

No. 20-732

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Supreme Court of United States Office of the Clerk  
Washington, DC 20543

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David Wyche

*Petitioner-Appellant*

v.

Occupational Safety & Health Administration  
OSHA – U.S. Department of Labor

*Respondent-Appellee*

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**Petition for Rehearing - Requesting Certiorari**

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David Wyche - *Plaintiff*

1 Towne Center Apt 621  
Cliffside Park, NJ 07010  
(718) 514-1178

V.

**Occupational Safety & Health - Respondent**  
(OSHA) United States Department of Labor  
Office of the Solicitor Room Room N-2716  
200 Constitution Avenue, NW  
Washington, DC 20210

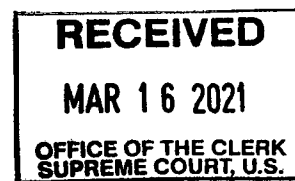
Clerk (Case No.19-3194)

**United States Court of Appeals for the Second Circuit**

Thurgood Marshall United States Courthouse

40 Foley Square

New York, NY 10007



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### **PETITION FOR REHEARING & CERTIFICATE OF SERVICE**

Pursuant to rule 44.2 of the rules of the United States Supreme Court, Petitioner respectfully petitions for the rehearing of this court's January 25, 2021 order denying the petition for certiorari. Pursuant to Rule 44.2, the undersigned hereby certifies that the attached petition for rehearing of an order denying writ of certiorari is restricted to the grounds specified in Rule

44.2: it is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Petitioner further certifies that the attached petition is presented in good faith and not for delay.

## **REASONS FOR GRANTING THE PETITION FOR REHEARING**

### **Constitutional Challenge to the Administrative Procedure Act (APA)**

Rule 44.2 of the Rules of the Supreme Court of the United States allows petitioners to file petitions for rehearing of the denial of a petition for writ of certiorari and permits rehearing on the basis of “intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Here, a substantial ground not previously presented warrants a rehearing. Briefly and distinctly, on this date this Court granted certiorari in three cases involving critically important questions concerning the constitutional status of the Administrative Procedure Act (APA): *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649 (1985), *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) and *Bowen v. Massachusetts*, 487 U.S. 879, 108 S. Ct. 2722 (1988). As the Federal Circuit record reflects, though the petitioner timely and correctly raised this very same constitutional challenge with the Federal Circuit (19-3194 Motion & Appendix); the petitioner was nevertheless incorrectly and unjustly denied relief. Rehearing is accordingly warranted.

## **GRANT, VACATE, REMAND ORDER**

I’m requesting that the supreme court grant my petition of certiorari, vacate the lower court decision without finding error and remand this case for further consideration by the lower court based on the second circuit’s denial of my petition for judicial review. OSHA -Department of Labor violated agency rule - **29CF.R. §1904.35(b)(1)(iv)** and federal authority **29 U.S. Code § 657(a)(1)(2)**, which led to abandonment of authority responsibilities under (OSH Act

1970), Section 11(c) **29 U.S.C. §660(c)**. In my earlier petitions I did not recognize agency's repeated violations of its own rules and how agency action served to veto statutory responsibilities under (OSH Act 1970), Section 11(c) **29 U.S.C. §660(c)**, which is why my petition should be granted certiorari to correct the legal suffering I experience due to agency action.

### **RELIEF SOUGHT**

Appellant moves the Court Pursuant to Federal Rule of Appellate Procedure 27 for an order vacating and remanding the case to the lower court.

### **GROUND FOR THE REQUESTED RELIEF**

On January 25, 2021 this court denied my writ of certiorari, which addressed the constitutionality of the occupational safety and health administration - dept of labor's decision to dismiss my whistleblower 11©-retaliation complaint arbitrarily. The second circuit court declined my petition for judicial review despite the APA allowing district court review. *"For the plaintiff to have standing to seek judicial review of administrative action, two questions must be answered affirmatively: (1) Has the complainant alleged an "injury in fact?; and (2) Is the interest that the complainant seeks to protect "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"? Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)".*

The second circuit district court cited *"Heckler v. Chaney, 470 U.S. 821 (1985)"* in support of the court's decision to deny my judicial review. The second circuit court ruled that the administrative agency's decision not to engage in enforcement proceedings did not subject my petition to judicial review. However, the supreme court justices ruled that *"agency inaction is*

*subject to judicial review if the agency expressly adopted a policy that amounted to an abdication of statutory responsibilities* **Heckler v. Chaney**, 470 U.S. 821 (1985)". "Since passage of the APA, the sustained effort of administrative law has been to "continuously narrow[w] the category of actions considered to be so discretionary as to be exempted from review." Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L. J. 1487, 1489, n. 11 (1983). Discretion may well be necessary to carry out a variety of important administrative functions, but discretion can be a veil for laziness, corruption, incompetency, lack of will, or other motives, and for that reason "the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion. "L. Jaffe, *Judicial Control of Administrative Action* 375 (1965).

#### **GROUND FOR THE REQUESTED RELIEF (continued)**

"Judicial review is available under the APA in the absence of a clear and convincing demonstration that Congress intended to preclude it precisely so that agencies, whether in rulemaking, adjudicating, acting or failing to act, do not become stagnant backwaters of caprice and lawlessness. "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat." *United States v. Wunderlich*, 342 U.S. 98, 101 (1951). There are five reasons why agency decision was arbitrary and capricious pursuant to **5 U.S. Code § 706(2)(a)**; (1) osha's disregard of my protected activity complaints, (2) osha's failure to act within statutory deadlines, (3) osha's denial of whistleblower protections under **49 U.S.C. §31105**, (4) osha's failure to conduct a work inspection involving reported hazards, (5) including agency's lack of recordkeeping.

## **TWO QUESTIONS PRESENTED**

This reconsideration for writ of certiorari includes two questions that serve to illuminate the respondent's repeated violations of multiple federal statutes the supreme court overlooked.

### **FIRST QUESTION PREFACE**

Should the supreme court reconsider the previous ruling, grant certiorari, vacate the lower court decision and remand this case to the lower court for future proceedings to correct agency violation of federal law **OSH Act Section 11(c) 29 U.S.C. §660(c)** considering I was terminated unjustly, including agency's (OSHA) omission of employment records an investigation, which is prohibited pursuant to the 1974 Privacy Act - **5 U.S. Code §552a (e)(1)(5)**.

### **FIRST QUESTION**

Did OSHA - Department of Labor abdicate statutory responsibilities under **OSH Act Section 11(c) 29 U.S.C. §660(c)** provided agency's inaction to collect employment records from my former employer (K&M Systems Inc.) or to give proper consideration to the facts of my whistleblower 11(c)-retaliation claim relevant to agency decision?

### **SECOND QUESTION PREFACE**

The second question seeks to conclusively resolve statutory interpretations of the Occupational Safety and Health Act (OSH Act), **Section 11(c) 29 U.S.C. §660(c)**, considering my agency complaint was dismissed despite established agency prima facie and I was terminated eleven days following my final protected activity complaint, which suggests retaliation by my former employer (K&M Systems Inc.) pursuant to the OSH Act of 1970 **Section 11(c) 29 U.S.C. §660(c)**. My work complaints were not investigated by my former employer whatsoever, instead I was quickly discharged within eleven days.

## SECOND QUESTION

Should the supreme court grant certiorari to conclusively resolve agency interpretations of the **OSH Act of 1970**, considering agency prima facie served to demonstrate that my former employer (K&M Systems Inc.) violated the general duty clause, but the agency failed to conduct a work inspection or maintain recordkeeping, which shows the agency neglect to perform statutory responsibilities under the **OSH Act of 1970**?

*"Congress enacted the OSH Act in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). Consistent with that purpose, Section 5(a) of the OSH Act mandates that: Each employer (1) shall furnish to each of his employees' employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards . . . and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct. 29 U.S.C. § 654(a). So that the Department of Labor may carry out the purposes of the OSH Act, Section 8(a) of the OSH Act authorizes the Secretary of Labor to inspect and investigate workplaces. 29 U.S.C. § 657(a). Section 8(b) authorizes the issuance of administrative subpoenas requiring "the attendance and testimony of witnesses and the production of evidence under oath." 29 U.S.C. § 657(b)"* **"Long Island Precast, Inc. v. U.S. Dep't of Labor, 14-MC-0772(JS) (E.D.N.Y. Jul. 29, 2014)"**.



## **OSHA's ARBITRARY AND CAPRICIOUS DISREGARD FOR PROTECTED ACTIVITY**

(1) My protected activity complaints involving unsafe work conditions to my former employer (K&M Systems Inc. -Human Resources), images of unsafe work conditions, in connection with my termination letter, which I received eleven days after my final protected activity complaints provided OSHA with the ability to establish prima facie in my whistleblower<sup>11</sup>©-retaliation claim under **Section 11(c) 29 U.S.C. §660(c) and 29 C.F.R. § 1977.9)(a) (Osha Federal Regulation)**. The second circuit court of appeals ruled that *"The causal connection between the protected activity and the adverse employment action can be established indirectly with circumstantial evidence, for example, by showing that the protected activity was followed by discriminatory treatment or through evidence of disparate treatment of employees who engaged in similar conduct or directly through evidence of retaliatory animus DeCintio v. Westchester County Medical Center, 821 F.2d 111 (1987)"*. I was fired eleven days after my final work complaint.

Agency prima facie was not challenged with employee retention-records i.e., employee training or disciplinary records, as I obtained my agency complaint file pursuant to **5 U.S. Code § 552a**, which omitted employment records. Agency did not collect employee records from my former employer (K&M Systems Inc.) to factually substantiate my former employer's claims that I was terminated for performance reasons and not for engaging in protected activity. Employment evidence e.g., training or disciplinary records would have demonstrated my job performance, but the respondent failed to collect recordkeeping evidence in an employment investigation, which conflicts with the respondent's regulations under **29 CFR 1904.35(b)(1)(iv)**, including **5 U.S. Code § 552a(e)(1)**. *"As Magistrate Judge Locke correctly stated, to plead a*

*violation of these sections, a complaint must "identify a rule or safeguard . . . that [the agency] should have established but did not." E.g., Dick v. Holder, 67 F. Supp. 3d 167, 186 (D.D.C. 2014) (collecting cases). Conyers v. U.S. Dep't of Veterans Affairs, 16-CV-0013 (JFB) (SIL) (E.D.N.Y. Feb. 26, 2018)".*

## **OSHA's ARBITRARY AND CAPRICIOUS DISREGARD FOR PROTECTED ACTIVITY (CONTINUED)**

Agency decision to dismiss my claim for performance reasons was not warranted by the facts of this case due to the agency's omission of employment evidence prohibited by **5 U.S. Code § 706(2)(e)(f)**, which illustrates agency inaction was arbitrary and capricious due to the agency's violation of its own record-keeping regulations under **29 CFR 1904.35(b)(1)(iv)**, including federal record-keeping laws such as **5 U.S. Code § 552a(e)(1)(5)(9)**. *"The agency's decision must reveal a rational connection between the facts found and the choice made State Farm, 463 U.S. at 43, 103 S. Ct. 2856 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156)".*

## **OSHA'S FAILURE TO ACT WAS ARBITRARY AND CAPRICIOUS**

- (2) Pursuant to **5 U.S. Code §551(13)**, the administrative procedure act defines agency action to include failure to act, *"failure to act is simply the omission of an action without formally rejecting a request - for example, the failure to promulgate a rule or take some decision by a statutory deadline Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004)"*. Agency rendered an untimely decision to dismiss my whistleblower<sup>11</sup>©-retaliation complaint wherein OSHA issued a decision two-hundred and twenty-six days from the date I filed my whistleblower claim (date of claim - 11/26/2018 - agency decision - 07/10/2019 = 226 days). Agency decision exceeded the statutory deadline

pursuant to the Surface Transportation Assistance Act **49 U.S.C. §31105(c)** - 210 days.

OSHA never explained the reason for the claim delays, which suggests bad faith considering the respondent took an unreasonable amount of time to render a decision.

### **OSHA'S FAILURE TO ACT WAS ARBITRARY AND CAPRICIOUS**

#### **(CONTINUED)**

The Surface Transportation Assistance Act (STAA) contains a “kick out” provision allowing good faith complainants like myself to file retaliation claims in district court once the two hundred-ten-day statutory deadline passed without decision. Based on my transportation worker status and the agency’s failure to make a decision pursuant to STAA statutory deadline, my whistleblower©-retaliation claim was qualified for “de novo review” on Monday June 25, 2019 (211 days). The Occupational safety and health administration’s unexplained claim delays and agency inaction to adhere to STAA statutory deadline illustrate the arbitrary and capricious handling of my whistleblower complaint pursuant to **5 U.S. Code § 706(1)(2)(a)**.

The agency’s repeated violation of the administrative procedure act demonstrates why my petition should be granted certiorari. The supreme court ruled that *“the APA only allows courts to examine government agencies' failures to meet specific statutory requirements Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004)”*. *“The purpose of U.S. Code § 706(2)(a) is to provide judicial review of agency action and inaction that falls outside its statutory powers NAACP v. Secretary of Housing Urban Development, 817 F.2d 149, 160 (1st Cir. 1987)”*. As *“Dunlop v. Bachowski, 421 U.S. 560 (1975), recognized, the problems and dangers of agency inaction are too important, too prevalent, and too multifaceted to admit of a single facile solution under which “enforcement”*.

## OSHA's OMISSION OF STAA PROTECTIONS WAS ARBITRARY AND CAPRICIOUS

(3) Agency action to withhold transportation whistleblower provisions from my whistleblower 11©-complaint was arbitrary and capricious considering OSHA'S Regional Investigator Dennis Vamvakas was aware of my transportation-worker status. My former employer (K&M Systems Inc.) hired me as a field test engineer, but my position mandated a driver license as I was provided with company vehicle, which was a bucket truck that contained ample cargo space to transport freight i.e., telecommunication procurements: fiber cables, antennas, radios, tools, etc. The bucket truck also contained an aerial lift that enabled me to work on small cells (compact cell towers) at height. Additionally, I provided OSHA Staff with work vehicle complaints I made to K&M Systems Inc. Human Resources. However, the agency failed to integrate transportation whistleblower protections I qualified for, into my whistleblower 11©-retaliation claim under **49 U.S.C. §31105**.

Resultantly, the agency acted arbitrary and capriciously by denying me federal transportation protections by intentionally excluding my transportation-worker status from agency investigation, which depicts the series of agency's abuse of power involving repeated violations of the administrative procedure act specifically **5 U.S. Code § 706(2)(a)(d)(e)**. OSHA - Department of Labor erased the possibility of job reinstatement provided by statute, **49 U.S.C. §31105** due to arbitrary and capricious handling of this claim, which is why I humbly request certiorari because I was aggrieved by the respondent unjustly. *"In cases where administrative misuse of procedure has delayed relief, the courts have the equitable power to order relief tailored to the situation, not mere remand for agency use of its discretion. Ford Motor Co. v. NLRB, 305 U.S. 364, 373, 59 S.Ct. 301, 307, 83 L.Ed. 221 (1939)".*

## **OSHA'S LACK OF HAZARD INSPECTION OR RECORDKEEPING WAS ARBITRARY AND CAPRICIOUS**

(3) My unsafe work complaints to K&M Systems Inc. - human resources, joined with images of unsafe work conditions showed the agency that my former employer violated the general duty clause pursuant to **29 U.S. Code § 654(a)(1)(2)**, which served to establish agency prima facie. OSHA refused to recognize that K&M Systems Inc. violated agency rule **29 CFR 1910.332(a)** "electrical training" despite being provided with images of work conditions that depict wet telecommunications equipment that me susceptible to electrical injury. I communicated to OSHA that I did receive electrical work training from my former employer despite working on energized equipment daily. Multiple cell towers I worked on contained splice fiber optic cables, warm equipment and my work vehicle was malfunctioned; it possessed multiple transmissions issues, e.g., transmission warning light on, grinding gears, vehicle consistently shaking, fluid leaks, broken shift knob and the passenger mirror was omitted.

The work hazards I experienced made me susceptible to serious physical harm e.g., fall from height due to the vehicle malfunctioned condition or electrical injury due to working in wet conditions under K&M Systems Inc. directives, which is prohibited pursuant to **29 U.S. Code § 654(a)(1)(2)**. OSHA - The Dept. of Labor did not conduct an employment inspection of the work hazards pursuant to **29 U.S. Code § 657(a)(1)(2)**, which adds to the agency's repeated violation of statutory responsibilities under **29 U.S. Code § 657(a)(1)(2)** regarding the agency's inaction to inspect work hazards, coupled with the agency's noncompliance to the administrative procedure act - **5 U.S. Code § 706(2)(a)**.

## **OSHA'S LACK OF HAZARD INSPECTION OR RECORDKEEPING WAS ARBITRARY AND CAPRICIOUS (CONTINUED)**

Agency inaction involving the handling of my claim led to the abdication of statutory responsibilities under **OSH Act Section 11(c) 29 U.S.C. §660(c)**, which qualifies my petition to be granted certiorari, considering the lower court denied my petition despite clear evidence of workplace retaliation, including protected activity *“Under the first step of the McDonnell Douglas framework, the plaintiff must establish a prima facie case of retaliation by showing 1) “participation in a protected activity”; 2) the defendant's knowledge of the protected activity; 3) “an adverse employment action”; and 4) “a causal connection between the protected activity and the adverse employment action.” Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173 (2d Cir.2005)”*.

**NY WHISTLEBLOWER STATUTE § 740(2)(a) & OSH ACT 1970 SECTION 11(c)**

(5) New York's Whistleblower laws prohibits retaliation based on the disclosure of unsafe work conditions to management and the **OSH Act of 1970** corresponds with **§ 740(2)(a)**. I faced adverse employment action e.g., termination; eleven days following my work complaint to human resources, which illustrates retaliation by my former employer (K&M Systems Inc.). Additionally, K&M Systems Inc. changed their reason for terminating my employment to OSHA once I initiated an agency complaint, which suggest retaliation. My termination letter reads that Crown Castle (third party company) wanted to conclude my work contract, following my termination I received an email from K&M Systems Inc. human resources thanking me for my hard work. Contrarily once K&M Systems Inc. was contacted by OSHA, my former employer told the agency I was discharged for underperformance, which suggests retaliation pursuant to

**NY WHISTLEBLOWER STATUE § 740(2)** on the grounds that K&M Systems Inc. provided conflicting reasons to terminate my employment.

*“Once the plaintiff has established prima facie showing of retaliation, the burden shifts to the employer to articulate some legitimate, non-retaliatory reason for the employment action. **United States v. Brennan**, 650 F.3d 65, 93 (2d Cir.2011)”*. *“From such discrepancies, a reasonable juror could conclude that the explanations were a pretext for a prohibited reason. See, e.g., **Byrnie v. Town of Cromwell, Bd. of Educ.**, 243 F.3d 93, 105–07 (2d Cir.2001). Cited in “**Kwan v. Andalex Grp. LLC**, 737 F.3d 834 (2d Cir. 2013)”*.

## **SECOND CIRCUIT DISTRICT COURT DENIAL MY JUDICIAL REVIEW**

The second circuit denied my judicial review, citing - **Heckler v. Chaney**, 470 U.S. 821 (1985). However, the supreme court ruled that *“agency inaction is subject to judicial review if the agency expressly adopted a policy that amounted to an abdication of statutory responsibilities. **Heckler v. Chaney**, 470 U.S. 821 (1985).* The Chaney decision made clear that judicial review of agency inaction is available when the agency's enforcement decision violates statutory constraints, therefore I am covered under this language considering OSHA’S inaction to apply federal protections I qualified for to my agency whistleblower claim under **49 U.S.C. §31105**. Agency’ refusal to conduct a work inspection pursuant to **29 U.S. Code § 657(a)(1)(2)** or adhere to agency recordkeeping rules under **29 CFR 1904.35(b)(1)(iv)** in order to perform statutory responsibilities under (OSH Act 1970), Section 11(c) **29 U.S.C. §660(c)**. OSHA’s violation of the 1974 Privacy Act; specifically, **5 U.S. Code § 552a (e)(1)(5)** involving the omission of employee records from my agency complaint file demonstrates agency action served to undermine the performance of the **OSH Act of 1970**.

## SECOND CIRCUIT DISTRICT COURT DENIAL MY JUDICIAL REVIEW

### (CONTINUED)

The second circuit upheld plaintiffs protected activity in the following case: *NLRB v. Pier Sixty, LLC*, No. 15-1841 (2d Cir. 2017) and granted enforcement proceedings but denied my judicial review despite established agency prima facie, including clear evidence of retaliation by my former employer. In *"Nat'l Labor Relations Bd. V. Matsu Corp."*, 19-2288-ag (2d Cir. Sep. 3, 2020), the second circuit granted enforcement proceedings based on the defendant's interference of protected activity, but the district court overlooked my petition that addressed the same legal questions or issues. The lower court made contradicting decisions involving related cases that addressed the same issues wherein my petition was denied judicial review, but the lower court granted similar cases enforcement proceedings involving protected activity and workplace retaliation, which is contradictory.

### FEDERAL RULES OF CIVIL PROCEDURE 60(b)(2)

**Rule 60(b)(2)** and 60(b)(6) - Federal Rules of Civil Procedure Title VII. (Judgement) enables me to seek "*extraordinary judicial relief*" upon a showing of "*exceptional circumstances*" *Nemaizer v. Baker*, 793 F.2d 58,61 (2d Cir. 1986). "*Second, a broad reading of the parties' stipulation here would deny the plaintiff his day in court by re-inserting the very language the parties themselves intentionally deleted. That result is contrary to the policy of Rule 60(b), "a remedial provision intended to prevent injustice by allowing parties their day in court even though some technical error has occurred which would otherwise be grounds for default or dismissal."* *Greater Baton Rouge Golf Association v. Recreation and Park Commission*, 507 F.2d 227, 228 (5th Cir. 1975) (*per curiam*) *Nemaizer v. Baker*, 793 F.2d 58,61 (2d Cir. 1986).



## **CONCLUSION**

I was retaliated by K&M Systems Inc -former employer and aggrieved by the agency involving the department of labor's arbitrary and capricious handling of my whistleblower complaint. I humbly request that my petition be granted certiorari based on the circumstances. Thank You!

### **APPENDIX** (in support of petition)

Emails (3 emails) Unsafe work conditions

- A. Protected activity complaints 9/17/2018 – Malfunctioned work vehicle.
- B. Protected activity complaints 10/22/2018 – Malfunctioned work vehicle.
- C. Protected activity complaint 11/5/2018 – Unsafe work conditions.

Good work recommendation email from Katie Hunt - K&M Systems Inc.

(Conflicts with staff statements that I unperformed).

Text Messages (4 Text messages) Training and Unsafe Work Conditions

- E. 10/22/2018 Reported unsafe work conditions.
- G. Messages show I was at work after 3pm (communicated with Katie & Mark of K&M Systems Inc.) on 11/5/2018.
- H. Additional messages that show I worked on 11/5/2018.

Penitent Claim Documents (8 documents)

- I. Termination Letter 11/16/2018 (does not specify reason of termination)
- I. 12/13/2018 K&M Systems Inc. conflicting statement involving whistleblower11c claim.
- J. Passenger mirror missing from work vehicle.
- K. Pictures of wet electrical equipment I partially installed in the rain on 11/5/2018.
- L. Prima Facie established (OSHA – U.S. Dept Labor) whistleblower11c document.
- N. Chronology on whistleblower11c investigation (cursory investigation)

**Additional material  
from this filing is  
available in the  
Clerk's Office.**