plaintiff will be
16 granted relief in her favor. The parties have represented to the Court that the MSPB
17 proceedings have not concluded.

18 On June 19, 2008, Plaintiff filed the instant Complaint against Defendant Mary E.
19 Peters, in her official capacity as the Secretary of the United States Department of
20 Transportation, alleging the following three claims: (1) Sex Discrimination in violation of
21 Title VII of the Civil Rights Act of 1964 (the “sex discrimination claim”), Compl. at 15-16
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23 ⁴ The EEOC held the EEO complaints in abeyance until the MSPB could determine its
24 jurisdiction over the EEO complaints. Compl. ¶ 65.

25 ⁵ On the appeal form, Plaintiff represented that her issues of discrimination
26 based on gender “are currently in the EEOC process,” and that her “gender complaints are
pending with the EEOC.” Diefenderfer Decl. Ex. C at Section 32a and Attachment
regarding Part IV, Section 31b.

1 ¶¶ 86-95, (2) Retaliation for EEO Activity in violation of Title VII of the Civil Rights Act of
2 1964 (the “retaliation claim”), Compl. at 16-18 ¶¶ 96-95,⁶ and (3) Unlawful Discrimination
3 Based on the Civil Service Reform Act, as Amended by the Whistleblower Protection Act
4 (the “whistleblowing claim”), Compl. at 18-19 ¶¶ 96-105. Each claim has numerous
5 subclaims. One subclaim of Plaintiff’s second retaliation claim is a claim for constructive
6 discharge (referred to herein as the “retaliatory constructive discharge claim”), Compl. at 17
7 ¶ 90s.⁷

8 **II. DISCUSSION**

9 **A. Standard of Review**

10 Defendant moves to dismiss Plaintiff’s retaliatory constructive discharge and
11 whistleblowing claims pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter
12 jurisdiction.⁸ “[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district
13 court is not restricted to the face of the pleadings, but may review any evidence, such as
14 affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction.”
15 McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988).

16 **B. Retaliatory Constructive Discharge Claim**

17 Defendant moves to dismiss Plaintiff’s claim for retaliatory constructive discharge,
18 Compl. at 17 ¶ 90s, based on Plaintiff’s failure to exhaust administrative remedies.
19 Specifically, Defendant argues that Plaintiff failed to file an EEO “charge” of constructive
20 discharge within 180 days of her resignation pursuant to 42 U.S.C. § 2000e-5(e)(1). In 2002,
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22 ⁶ Plaintiff’s Complaint contains errors in numbering paragraphs, and therefore the Court
23 uses page and paragraph numbers for reference, where necessary.

24 ⁷ Plaintiff’s retaliatory constructive discharge claim, which is alleged under Title VII, is
25 not to be confused with her constructive discharge subclaim of her third claim for
whistleblowing.

26 ⁸ Defendant also moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(6); however
Defendant does not present any substantive argument that Plaintiff has failed to state a claim
upon which relief can be granted.

1 the United States Supreme Court discussed the 180-day requirement for filing an EEO
2 charge:

3 Title 42 U.S.C. § 2000e-5(e)(1) is a charge filing provision that specifies with
4 precision the prerequisites that a plaintiff must satisfy before filing suit. . . .
5 [T]he critical sentence of the charge filing provision is: ‘A charge under this
6 section *shall be filed* within one hundred and eighty days *after the alleged*
7 *unlawful employment practice occurred.*’ § 2000e-5(e)(1). . . . ‘Shall’ makes
8 the act of filing a charge within the specified time period mandatory. . . . A
9 discrete retaliatory or discriminatory act ‘occurred’ on the date that it
10 ‘happened.’ A party, therefore, must file a charge within . . . 180 . . . days of
11 the date of the act or lose the ability to recover for it. . . . Discrete acts such as
12 termination . . . are easy to identify.

13 Morgan, 536 U.S. at 109-114 (emphasis in original) (internal quotations and citations
14 omitted). Defendant relies on Morgan, and Plaintiff does not argue that Morgan should not
15 be applied retroactively. Under the teaching of Morgan, the Court rejects Plaintiff’s
16 argument that constructive discharge is “neither a claim nor cause of action, but rather an
17 issue related to economic damages” that “need not be submitted as a charge.” Pl.’s Resp. at
18 9; see also Ong v. Cleland, 642 F.2d 316, 320 (9th Cir. 1981) (treating constructive discharge
19 as a claim requiring exhaustion).

20 The Court also rejects Plaintiff’s argument that her retaliatory constructive discharge
21 claim is “like or reasonably related” to the charges outlined in her EEO complaints. See
22 Leong v. Potter, 347 F.3d 1117, 1123 (9th Cir. 2003) (holding that the district court’s failure
23 to consider whether the plaintiff’s disability claim was like or reasonably related to the
24 claims he presented to the EEOC was harmless because plaintiff’s disability claim differed
25 substantially from the claims he presented); Ong, 642 F.2d at 320 (dismissing unexhausted
26 constructive discharge claim as not like or reasonably related to discrimination in promotion
allegations in the charge). Plaintiff’s EEO claims involved a reassignment, denied positions,
a reprimand, denial to a database and other discrete acts that were spread over several years
and taken by different decision-makers. Plaintiff’s retaliatory constructive discharge claim
presents a different theory of liability not presented by Plaintiff’s EEO claims. See Leong,
347 F.3d at 1122. The Court is mindful of the Ninth Circuit’s requirement to construe an

1 EEOC charge with “utmost liberality” but, at the same time, the Court keeps in mind that
2 Plaintiff was familiar with the EEO filing procedures. See Lyons v. England, 307 F.3d 1092,
3 1104 (9th Cir. 2002).

4 “The jurisdictional scope of the plaintiff’s court action depends on the scope of the
5 EEOC charge *and investigation*.” Leong, 347 F.3d at 1122 (emphasis added). Plaintiff’s
6 resignation was not the subject of the EEOC investigation. In his April 11, 2000 Report of
7 Investigation, Robin Lindley, the EEOC investigator, acknowledged Plaintiff’s resignation
8 on November 16, 1999, but *he did not discuss her resignation as the basis for any claim*.
9 Diefenderfer Decl. Ex. A at 15, 17. He investigated Plaintiff’s charges of retaliation, which
10 she had alleged resulted in her being placed on AWOL status and in her receiving a proposed
11 suspension. Id., Ex. A at 18. But he did not investigate whether her resignation was
12 involuntary and the result of any retaliation. The Court cannot find that the investigator erred
13 in not investigating her resignation as retaliatory because, foremost, she had not filed a
14 charge of constructive discharge to give him notice of such a claim. Moreover, he could
15 have reasonably relied on the assumption that if she wanted to assert such a claim, she would
16 have. Indeed, Plaintiff filed her ninth EEO complaint just three days prior to her resignation.
17 See Lonquist Decl., docket no. 22, Ex. I. The absence of a charge after her resignation
18 could reasonably be relied on by the investigator as a reason to believe that she did not
19 consider her resignation as the basis for a claim. Plaintiff blames the EEO investigator,
20 Robin Lindley, for “never advis[ing] Ms. Diefenderfer to file a new charge or to amend an
21 existing charge to add an allegation of constructive discharge.” Pl.’s Resp., docket no. 17, at
22 5:20-21. Plaintiff has provided no authority to support the proposition that an EEO
23 investigator has a duty to advise a complainant of her rights to amend or file charges, a duty,
24 which, this Court notes, might compromise his neutrality.

25 Plaintiff’s alleged constructive discharge constitutes a discrete act that occurred on the
26 date of her resignation. Under Morgan and Ong, Plaintiff was required to file an EEO charge

1 alleging constructive discharge within 180 days of her resignation. See also Spencer v.
2 Ashcroft, 147 Fed. Appx. 373, 375 (4th Cir. 2005) (holding that constructive discharge is a
3 discrete discriminatory act requiring administrative exhaustion where plaintiff failed to show
4 that constructive discharge was not “imbedded” within the EEO complaint). There is no
5 dispute that Plaintiff failed to file an EEO charge alleging constructive discharge within 180
6 days of her November 16, 1999 resignation pursuant to 42 U.S.C. § 2000e-5(e)(1). Plaintiff
7 neither filed a new EEO complaint nor amended one of her existing EEO complaints to
8 allege a claim for constructive discharge.⁹

9 Plaintiff raised the issue of constructive discharge for the first time during the March
10 2007 hearings before the EEOC ALJ – over six years after her resignation.¹⁰ This delayed
11 and informal method of presentation of a claim does not fulfill the statutory filing
12 requirement. See Moore v. Schafer, 573 F.Supp.2d 216, (D.D.C. 2008) (dismissing
13 constructive discharge claim for failure to exhaust and holding that constructive notice was
14 not enough). In the March 2008 EEOC Order, the ALJ’s consideration of the merits of
15 Plaintiff’s constructive discharge claim was dicta. See Harris v. Vasquez, 949 F.2d 1497,
16 1541-42 (9th Cir. 1990) (discussion of the merits of a habeas petition is dicta in light of a
17 holding that the petition is procedurally barred). The same ALJ concluded that Plaintiff’s
18 constructive discharge claim failed procedurally as a result of Plaintiff’s failure to exhaust
19 administrative remedies.

20 Although the failure to exhaust administrative remedies before filing suit can, under
21 certain statutes, operate as a jurisdictional bar to judicial review, in the case of EEO

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23 ⁹ The availability of a procedure to amend the complaint, which is undisputed by
24 Defendant, see Def.’s Notice of Suppl. Citation, docket no. 29, is irrelevant in the absence of any
25 motion to amend or amendment by Plaintiff.

26 ¹⁰ Plaintiff’s supplemental submission to the Court on the day of oral argument contains
no evidence of Plaintiff having raised the claim of constructive discharge to the EEOC prior to
2007. Suppl. Lonquist Decl., docket no. 27, Ex. D (OSC letter dated Feb. 14, 2003), Ex. E
(MSPB Order dated Oct. 1, 2003), and Ex. F (MSPB Summary of Telephonic Prehearing
Conference dated June 6, 2005)

1 complaints, “filing a timely charge of discrimination with the EEOC is not a jurisdictional
2 prerequisite to suit in federal court.” Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393
3 (1982).¹¹ Instead, it is “a requirement that, like a statute of limitations, is subject to waiver,
4 estoppel, and equitable tolling.” Id., cited with approval in Nat’l R.R. Passenger Corp. v.
5 Morgan, 536 U.S. 101, 113 (2002). “Courts may evaluate whether it would be proper to
6 apply such [equitable] doctrines, although they are to be applied sparingly.” Morgan, 536
7 U.S. at 113.

8 As a result of Plaintiff’s failure to bring an EEO charge alleging constructive
9 discharge, Plaintiff lost the ability to recover for her retaliatory constructive discharge claim,
10 unless equitable tolling applies. “Equitable tolling focuses on a plaintiff’s excusable
11 ignorance and lack of prejudice to the defendant.” Leong, 347 F.3d at 1123. Tolling excuses
12 delay, but not the complete failure to file a claim. See id.; see also Sommatino, 255 F.3d at
13 710 (“[E]quitable remedies are unavailable in federal court when the record shows that no
14 administrative filing was ever made.”). “[O]nce a claimant retains counsel, tolling ceases
15 because she has gained the means of knowledge of her rights and can be charged with
16 constructive knowledge of the law’s requirements.” Leong, 347 F.3d at 1123 (citations
17 omitted). At the time of her resignation in November 1999, Plaintiff was aware of the EEO
18 complaint process. Defendant would be prejudiced if the Court were to apply equitable
19 tolling to permit Plaintiff’s retaliatory constructive discharge claim. By not filing an
20 administrative claim of constructive discharge, the EEOC and Defendant were denied the
21 opportunity to resolve the claim and to develop an administrative record before the initiation
22 of the present Title VII suit. See Ong, 642 F.2d at 320 (discussing policies behind
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25 ¹¹ Notwithstanding the “not a jurisdictional prerequisite” statement in Zipes, Ninth Circuit
26 “case law also holds that substantial compliance with the presentment of discrimination
complaints to an appropriate administrative agency is a jurisdictional prerequisite.” Sommatino
v. United States, 255 F.3d 704, 709 (9th Cir. 2001) (emphasis in original).

1 exhaustion requirement). The Court declines to apply equitable tolling to Plaintiff's
2 retaliatory constructive discharge claim.

3 The Court GRANTS Defendant's motion to dismiss Plaintiff's retaliatory constructive
4 discharge claim for failure to exhaust administrative remedies.¹²

5 **C. Whistleblowing Claim**

6 Plaintiff seeks judicial review of her whistleblowing claims pursuant to 29 C.F.R.
7 § 1614.310, which provides that "an individual . . . is authorized by 5 U.S.C. § 7702 to file a
8 civil action in an appropriate United States District Court . . . after 120 days from the date of
9 filing an appeal with the MSPB if the MSPB has not yet made a decision." Compl. ¶ 100.
10 Title 5 U.S.C. § 7702 applies to "actions involving discrimination." 5 U.S.C. § 7702.

11 Defendant moves to dismiss Plaintiff's third claim for whistleblowing, Compl. at 18-
12 19 ¶¶ 96-105, for lack of subject matter jurisdiction. Defendant asserts that Plaintiff's
13 whistleblowing claims should be dismissed by this Court and then re-filed by Plaintiff in the
14 United States Court of Appeals for the Federal Circuit (the "Federal Circuit") pursuant to 5
15 U.S.C. § 7703(b)(1) and 5 C.F.R. § 1201.120.

16 Plaintiff's asserted basis for jurisdiction fails. The Court finds that 29 C.F.R.
17 § 1614.310 and 5 U.S.C. § 7702 do not apply to Plaintiff's whistleblowing claims because
18 Plaintiff filed her complaint with the OSC and appealed to the MSPB by way of an IRA
19 appeal. The MSPB's ALJ declined jurisdiction over Plaintiff's discrimination claims.
20 Plaintiff thereafter pursued her discrimination claims before the EEOC. The MSPB never
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22 ¹² In addition to moving to dismiss Plaintiff's retaliatory constructive discharge claim
23 based on Plaintiff's failure to file a charge within 180 days, Defendant also moves to dismiss this
24 claim based on Plaintiff's failure to initiate contact regarding her alleged constructive discharge
25 with an EEO Counselor within 45 days of her November 16, 1999 resignation pursuant to 29
26 C.F.R. § 1614.105(a)(1). "Although it does not carry the full weight of statutory authority,
failure to comply with this regulation has been held to be fatal to a federal employee's
discrimination claim." *Lyons*, 307 F.3d at 1105. There is no dispute that Plaintiff failed to
initiate contact regarding her alleged constructive discharge with an EEO Counselor within 45
days of the November 16, 1999 resignation. This failure presents an alternative basis to dismiss
Plaintiff's retaliatory constructive discharge claim.

1 considered the merits of Plaintiff's discrimination claims. Plaintiff's appeal to the MSPB did
2 not constitute a "mixed case appeal" because she did not directly file her non-discrimination
3 and discrimination claims with the MSPB. See Sloan v. West, 140 F.3d 1255, 1259 (9th Cir.
4 1998). In the alternative, Plaintiff's appeal to the MSPB did not constitute a "mixed case
5 appeal" because the MSPB declined jurisdiction over Plaintiff's discrimination claims. See
6 id. This Court does not have jurisdiction to review the MSPB's handling of Plaintiff's IRA
7 appeal. See Bloom v. Dep't of Army, 245 Fed. Appx. 953, 955 (9th Cir. 2007); 5 U.S.C.
8 § 1221(h)(2); 5 U.S.C. § 7703(b)(1).

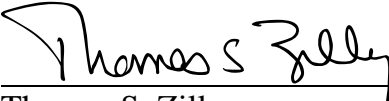
9 The Court GRANTS Defendant's motion to dismiss Plaintiff's whistleblowing claim
10 for lack of subject matter jurisdiction.¹³

11 **III. CONCLUSION**

12 The Court GRANTS Defendant's Motion to Dismiss Whistleblowing and
13 Constructive Discharge Claims, docket no. 12, pursuant to Fed. R. Civ. P. 12(b)(1).
14 Accordingly, the Court DISMISSES with prejudice Plaintiff's retaliatory constructive
15 discharge claim, Compl. at 17 ¶¶ 90s, and DISMISSES without prejudice Plaintiff's
16 whistleblowing claim, Compl. at 18-19 ¶¶ 96-105.

17 IT IS SO ORDERED.

18 DATED this 29th day of June, 2009.

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21 _____
22 Thomas S. Zilly
23 United States District Judge
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26 ¹³ The Court does not reach the issue of whether the MSPB has issued a final order or
final decision that can be appealed to the Federal Circuit pursuant to 5 U.S.C. § 7703(b)(1).