

Whistleblower Newsletter

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Highlights of this issue

AIR21 Cases:

- # Publication of final regulations - [Page 4]
68 Fed. Reg. 14099 (Mar. 21, 2003)
- # Bankruptcy stay - no exemption where DOL does not prosecute - [Page 4]
Davis v. United Airlines, ARB No. 02-105, ALJ No. 2001-AIR-5 (ARB May 30, 2003)
- # Insubordination of complainant - fact specific analysis - [Page 5]
Herchak v. American West Airlines, Inc., 2002-AIR-12 (ALJ Jan. 27, 2003)
Lawson v. United Airlines, Inc., 2002-AIR-6 (ALJ Dec. 20, 2002)
- # Adverse action; tangible job consequences - [Page 6]
Daniel v. TIMCO Aviation Services, Inc., 2002-AIR-26 (ALJ June 11, 2003)
- # Attorney misconduct - [Page 8]
Powers v. Pinnacle Airlines, Inc., 2003-AIR-12 (ALJ May 21, 2003)

ERA Cases:

- # Relationship of gatekeeping function and FRCP 8(a) - [Page 10]
Hasan v. Stone & Webster Engineers & Constructors, Inc., 2000-ERA-10 (ALJ Feb. 6, 2003)
- # Complainant's conduct - indefensible under the circumstances standard - [Page 14]
Williams v. Mason & Hanger Corp., ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002)
- # Clear and convincing evidence - highly probable standard - [Page 15]
Duprey v. Florida Power & Light Co., ARB No. 00-070, ALJ No. 2000-ERA-5 (ARB Feb. 27, 2003)

- # Negative performance appraisal - tangible consequences standard - [Page 19]
Gutierrez v. Regents of the University of California, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002)
- # Hostile work environment - negligence or notice liability standard - [Page 20]
Williams v. Mason & Hanger Corp., ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002)
- # Authorized representative of employees - standing of attorney, board member - [Page 22-23]
Slavin v. Pacific Northwest National Laboratory, ARB No. 00-081, ALJ No. 2000-ERA-26 (ARB Feb. 27, 2003)
Anderson v. Metro Wastewater Reclamation District, ARB No. 01-103, ALJ No. 1997-SDW-7 (ARB May, 29, 2003)
- # Attorney misconduct sufficient to result in dismissal of complaint - [Page 26]
Puckett v. Tennessee Valley Authority, 2002-ERA-15 (ALJ Nov. 21, 2002),
- # Sovereign immunity under ERA - [Page 27]
Pastor v. Dept. of Veterans Affairs, ARB No. 99-071, ALJ No. 1999-ERA-11 (ARB May 30, 2003)

Environmental Cases:

- # Timeliness of blacklisting complaint - [Page 28]
Pickett v. Tennessee Valley Authority, ARB No. 00-076, ALJ No. 2000-CAA-9 (ARB Apr. 23, 2003)
- # Continuing violation - no rehire decision - [Page 29]
Johnsen v. Houston Nana, Inc., ARB No. 00-064, ALJ No. 1999-TSC-4 (ARB Jan. 27, 2003)
- # Protected advocacy activity that interferes with performance of duties - [Page 34]
Jenkins v. United States Environmental Protection Agency, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003)
- # Adverse action - tangible consequences standard - [Page 35]
Jenkins v. United States Environmental Protection Agency, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003)
- # Individual liability of government officials - [Page 38]
Gass v. U.S. Dept. of Energy, 2002-CAA-2 (ALJ Nov. 20, 2002) (disagreeing with dissent in *Williams v. Lockheed Martin Energy Systems, Inc.*, 1995-CAA-10 (ARB Jan. 31, 2001))

STAA Cases:

- # Attorney misconduct - contributing to complainant's misconduct - [Page 43]
Somerson v. Mail Contractors of America Inc., 2003-STA-11 (ALJ Jan. 10, 2003)
- # Leeway for impulsive behavior - lack of protection where complainant's actions were continuing and reasoned - [Page 45]
Harrison v. Roadway Express, Inc., ARB No. 00-048, ALJ No. 1999-STA-37 (ARB Dec. 31, 2002)
- # Pretext analysis - balancing business interests with Congressional policy to promote highway safety - [Page 45]
Harrison v. Roadway Express, Inc., ARB No. 00-048, ALJ No. 1999-STA-37 (ARB Dec. 31, 2002)
- # No rehire decision - [Page 46]
Becker v. West Side Transport, Inc., ARB No. 01-032, ALJ No. 2000-STA-4 (ARB Feb. 27, 2003)
- # Complainant's harassment of witnesses and opposing counsel is not protected activity - [Page 47]
Somerson v. Mail Contractors of America Inc., 2003-STA-11 (ALJ Jan. 10, 2003)

- # "Filing a complaint" under § 31105 (a)(1)(A) requires communication with a supervisor - [Page 47]
Harrison v. Roadway Express, Inc., ARB No. 00-048, ALJ No. 1999-STA-37 (ARB Dec. 31, 2002)
- # Adverse action - tangible consequences standard - [Page 49-51]
Calhoun v. United Parcel Service, ARB No. 00-026, ALJ No. 1999-STA-7 (ARB Nov. 27, 2002)
- # Complainant's misconduct during hearing as grounds for dismissal of complaint - [Page 52-53]
Bacon v. Con-Way Western Express, ARB No. 01-058, ALJ No. 2001-STA-7 (ARB Apr. 30, 2003)
Somerson v. Mail Contractors of America, Inc., 2002-STA-44 (ALJ Dec. 16, 2002)

SOX Cases:

- # Publication of interim regulations - [Page 54]
68 Fed. Reg. 31859 (May 28, 2003)
- # District court jurisdiction; exercise of equitable powers or proceeding as regular federal question case - [Page 54]
Stone v. Duke Energy Corp., 3-03-CV-256 (WD NC June 10, 2003) (case below 2003-SOX-12)
- # Respondent must be publicly traded company - [Page 55]
Powers v. Pinnacle Airlines, Inc., 2003-AIR-12 (ALJ Mar. 5, 2003)
- # Mandatory arbitration agreements - [Page 55]
Boss v. Salomon Smith Barney Inc., No. 02 Civ. 7539(RO) (S.D.N.Y. May 16, 2003)

Miscellaneous:

- # HIPAA privacy rules for medical records - [Page 57]
45 CFR Parts 160 and 164
- # FOIA - critical infrastructure information exemption - [Page 57]
Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2135, § 214(a)
- # ARB - revised Secretary's Order delegating responsibilities - [Page 58]
Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002)

AIR21

Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century

FINAL AIR21 REGULATIONS

On March 21, 2003, the Occupational Safety and Health Administration published a Final Rule implementing the whistleblower provision of AIR21. ***Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003)***. Among the changes found in the Final Rule are (1) clarifications in the definitions section, (2) a clarification of the complainant's burden of proof, (3) a change to lengthen the time provided for a respondent to file a response with OSHA, (4) a clarification that an order of reinstatement is not appropriate when it is established that the complainant is a security risk (whether or not the information is obtained after the complainant's discharge), (5) a clarification that a respondent may seek attorneys fees incurred during the OSHA investigation (up to \$1,000) in a hearing before an ALJ if it alleges that the complaint was frivolous or brought in bad faith, and (6) a provision that appeals to the ARB are not a matter of right, but accepted at the discretion of the ARB.

BANKRUPTCY STAY; AIR21 CASES; POLICE AND REGULATORY AUTHORITY EXEMPTION DOES NOT APPLY WHERE COMPLAINANT IS SOLE PROSECUTING PARTY

In ***Davis v. United Airlines***, ARB No. 02-105, ALJ No. 2001-AIR-5 (ARB May 30, 2003),* the ARB ruled in a consolidated Order Staying Proceedings that, where the employee complainant is the sole prosecuting party in an AIR21 whistleblower adjudication, the automatic stay of the Bankruptcy Code, 11 U.S.C. § 362(a)(1) applies, and the proceeding is not exempt under § 362(b)(4). The § 362(b)(4) exemption to actions and proceedings by a governmental unit to enforce its police and regulatory authority. The ARB found that the great weight of the authority is that § 362(b)(4) refers to prosecutorial activity by a governmental unit. The Board rejected the argument that the Secretary's involvement in the entire administrative process created by § 42121 renders every step of that process a "governmental action or proceedings" within the meaning of the bankruptcy stay exemption. The ARB found that the few cases that "focus on adjudication by a governmental unit reject the notion that an agency adjudicator could be a § 362(b)(4) governmental unit." In other words, an agency acting in a quasi-judicial capacity seeking to adjudicate private rights is not engaged in the enforcement of policy or regulatory laws within the meaning of the bankruptcy stay exemption.

The decision takes no position on whether the stay applies if the Secretary or a delegate took a role in an AIR21 proceeding other than as an investigator of the employee's initial complaint.

* The order also applies to the consolidated cases of *Hafer v. United Airlines*, ARB No. 02-088, ALJ No. 2002-AIR-5 (ARB May 30, 2003), *Lawson v. United Airlines*, ARB No. 03-037, ALJ No. 2002-AIR-6 (ARB May 30, 2003) and *Taylor v. Express One International, Inc.*, ARB No. 02-054, ALJ No. 2001-AIR-2 (ARB May 30, 2003). In *Lawson*, the ALJ issued a Recommended Decision and Order after the filing of the petition for bankruptcy. The ARB agreed with the Respondent that this recommended decision was void ab initio.

JURISDICTION; DOL'S AUTHORITY TO DETERMINE WHETHER BANKRUPTCY STAY APPLIES

In ***Davis v. United Airlines***, ARB No. 02-105, ALJ No. 2001-AIR-5 (ARB May 30, 2003), Respondents provided notice to the ARB of their filing for bankruptcy protection, and the ARB ordered briefs on whether the police and regulatory power exemption applied. One Respondent argued that only the Bankruptcy Court has authority to decide whether the automatic stay applies. The ARB, however, found that the overwhelming weight of authority is that the non-bankruptcy court properly responds

to a filing by a party asserting an automatic stay under the bankruptcy law by determining whether the automatic stay applies to (*i.e.*, stays) the proceedings.

INSUBORDINATION; FACTS OF INDIVIDUAL CASES IMPORTANT

In *Herchak v. American West Airlines, Inc.*, 2002-AIR-12 (ALJ Jan. 27, 2003) and *Lawson v. United Airlines, Inc.*, 2002-AIR-6 (ALJ Dec. 20, 2002), two different ALJs considered the issue of whether an employee's behavior during the raising of safety concerns was the cause of adverse employment action, and came to very different conclusions based on the individual facts of the cases.

In *Herchak*, the Complainant, a pilot, had raised concerns since 1995 about fatigue, fatigue pairing, inaccurate timekeeping, and other matters with both Respondent's management and the FAA. The ALJ heard testimony of at least 10 active pilots other than Complainant who all made numerous safety complaints but were not disciplined for expressing such concerns. Complainant, however, had a disciplinary letter placed in his personnel record based on a finding that he continued to pursue a complaint about a scheduling error for no purpose other than to "accuse, intimidate and abuse" the employee who had made the mistake, even after the problem had been remedied and an apology issued. Based on a review of the entire record, the ALJ concluded that it was not Complainant's message that had gotten him into trouble, but the confrontational style he used in delivering the message, with the event leading up to issuance of the disciplinary letter being the "final straw."

In contrast, in *Lawson*, Complainant, a mechanic, refused to drop a concern he had about a supervisor's actions during a mechanical repair that had resulted in a dangerous situation for Complainant's work partner. Convinced that Respondent had failed to seriously respond to the concern and based on his belief that the supervisor made misrepresentations, Complainant persisted in seeking answers. On several occasions, Complainant used offensive, abrasive and foul language directed at the supervisor. The matter culminated with Complainant's termination from employment following an encounter in a break room when Complainant swore at and insulted the supervisor, and Complainant later refused to leave the break room for between three to five minutes to attend an "investigation" of the encounter. The ALJ found that Complainant had established that protected activity was a contributing factor to the termination, and that Respondent's articulated legitimate non-discriminatory rationales were not credible when assessed under the clear and convincing evidence standard. First, although Complainant used foul language, the punishment was disparate, the record being replete with evidence that such language was common in the workplace, and that worse abuses by others had not been disciplined. Second, although Respondent alleged intimidation of a supervisor as a ground for the termination, the ALJ found that the incidents were not objectively intimidating, and discounted the supervisor's subjective assertions of intimidation based on his finding that the supervisor was a marginally credible witness. The ALJ also observed that intimidation was not documented as a basis for the discipline at the time. Third, although Respondent alleged insubordination as a rationale, the ALJ found that the brief 3 to 5 minutes during which Complainant resisted leaving the break room for an "investigation" was more indicative of disagreement over the conditions of the investigation or confusion over its purpose than a refusal to participate; that there was no evidence that Complainant explicitly refused a direct order; and that Respondent did not follow its own guidelines on responding to insubordination.

ADVERSE EMPLOYMENT ACTION AND THE TANGIBLE CONSEQUENCES EXCEPTION

In *Daniel v. TIMCO Aviation Services, Inc.*, 2002-AIR-26 (ALJ June 11, 2003), the ALJ noted caselaw in DOL whistleblower proceedings indicating that "absent a showing of 'tangible consequences' such as demotion, neither discriminatory oral criticism nor negative written evaluations can be considered actionable adverse actions." The ALJ observed that the the source of this DOL caselaw is Title VII race discrimination cases, and analyzed whether such cases truly provide valid guidance in whistleblower protection cases. Pointing out differences between the purposes of race discrimination cases and whistleblower cases, the ALJ observed that

considering the objectives of the whistleblower enactments, it seems appropriate to suggest that a "tangible consequence" in these types of cases is not merely one which impacts the worker's narrow pecuniary interests, but one which is likely to stifle precisely the sort of behavior Congress intended to encourage, i.e. a "tangible consequence" in a whistleblower context is one which is reasonably likely to dissuade potential whistleblowers from getting involved in allegedly protected activity; a "consequence" which not only impacts the worker's economic interests immediately as in a Title VII setting, but one designed to counteract a worker's incentive to engage in activities Congress sought to encourage.

In *Daniel*, however, the evidence adduced at the hearing established that Respondent's written reprimand was a non-discriminatory application of a policy designed to hold employees accountable for their inspections, and therefore not actionable.

[Compare the "tangible consequences" rulings in this newsletter, *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002) [Nuclear & Environmental Whistleblower Digest XIII B 17]; *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003) [Nuclear & Environmental Whistleblower Digest XIII A and XIII B 18]; *Calhoun v. United Parcel Service*, ARB No. 00-026, ALJ No. 1999-STA-7 (ARB Nov. 27, 2002) [STAA Whistleblower Digest VI B 4].]

NEW COMPLAINT; FILING DIRECTLY WITH OALJ WHILE OLDER COMPLAINT PENDING ADJUDICATION

In *Ford v. Northwest Airlines, Inc.*, 2002-AIR-21 (ALJ Oct. 18, 2002), while his initial complaint was pending before an ALJ, Complainant filed a new complaint about blacklisting with the ALJ, arguing a right to amend his complaint to include new evidence of retaliatory adverse action. The ALJ reasoned that Congress had provided for a two-tier scheme for handling whistleblower complaints that begins with an OSHA investigation. Thus, the ALJ concluded that "[a] better procedure is to make the initial complaint to OSHA and then move to consolidate the complaint with litigation pending before the OALJ." The ALJ remanded the case for an OSHA investigation into complaints that had originally been determined by OSHA to be untimely and therefore not investigated.

Respondent appealed to the ARB. The ARB declined interlocutory review, and, applying the collateral order test wrote:

The purpose of the [ALJ's] remand order is to conduct an investigation into the complaints of blacklisting that allegedly form a basis of Ford's complaint. Thus the subject matter of the remand is not completely separate from the merits. In fact, it is possible that as a result of the investigation, the complaint will be resolved and no further adjudication by the ALJ or Board will be required. In any event, if ultimately Northwest is dissatisfied with either the results of the investigation or, if the complaint is upheld, with the ALJ's determination regarding the alleged protected activities falling

within the ambit of the complaint, Northwest may raise these issues with Board upon the filing of a timely petition for review of the ALJ's final order.

TIMELINESS; BLACKLISTING

Applying *National Railroad Passenger Corp. v. Morgan*, 536 U.S. ___, 122 S.Ct. 2061 (2002), the ALJ in ***Ford v. Northwest Airlines, Inc.***, 2002-AIR-21 (ALJ Oct. 18, 2002), determined that, where Complainant applied for jobs on separate, identifiable occasions, each occasion where Respondent allegedly made a blacklisting remark (and arguably on each occasion that a prospective employer remembered a prior blacklisting remark made by Respondent in refusing to hire Complainant) constituted a discrete act of blacklisting. Even if the events were interrelated and connected, there is no actionable "serial violation." The ALJ, however, remanded the case for an investigation into other, timely, allegations of blacklisting activity (OSHA had not earlier investigated these allegations, finding that the complaints were time barred).

INTERLOCUTORY APPEALS IN AIR21 CASES – PLUMLEY STANDARD

In ***Ford v. Northwest Airlines, Inc.***, 2002-AIR-21 (ARB Jan. 24, 2003), the ARB determined that it would apply the *Plumley v. Federal Bureau of Prisons*, 1986-CAA-6 (Sec'y Apr. 29, 1987), interlocutory review procedures to AIR21 whistleblower cases. The ARB rejected Respondent's contention that the ALJ's having placed a notice of appeal rights on a remand order converted the ALJ's decision into a final appealable rather than an interlocutory order "because the Order of Remand does not 'end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment.' *Catlin v. United States*, 324 U.S. 229, 233 (1945)." The ARB, however, did find that the ALJ's notice of appeal rights was, in effect, a certification of the question for ARB review. Nonetheless, the ARB declined to depart from its strong policy against piecemeal appeals and strict construction of the collateral appeal exception.

REQUEST FOR REVIEW BY ARB; TIMELINESS; INAPPLICABILITY OF PART 18; EQUITABLE CONSIDERATIONS

In ***Herchak v. America West Airlines, Inc.***, ARB No. 03-057, ALJ No. 2002-AIR-12 (ARB May 14, 2003), the Complainant filed a petition for review with the ARB that arrived on the 16th day after the ALJ's decision. Under the regulations in effect at the time, such a petition had to "be received within 15 days of the date of the decision of the administrative law judge" to be effective. 29 C.F.R. § 1979.110(a) (2002). Complainant argued that he had 20 days to file his petition by operation of 29 C.F.R. §§ 18.4(c)(3) and 1979.107(a) (incorporating the OALJ rules of practice at 29 C.F.R. Part 18 except as provided in Part 1979). The ARB found that the plain language of section 1979.110(a) admitted no room for debate that the petition had to be received by the 15th day, that sections 1979.110(a) and 18.58 both establish that Part 18 applies to hearing procedures and not appellate procedures, that section 1979.110(a) is a rule of specific application and therefore applies instead of section 18.4(c)(3), and finally that on its face, section 18.4(c) did not apply as it refers to calculations from service, not dates of documents.

The ARB then considered whether equitable tolling applies, citing the now familiar three situations in which tolling is proper: (1) when the defendant actively misleads the plaintiff respecting the cause of action, (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. The ARB indicated that the inability to satisfy one of these elements would not necessarily be fatal but that due diligence is important. Further, the ARB stated that absence of prejudice to the other party could be considered, but only after some other factor justifying equitable tolling is identified. It is the party seeking to invoke equitable principles who bears the burden of justifying their application.

In the instant case, the only ground for equitable tolling was the claim that Airborne failed to deliver on time. The ARB, however, faulted Complainant for failing to establish that he delivered the package to Airborne in time to invoke the overnight package guarantee, and for failing to determine whether Airborne timely delivered the package, either by inquiring of the Board or Airborne as to whether the package had been received, noting that failure of timely delivery could have been rectified by faxing a copy of the petition.

[Editor's note: This decision appears to make it crucial to obtain confirmation of delivery of overnight delivery packages to the ARB if timeliness is a concern.]

ATTORNEY CONDUCT; BARRING ENTRY OF APPEARANCE AND ANY REPRESENTATION OF COMPLAINANT

In *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ Apr. 23, 2003), the ALJ issued an order to show cause why the complaint should not be dismissed based on Complainant's failure to cooperate in discovery and based on her conduct in filing legally frivolous, dilatory, redundant, misleading, and inaccurate pleadings with the Court. Eventually, Complainant informed the ALJ that she no longer wished to be represented by her attorney, and the ALJ dismissed the attorney from the case. *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ May 12, 2003). Subsequently, however, Complainant asserted that she might intend to re-employ the attorney, and the ALJ proceeded to rule on an earlier filed motion to disqualify the attorney, and held that the attorney would be barred from entering an appearance on behalf of the Claimant, or otherwise representing her in this matter. *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ May 21, 2003). The ALJ detailed the conduct of the attorney, which had essentially prompted the earlier order to show cause, and wrote:

The Complainant and her counsel have every right to make vigorous arguments in support of her positions. Neither, however, is entitled to make misleading and factually incorrect statements, to flood the Court with boilerplate and string citations that have nothing to do with the issues presented by this case, and to repeatedly ignore the directives of this Court. Nor is either entitled to attack the dignity and integrity of this Court, in the hopes that I will recuse myself and the Complainant will have another chance with a different judge.

SETTLEMENTS; AIR21 SETTLEMENT REACHED DURING ARB REVIEW MUST BE SUBMITTED TO ARB FOR APPROVAL

Pursuant to 29 C.F.R. 1979.111(2), the parties are required to submit any settlement agreement reached while the case is pending before the ARB to the ARB for approval. *Baena v. Atlas Air, Inc.*, ARB No. 03-008, ALJ No. 2002-AIR-4 (ARB Nov. 18, 2002). See also *Baena v. Atlas Air, Inc.*, ARB No. 03-008, ALJ No. 2002-AIR-4 (ARB Jan. 10, 2003).

ERA

Energy Reorganization Act

[Nuclear & Environmental Whistleblower Digest II B 2]

DISTINCTION BETWEEN COVERAGE OF WORKPLACE SAFETY IN ERA AND ENVIRONMENTAL CASES

See *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002), casenoted at XII A, *infra*.

[Nuclear & Environmental Whistleblower Digest III B 2 b]

TIMELINESS; RECEIPT OF WAIVER OF RELEASE

In *Honardoost v. PECO Energy Co.*, ARB No. 01-030, ALJ No. 2000-ERA-36 (ARB Mar. 25, 2003), Complainant's receipt of a "Waiver of Release" (which specified a date of termination of employment) constituted a "final and unequivocal" notice of the alleged adverse action that triggers the limitations period for filing an ERA whistleblower complaint, regardless of whether Complainant signed the release. The limitations period was not extended by the fact that the size of his annuity payment was later recalculated several times.

[Nuclear & Environmental Whistleblower Digest III C 4]

HOSTILE WORK ENVIRONMENTAL; TIMELINESS; DIFFERENCE BETWEEN DISCRETE ACTS AND THOSE THAT MAKE UP A HOSTILE WORK ENVIRONMENT

In *Gorman v. The Consolidated Edison Corp.*, 2001-ERA-42 (ALJ Nov. 21, 2002), the ALJ agreed with the Complainant's argument that the recent Supreme Court decision in *National Railroad Passenger Corporation v. Morgan*, ___U.S.___, 122 S.Ct. 2061 (2002) (a Title VII case), was applicable to Complainant's ERA whistleblower complaint. The ALJ concluded:

I glean from *Morgan* several differences between "discrete" acts and acts that make up a hostile work environment. First, where an employer's conduct against an employee is actionable in and of itself – i.e., it directly affects his wages, hours or other terms or conditions employment – it constitutes a discrete act for which the statute of limitations begins to run immediately. In such a circumstance, even if subsequent employer discriminatory conduct is related to the earlier conduct the later conduct does not re-start the statute of limitations for the earlier conduct. However, where the discriminatory conduct is less severe – for example, a "mere offensive utterance," such as racial jokes, racial epithets, and race-based negative comments – it is not a discrete act that would support a cause of action, but it could constitute a portion of the fabric making up a hostile work environment.

Slip op. at 3-4 (footnotes omitted). Applying this distinction, the ALJ analyzed the acts Complainant contended were not time-barred because they constituted a hostile work environment that continued into the statutory time period, and found that those acts that were actionable insofar as they directly affected Complainant's conditions of employment were time barred. The ALJ, however, observed that such acts may be admissible in evidence as background evidence.

[Nuclear & Environmental Whistleblower Digest IV B 1]

TIMELINESS OF COMPLAINT; EQUITABLE TOLLING; RESPONDENT'S LULLING COMPLAINANT INTO BELIEF THAT HE WAS BEING TRANSFERRED TO AN EQUALLY DESIRABLE AND SECURE JOB

In *Tennessee Valley Authority v. U.S. Secretary of Labor*, 2003 WL 932433 (6th Cir. Mar. 6, 2003) (unpublished) (case below *Overall v. Tennessee Valley Authority*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-53), the Sixth Circuit affirmed the DOL's decision to toll the statute of limitations for filing an ERA complaint where "DOL reasonably inferred from the evidence that, by guaranteeing [Complainant] an equally desirable and secure job with [another component] TVA lulled [Complainant] into refraining from filing a [timely] retaliation claim."

[Nuclear & Environmental Whistleblower Digest VII C 1]

SUMMARY DECISION; BALD CONCLUSORY ASSUMPTION IS INSUFFICIENT TO OPPOSE MOTION

In *Honardoost v. PECO Energy Co.*, ARB No. 01-030, ALJ No. 2000-ERA-36 (ARB Mar. 25, 2003), the ARB affirmed the grant of summary decision to Respondent where Complainant failed to proffer any disputed material facts that, if proven, would establish that his employment was terminated because he engaged in protected activity. Merely alleging that he engaged in a protected activity and that he was terminated does not establish a causal connection. The ARB stated that a "bald conclusory assumption, without any allegation of supporting material facts, is simply insufficient to carry [a complainant's] burden of opposing a motion for summary judgment." (citation omitted). Of note in the ARB's view was the fact that there was a four year gap between the protected activity and the adverse employment action. The ARB made a similar finding in regard to a reduction in Complainant's annuity benefit, which Respondent had explained as caused by an accounting error.

[Nuclear & Environmental Whistleblower Digest VII C 3]

FAILURE TO STATE A CLAIM; RELATIONSHIP BETWEEN ERA GATEKEEPING FUNCTION AND FEDERAL RULE 8(a)

In *Hasan v. Stone & Webster Engineers & Constructors, Inc.*, 2000-ERA-10 (ALJ Feb. 6, 2003), Complainant argued that despite the failure to allege a *prima facie* case of discrimination, his complaint should not be dismissed for failure to state a claim upon which relief can be granted, based on the United States Supreme Court decision in *Swierkiewicz v. Soreman*, 534 US 506, 122 S Ct 992, 152 L Ed 2d 1 (2002). The ALJ, however, found that *Swierkiewicz* was inapposite because

The decision in *Swierkiewicz* states the pleading requirement in employment discrimination cases brought under the Federal Rules of Civil Procedure, such as those involving Title VII and the ADEA. Unlike the Petitioner in *Swierkiewicz*, the instant case involves a claim brought under the Energy Reorganization Act's whistleblower provision. In 1992, Congress amended the ERA to include a gatekeeping function, "which prohibits the Secretary from investigating a complaint unless the complainant establishes a *prima facie* case that his protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint." *Hasan v. U.S. Dep't. of Labor*, 298 F.3d 914, 917 (10th Cir. 2002)(citing 42 U.S.C. § 5851(b)(3)(A)), *cert. denied*, ____ U.S. ____ (2003). Here, the Complainant has failed to meet his burden. Moreover, the Complainant has a history of applying for jobs, then seeking broad discovery when he receives no response. However, at no point does Mr. Hasan mention that the Seventh, Tenth and Eleventh Circuits recently affirmed dismissals of several of his ERA complaints that were substantially the same as the complaint at issue here.

Slip op. at 7 (footnotes omitted).

[Nuclear & Environmental Whistleblower Digest VII D 2]

HARMLESS ERROR; FAILURE TO ADMIT EVIDENCE THAT DOES NOT AFFECT OUTCOME

Failing to admit documents that do not affect the outcome of the case is harmless error, if error at all. *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002).

[Nuclear & Environmental Whistleblower Digest VII D 4]

RECUSAL; REQUEST TO CHIEF ALJ TO REMOVE PRESIDING JUDGE

In *Hasan v. Stone and Webster Engineers and Constructors, Inc.*, 2000-ERA-10 (ALJ Jan. 14, 2003), the Chief ALJ denied Complainant's motion requesting that the Chief ALJ order recusal of the presiding ALJ and assign the case to another ALJ. The Chief Judge found that he had no authority to hear motions for recusal of another ALJ initially or as a matter of appeal, citing *Johnson v. Oak Ridge Operations Office*, 1995-CAA-20, 21 and 22 (ALJ Feb. 12, 1997).

[Nuclear & Environmental Whistleblower Digest VIII A 2 c]

ALJ DECISION; FINDINGS MUST EXPLAIN RESOLUTION OF CONFLICTS

"The ERA requires that Secretarial decisions "be made on the record after notice and opportunity for public hearing." 42 U.S.C. §5851(b)(2)(A). Pursuant to the Administrative Procedure Act, decisions on the record must provide the 'findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record' 5 U.S.C. §557(c)(3)(A) (1994); see *Lockert v. U.S. Dep't of Labor*, 867 F.2d 513, 517 (9th Cir. 1989) (holding that Secretary's ERA decision was adequate under §557(c)(3)(A), because the evidentiary basis for the decision was clearly specified and thus did not require speculation by the court); 29 C.F.R. §18.57(b) (summarizing contents required in ALJ decisions). Consistent with the mandate of Section 557(c)(3)(A), the ALJ's findings of fact must provide an explanation for the resolution of conflicts in the evidence and must reflect proper consideration of evidence that could support contrary findings." *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002) (some citations omitted).

[Nuclear & Environmental Whistleblower Digest VIII B 1 b]

REQUEST FOR REVIEW BY THE BOARD; EQUI TABLE TOLLING; DELIVERY TO FOREIGN COUNTRY

In *De Melo v. U.S. Dept. of Veterans Affairs*, ARB No. 03-027, ALJ No. 2002-ERA-17 (ARB Mar. 25, 2003), Complainant argued that his petition for review by the ARB was late because of slow delivery of mail to Canada. Although the ARB considered the question to be close, they found -- giving the *pro se* litigant the benefit of a doubt -- that his petition for review was made within 10 days of receipt of the ALJ's decision, that there was no evidence that Complainant failed to notify the ALJ of a address change or waited an extended period to inquire into the status of a case, and that its own experience with mailing documents to Complainant confirmed that there was a delay in mail delivery. Accordingly the ARB found that Complainant was not responsible for the untimely filing, and accepted the petition for review.

[Nuclear & Environmental Whistleblower Digest VIII B 1 d]

SUBJECT MATTER JURISDICTION; JURISDICTION TO DETERMINE JURISDICTION; OBLIGATION OF ADJUDICATOR TO MAKE INQUIRIES IF JURISDICTION IN DOUBT

An adjudicator is obligated to inquire *sua sponte* whenever a doubt arises as to the existence of its subject matter jurisdiction. Courts have jurisdiction to determine their jurisdiction, even if it is determined that it does not have jurisdiction over the merits. See *Pastor v. Dept. of Veterans Affairs*, ARB No. 99-071, ALJ No. 1999-ERA-11 (ARB May 30, 2003).

[Nuclear & Environmental Whistleblower Digest VIII B 1 d]

JURISDICTION; DOL AUTHORITY TO DETERMINE WHETHER BANKRUPTCY STAY APPLIES

See *Davis v. United Airlines*, ARB No. 02-105, ALJ No. 2001-AIR-5 (ARB May 30, 2003), casenoted in AIR21 section, *supra* (DOL has authority to determine whether it will stay case when presented with a claim that the bankruptcy automatic stay applies).

[Nuclear & Environmental Whistleblower Digest VIII B 2 c]

ARGUMENT RAISED FOR FIRST TIME ON APPEAL; ARB DECLINES TO CONSIDER

In *Duprey v. Florida Power & Light Co.*, ARB No. 00-070, ALJ No. 2000-ERA-5 (ARB Feb. 27, 2003), Complainant argued on appeal to the ARB that he was taking leave under the Family and Medical Leave Act, which rebutted Respondent's assertion of its absenteeism policy as the basis for Complainant's demotion. The ARB found that, except for a passing reference in his complaint, Complainant had raised this argument for the first time on appeal, and therefore declined to consider it.

To the same effect: *Honardoost v. PECO Energy Co.*, ARB No. 01-030, ALJ No. 2000-ERA-36 (ARB Mar. 25, 2003); *Anderson v. Metro Wastewater Reclamation District*, ARB No. 01-103, ALJ No. 1997-SDW-7 (ARB May, 29, 2003); *Bauer v. United States Enrichment Corp.*, ARB No. 01-056, ALJ No. 2001-ERA-9 (ARB May 30, 2003).

[Nuclear & Environmental Whistleblower Digest VIII B 3]

INTERLOCUTORY APPEAL; DENIAL OF PROTECTIVE ORDER REGARDING DEPOSITION OF CEO

In *Shirani v. Com/Exelon Corp.*, ARB No. 03-028, ALJ No. 2002-ERA-28 (ARB Dec. 10, 2002), the ARB denied interlocutory appeal of an ALJ's order denying a protective order regarding the deposition of Respondent's CEO. The ARB found that Respondent had failed to allege, much less establish, that the ALJ's order falls within the collateral appeal exception to the final decision requirements, and observed that it is reluctant to interfere with an ALJ's control over the course of a hearing.

[Nuclear & Environmental Whistleblower Digest IX H]

PRO SE LITIGANT; FAILURE TO OBSERVE CIVILITY AND RESPECT DURING LITIGATION

In *Hasan v. Sargent & Lundy*, ARB No. 03-078, ALJ No. 2002-ERA-32 (ARB Mar. 28, 2003), Respondent filed a request that the ARB strike a motion filed by Complainant on the ground that it was one of a series of pleadings in which Complainant defamed opposing counsel, the various judges that have been assigned his cases, the federal agencies with responsibility for ERA matters and the U.S. Congress. Finding that the pleading was replete with offensive personal attacks on the integrity and competency of DOL ALJs and others, and that it had previously admonished Complainant, the ARB held the Respondent's motion to strike in abeyance, and directed that if Complainant persisted in filing pleadings in that case or any other case before the ARB that contain such vitriolic personal attacks, the ARB would strike the pleading, and, if appropriate, dismiss the complaint.

[Nuclear & Environmental Whistleblower Digest X E]

INDICIA OF WITNESS RELIABILITY FOR RESOLVING CONFLICTS IN TESTIMONY

In addition to demeanor while testifying, indicia of witness reliability that may be applied to resolve relevant conflicts in the testimony include "witness self-interest, whether or not a witness' testimony is internally consistent, inherently improbable, or either corroborated or contradicted by other evidence. See *Bartlik v. Tennessee Valley Auth.*, No. 88-ERA-15, slip op. at 5 n.2 (Sec'y Apr. 7, 1993) and cases there cited." ***Williams v. Mason & Hanger Corp.***, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002).

[Nuclear & Environmental Whistleblower Digest XI A]

PRIMA FACIE CASE ANALYSIS; NOT ERROR TO PROCEED DIRECTLY TO ULTIMATE QUESTION OF LIABILITY

In ***Hobby v. USDOL***, No. 01-10916 (11th Cir. Sept. 30, 2002) (unpublished) (case below ARB No. 98-166, ALJ No. 1990-ERA-30), Respondent on appeal argued that the Secretary committed reversible error by failing to find that Complainant established a *prima facie* case. Essentially, in the Secretary's decision, the Secretary skipped over consideration of the elements of a *prima facie* case, and went straight to the ultimate question of whether Respondent retaliated against Complainant for engaging in protected activity. The Eleventh Circuit characterized Respondent's appeal as a complaint that the Secretary failed to "belabor" the question of whether Complainant established a *prima facie* case. The court held that "it is not error to omit a formalistic analysis when the ultimate conclusion implicitly includes a finding of an inference as to that same conclusion" and cited *United States Postal Service v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478 (1983) for the proposition that the *prima facie* case analysis "was never intended to be rigid, mechanized, or ritualistic." 460 U.S. at 713-15, 103 S.Ct. at 1481-82 (citations, quotations and note omitted).

[Nuclear & Environmental Whistleblower Digest XI A]

PRIMA FACIE CASE ANALYSIS ONCE CASE TRIED ON THE MERITS

In ***Williams v. Baltimore City Public Schools System***, ARB No. 01-021, ALJ No. 2000-CAA-15 (ARB May 30, 2003), the ARB complimented the ALJ in affirming her "well-written, well-reasoned recommended decision." In a footnote, however, the ARB stated that the ALJ erred in examining whether Complainant had established a *prima facie* case, stating that "after a whistleblower case has been fully tried on the merits, the ALJ does not determine whether a *prima facie* showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity."

To the same effect ***Mourfield v. Frederick Plaas & Plass, Inc.***, ARB Nos. 00-055 and 00-056, ALJ No. 1999-CAA-13 (ARB Dec. 6, 2002) (criticizing ALJ's use of *prima facie* case analysis);

But see ***Jenkins v. United States Environmental Protection Agency***, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), in which the ARB analyzed whether Complainant had established a *prima facie* case, and thereby sharpened the issues remaining for decision. For instance, the ARB analyzed the issue of adverse action sufficiently to find that only a couple of complained of actions by the employer in fact constituted adverse action within the meaning of the environmental whistleblower statutes.

[Nuclear & Environmental Whistleblower Digest XI A]

WHETHER CLOSE ANALYSIS OF ALL PROOF ELEMENTS IS NECESSARY WHEN THERE IS OVERWHELMING EVIDENCE THAT THE ELEMENT HAS BEEN ESTABLISHED

In *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), the ARB assumed without detailed analysis that several elements of the *prima facie* case had been established. For instance, the ARB found that Complainant's activities were so well publicized that it was safe to assume that her employer had knowledge of them. Similarly, where the Complainant had written nine letters to Congress and 56 internal documents, and had presented evidence of 13 employment actions over a span of about four years, the ARB merely assumed that a *prima facie* showing raising an inference of causation had been made, and proceeded to the determinative portions of the analysis. But see *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002), finding that ALJ should have analyzed protected activity closely, even though the record clearly established it, in order to determine whether there was a causal link between the activity and workplace harassment.

[Nuclear & Environmental Whistleblower Digest XI A 2 b iii]

CAUSATION; NOTIFICATION OF "AT-RISK" STATUS PRIOR TO DISCHARGE BUT BEFORE PROTECTED ACTIVITY

In *Tennessee Valley Authority v. U.S. Secretary of Labor*, 2003 WL 932433 (6th Cir. Mar. 6, 2003) (unpublished) (case below *Overall v. Tennessee Valley Authority*, ARB Nos. 98-111, 98-128, ALJ No. 1997-ERA-53), Respondent asserted on appeal that DOL had erred in finding a causal connection between Complainant's protected activity and the adverse employment action because Respondent had provided notification to Complainant of his potential at-risk status prior to the protected activity. The court upheld DOL's rejection of this assertion because the notification only stated that Complainant "may" be transferred, which was plainly not indicative of a final decision. The court found that "DOL reasonably concluded from substantial evidence that TVA made the decision to remove [Complainant] ... only after [engaged in the protected activity]."

[Nuclear & Environmental Whistleblower Digest XI B 2 b i]

CAUSATION; STANDARD FOR EVALUATING WHETHER COMPLAINANT'S CONDUCT REMOVES WHISTLEBLOWER PROTECTION – INDEFENSIBLE UNDER THE CIRCUMSTANCES STANDARD

In *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002), the ALJ had concluded that hostility toward the complainants was not motivated by their raising of safety concerns, but rather by a "sense of ownership" of the processes being used for weapons disassembly (which was being questioned by the Complainants), and the Complainants' conduct, such as improperly bypassing the chain of command and provoking hostility such as by threatening lawsuits and shut downs and ignoring advice from other workers. The ARB found that the ALJ's ruling about "sense of ownership" would permit personal, subjective sentiments to justify harassment of employees who were attempting to reduce risks of nuclear exposure or accident, and therefore antithetical to ERA whistleblower protection. The ARB found that the bypassing the chain of command finding was not supported by the record, and even if it were, it could not in itself deprive the Complainants of ERA protection. Finally, the ARB found that the ALJ applied the wrong standard in evaluating the impact of the Complainant's provocative conduct – the appropriate standard being "indefensible under the circumstances." The Board wrote:

To properly evaluate whether the hostility was related to protected activity, the Board must first examine the various incidents of harassment to determine whether they are linked to protected activity, or whether some acts of harassment were motivated by other factors, including conduct on the part of one or more of the Complainants that was wholly unrelated to protected activity. See *Berkman*, slip op.

at 17-21; *Acord v. Alyeska Pipeline Serv. Co.*, ARB No. 97-011, ALJ No. 95-TSC-4, slip op. at 2-6 (ARB June 30, 1997). If the harassment was linked to protected activity, we then examine the incident to determine whether one or more of the Complainants engaged in misconduct that was indefensible in those circumstances, and thus forfeited their protection under the ERA. See *Martin*, slip op. at 5. The *Martin* standard also applies to a complainant's conduct in circumstances in which he or she has been provoked by the actions of others that violate the ERA. See *Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986); *Carter*, slip op. at 19-21. Of course, only the Complainants' protected activities that were known to their supervisors and co-workers could have contributed to retaliatory harassment. See *Berkman*, slip op. at 16-17, 21-22.

Williams, ARB No. 98-030, USDOL/OALJ Reporter at 26.

[Nuclear & Environmental Whistleblower Digest XI B 2 b v and vi]

LEGITIMATE, NONDISCRIMINATORY REASON; UNAUTHORIZED USE OF MAILING LIST; DISRUPTION CAUSED BY CIRCULATING UNFOUNDED ALLEGATIONS

In *Williams v. Baltimore City Public Schools System*, ARB No. 01-021, ALJ No. 2000-CAA-15 (ARB May 30, 2003), Complainant was a mathematics teacher who alleged that she was suspended and later dismissed for reporting numerous environmental safety and health complaints to both the school system and to government agencies. The ARB affirmed the ALJ's finding that, although Complainant had engaged in many activities that the Acts protect, Complainant was not engaged in protected activity when she mailed a letter to students' parents erroneously stating that water in one of the schools contained lead and circulated similar letters to staff, students, and parents containing unfounded and sensationalized allegations about lead and asbestos hazards at three other schools.

The ARB also affirmed the ALJ's finding that Respondent's proffered reasons for suspending and dismissing Complainant – her unauthorized use of the names and addresses of persons to whom she sent the letters and the disruption in the school system caused by circulating the unfounded allegations – were legitimate and nondiscriminatory, and were not shown to be a pretext for discrimination.

[Nuclear & Environmental Whistleblower Digest XI B 2 b ix]

FAILURE TO FOLLOW CHAIN OF COMMAND IS NOT A LAWFUL REASON FOR ADVERSE ACTION

"[I]t is a long-standing principle of whistleblower case law, established by the Secretary and further developed by this Board and the United States Courts of Appeals, that it is a prohibited practice for an employer to retaliate against an employee for not following the chain of command in raising protected safety issues. This chain of command principle is as applicable to communications with a regulating agency like the DOE as it is to the raising of nuclear safety concerns within the employer's organization." *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002) (citations omitted).

[Nuclear & Environmental Whistleblower Digest XI D 1]

CLEAR AND CONVINCING EVIDENCE; "HIGHLY PROBABLE" STANDARD

In *Duprey v. Florida Power & Light Co.*, ARB No. 00-070, ALJ No. 2000-ERA-5 (ARB Feb. 27, 2003), the ARB concurred with the ALJ's finding that Respondent's articulated reason for demoting the Complainant – excessive absenteeism – was rebutted by inferential evidence showing that Respondent had a retaliatory motive for the demotion. Nonetheless, the ARB also concurred with the ALJ's finding that Respondent had demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Complainant's protected activity, where Respondent presented evidence demonstrating that managing absenteeism is very important at a

nuclear power plant, that Respondent had a progressive discipline policy, that Complainant had exhibited regular and continual excessive absenteeism despite counseling, and that it had not selectively applied its sick leave policy to Complainant or treated other offenders less harshly. The ARB found that Respondent had established that it was "highly probable" that Complainant would have been demoted even if he had not engaged in protected activity. The ARB cited in this respect the decision in *Colorado v. New Mexico*, 467 U.S. 310, 315-317 (1984) for the proposition that "[c]lear and convincing evidence is that which is 'highly probable' because it would 'instantly tilt [] the evidentiary scales in the affirmative when weighed against [the opposing evidence].'"

[Nuclear & Environmental Whistleblower Digest XII A, XII C 1, XII D 1 b, XII D 3 and 8]

PROTECTED ACTIVITY; MAY BE ORAL OR IN WRITING; MUST BE SPECIFIC TO A PRACTICE, CONDITION, DIRECTIVE OR OCCURRENCE; REASONABLE BELIEF THAT SAFETY STANDARD IS BEING COMPROMISED; DISTINCTION BETWEEN COVERAGE OF WORKPLACE SAFETY IN ERA AND ENVIRONMENTAL CASES

In *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002), the ARB described several general principles relating to protected activity under the ERA whistleblower provision, and specifically as applicable to nuclear weapons workers:

Within the context of nuclear power plant operation and repair, the Secretary, the Board and a number of the United States Courts of Appeals have repeatedly addressed the issue of which activities qualify for ERA protection. That body of case law provides the following guidelines. First, safety concerns may be expressed orally or in writing. Second, the concern expressed must be specific to the extent that it relates to a practice, condition, directive or occurrence. Third, a whistleblower's objection to practices, policies, directives or occurrences is covered if the whistleblower reasonably believes that compliance with applicable nuclear safety standards is in question; it is not necessary for the whistleblower to cite a particular statutory or regulatory provision or to establish a violation of such standards. This third principle is especially relevant to this case where, for the most part, the Complainants raised safety concerns while performing work with nuclear weapons that posed a risk of imminent danger to the workers and the public. Conditioning protection for such concerns on a reference to supporting legal authority or proof that a nuclear incident would otherwise occur would contravene the ERA interest of minimizing the risk of a nuclear accident.

Id., USDOL/OALJ Reporter at 18-19 (citations omitted).

The ARB also observed that in cases involving nuclear weapons workers, it would "also look to DOE regulations and orders regarding nuclear safety in determining what activities qualify for ERA protection." *Id.* at 19. For example, although under the environmental whistleblower statutes a concern relating only to an employee's workplace health and safety, and not to an adverse impact on the public or the environment, is not protected by the environmental protection statutes, radiological protection for workers, as well as the public, is covered by the whistleblower provisions of the ERA. There is unqualified protection for concerns related to employees' radiation exposure under the ERA. *Id.* at 20-22, distinguishing *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-0012, slip op. at 4 (ARB Apr. 8, 1997). Similarly, although the Secretary held in *Abu-Hejli v. Potomac Elec. Power Co.*, 1989-WPC-1 (Sec'y Sept. 24, 1993), that employees "have no protection . . . for refusing work simply because they believe that another method, technique, or procedure or equipment would be better or more effective[,]" the ARB held because that case arose under the WPCA and involved an analyst who refused to perform analytical work in an office setting, it was inapposite to ERA complaints arising in a nuclear weapons plant engaged in the disassembly of nuclear weapons.

[Nuclear & Environmental Whistleblower Digest XII C 3]

PROTECTED ACTIVITY; COMPLAINANT'S MOTIVES

In *Hasan v. Sargent & Lundy*, 2000-ERA-7 (ALJ Dec. 5, 2002), Employer argued that Complainant raised safety concerns with the expectation that he would be assigned to complete additional review work and thereby extend his employment. Thus, Respondent argued, although Complainant's activity would typically be considered protected activity, it should not in the instant case because Complainant was not a good faith whistleblower. The NRC, however, had validated some of the problems raised by Complainant. Thus, the ALJ concluded that although the record supported questions about Complainant's motives, Complainant had nonetheless engaged in protected activity.

[Nuclear & Environmental Whistleblower Digest XII C 4]

PROTECTED ACTIVITY; MAILING AND CIRCULATING LETTERS CONTAINS UNFOUNDED ALLEGATIONS IS NOT PROTECTED

In *Williams v. Baltimore City Public Schools System*, ARB No. 01-021, ALJ No. 2000-CAA-15 (ARB May 30, 2003), Complainant was a mathematics teacher who alleged that she was suspended and later dismissed for reporting numerous environmental safety and health complaints to both the school system and to government agencies. The ARB affirmed the ALJ's finding that, although Complainant had engaged in many activities that the Acts protect, Complainant was not engaged in protected activity when she mailed a letter to students' parents erroneously stating that water in one of the schools contained lead and circulated similar letters to staff, students, and parents containing unfounded and sensationalized allegations about lead and asbestos hazards at three other schools.

[Nuclear & Environmental Whistleblower Digest XII D 2 c, D 2 d, D 2 h and D 5]

PROTECTED ACTIVITY; RAISING ISSUES AS PART OF JOB AS INTERNAL ASSESSOR, NOTIFYING DOE OFFICIAL, AND COMMUNICATING WITH MEMBERS OF CONGRESS, PUBLIC INTEREST GROUP AND NEWSPAPERS

In *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002), the ARB affirmed the ALJ's rulings that Complainant -- an internal assessor at Los Alamos National Laboratory ("LANL") -- engaged in protected activity when he publicly revealed information related to safety and health issues at the LANL; raised these issues in reports, as part of his job; notified a Department of Energy official about leaks in LANL's plutonium facility; provided copies of a statement about his concerns at LANL to members Congress and Citizens Concerned for Nuclear Safety; and communicated with newspapers, which quoted his health and safety concerns in articles.

[Nuclear & Environmental Whistleblower Digest XIII A]

ADVERSE ACTION; SECOND-HAND HARASSMENT

In *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002), the ARB recognized Title VII authority concerning "second-hand" harassment as applicable to ERA whistleblower cases. In the instant case, second-hand harassment included comments or actions that were directed at another whistleblower but were witnessed by or recounted to a Complainant.

[Nuclear & Environmental Whistleblower Digest XIII B 4]

ADVERSE ACTION; SMALLER SALARY INCREASE THAN CO-WORKERS

In *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002), the ARB determined that Complainant's having received a smaller salary increase than other workers was an adverse employment action where internal audit work had been taken away from Complainant based on his protected disclosures of safety concerns. The lack of such work

content was the only objective difference between Complainant and workers who got larger raises.

[Nuclear & Environmental Whistleblower Digest XIII B 6]

CONSTRUCTIVE DISCHARGE; SIXTH CIRCUIT CASELAW; MISREPRESENTATION AS CONSTRUCTIVE DISCHARGE

In *Belt v. United States Enrichment Corp., Inc.*, 2001-ERA-19 (ALJ Aug. 30, 2002), the ALJ reviewed Sixth Circuit caselaw under Title VII regarding the test for whether a complainant was constructively discharged. The ALJ cited *Held v. Gulf Oil Co.*, 648 F.2d 427, 432 (6th Cir. 1982), for the general proposition that for constructive discharge to exist it must be shown that "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Continuing, the ALJ found that Sixth Circuit constructive discharge law requires an inquiry into both the intent of the employer and the objective feeling of the employee. The ALJ analyzed the facts and found that Complainant was not constructively discharged under this standard.

Complainant also alleged that he was misled, tricked or defrauded into voluntarily applying for a reduction in force, which constituted a force of coercion and therefore a constructive discharge. The only caselaw the ALJ could find even touching on the subject was *Baker v. Consolidated Rail Corp.*, 835 F.Supp. 846 (W.D. Penn. 1993), an ADEA case. Although the ALJ did not entirely agree with all aspects of the rationale in that case, he agreed that misrepresentations could provide grounds for a constructive discharge if considered material and coercive by the court. The ALJ, however, found no evidence that Complainant was treated any differently than other employees in regard to the reduction in force.

[Nuclear & Environmental Whistleblower Digest XIII B 6]

CONSTRUCTIVE DISCHARGE; WORK ENVIRONMENT MUST HAVE COMPELLED A REASONABLE PERSON TO HAVE RESIGNED

In *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002), the Complainants had presented sufficient evidence to establish the existence of a hostile work environment. One Complainant also presented a constructive discharge claim. The ARB observed that "a constructive discharge requires proof of a work environment that is more offensive than that required for establishing a [hostile work environment] claim." *Id.*, USDOL/OALJ Reporter at 60. The Complainant must establish working conditions so intolerable that a reasonable person would feel compelled to resign.

[Nuclear & Environmental Whistleblower Digest XIII B 8]

ADVERSE ACTION; NON-SELECTION FOR PROMOTION; BOARD WILL NOT RE-EVALUATE QUALIFICATIONS OF APPLICANTS IF EVIDENCE ESTABLISHES LEGITIMATE BASIS FOR DISTINGUISHING CANDIDATES

In *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002), one of the Complainants alleged that Respondent's failure to select him for a supervisory position was in violation of the ERA whistleblower provision. The ARB stated that to prevail on this claim, the Complainant was required to establish that he was qualified for the supervisory position, and that he applied for it, and that he was rejected in favor of a similarly qualified selectee. In the instant case, the ARB determined that Complainant had failed to establish that he and the individual selected were "similarly qualified." The Board wrote:

The record indicates that, as an incumbent supervisor with the Respondent, the selectee had an obvious advantage over [Complainant], despite [Complainant]'s years of managerial experience at a high level in the United States Navy. In examining a non-selection claim, it is not our role to re-evaluate the comparable qualifications of the candidates at issue if the evidence establishes a legitimate basis on which management could distinguish between the candidates' qualifications. See generally *Nichols v. Lewis Grocer*, 138 F.3d 563, 567-70 (5th Cir. 1998) (upholding employer's reliance on higher qualifications as evaluated by employer in case arising under Louisiana anti-discrimination statute).

[Nuclear & Environmental Whistleblower Digest XIII B 17]

ADVERSE ACTION; NEGATIVE PERFORMANCE RATING

In *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002), the ARB reiterated that commentary in a performance evaluation that does not implicate tangible job consequences is not actionable, but that a portion of a performance appraisal may constitute an adverse action, even where the overall rating is satisfactory, if the evaluation is in retaliation for engaging in protected activity and can result in tangible consequences.

In the instant case, Respondent had included a notation of "unfavorable customer feedback" in Complainant's Performance Assessment and in an appended note. The ARB found that these were adverse actions because: 1) the comment and addendum did not address Complainant's job performance per se, but rather faulted him for engaging in protected activity; 2) the comment and addendum suggested that Complainant could improve his performance, and consequently his pay, if he stopped his protected activity; 3) the comment and note became part of the Complainant's personnel record and could be consulted in making promotions and taking other personnel actions; 4) Complainant's appraiser failed to adhere to Respondent's Administrative Manual when he added the note to the Performance Assessment without Complainant's signature; 5) Respondent's policy and practice were to take comments in a Performance Assessment into account in determining an employee's pay increase; and 6) the appraiser did take Gutierrez's Performance Assessment and job content into account in making his salary determination.

Compare *Daniel v. TIMCO Aviation Services, Inc.*, 2002-AIR-26 (ALJ June 11, 2003) (ALJ argues that "tangible consequences" should not be merely ones that impact on narrow pecuniary interests, but also ones likely to stifle protected activity).

[Nuclear & Environmental Whistleblower Digest XIII C]

HOSTILE WORK ENVIRONMENT; WHETHER LEVEL OF HOSTILITY WOULD HAVE DETRIMENTALLY AFFECTED A REASONABLE PERSON

In *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002), the ARB indicated that, in a hostile work environment case, once it has been concluded that a complainant engaged in protected activity and suffered intentional harassment related to that activity, the trier of fact must determine the level of hostility demonstrated and whether that hostility would have detrimentally affected a reasonable person and actually did detrimentally affect the complainant. The Board wrote:

To evaluate the level of hostility – *i.e.*, whether the Complainants have established the existence of an abusive working environment – requires consideration of the factors from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), factors, discussed above: the frequency and severity of the harassment; whether the harassment was physically threatening or humiliating, or merely offensive; and whether it unreasonably interfered with the complainant's work performance. In applying these factors we employ an objective standard and consider the impact that the harassment would have on a reasonable person, and the actual impact on the Complainants. The *Harris* factors are illustrative and not a definitive list of requirements that must be met in order to establish an actionable level of hostility. We consider all the "surrounding circumstances, expectations and relationships" in evaluating the workplace environment. We again emphasize that, above all, our evaluation of the workplace environment must serve the purpose of ERA whistleblower protection, which is to promote nuclear-related health and safety by encouraging the raising of safety related concerns.

Williams, ARB No. 98-030, USDOL/OALJ Reporter at 44 (citations omitted).

[Nuclear & Environmental Whistleblower Digest XIII C]

HOSTILE WORK ENVIRONMENT; EMPLOYER LIABILITY; VARNADORE (1996) AND THE NEGLIGENCE STANDARD

In *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002), the ARB observed that its holding in *Varnadore v. Oak Ridge Nat'l Laboratory*, 1992-CAA-2 (ARB June 14, 1996) (*Varnadore* (1996)) regarding employer liability for supervisory harassment was an adoption of the negligence, or notice liability standard for evaluating employer liability in supervisory harassment Title VII cases. The Board stated that "[t]he negligence standard is also referred to as a theory of direct liability because it looks to the employer's actions, rather than those of the harassing employee, to determine whether liability will attach." *Williams*, ARB No. 98-030, USDOL/OALJ Reporter at 47 (citations omitted). The Board wrote:

Under the negligence standard, an employer is liable for an employee's harassing conduct if the employer knew, or in the exercise of reasonable care should have known, of the harassment and failed to take prompt remedial action. To avoid liability an employer must take both preventive and remedial measures to address workplace harassment. *Wilson*, at 540-42. An employer who fails to provide an adequate procedure for raising harassment complaints has not exercised reasonable care to ensure that it receives notice of the harassment, and cannot thereafter successfully defend on grounds that it did not receive actual notice. Instead, the employer will be deemed to have constructive notice of the harassment. Constructive notice may also be imputed to the employer if the harassment was so severe and pervasive that management should have known about it. Once an employer has been put on notice

of the harassment, the question becomes whether the employer has addressed the harassment claim "adequately and effectively."

Id., USDOL/OALJ Reporter at 48 (citations omitted). The Board rejected Complainants' argument that the *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and "vicarious liability" standard should be used in ERA whistleblower cases.

In *Williams*, the ARB carefully and thoroughly reviewed the evidence and determined that when Respondent's upper management received actual notice of the hostile work environment it took prompt, appropriate action to correct the hostile work environment, both when it first received the report and when it was provided notice of recurrent hostility. Moreover, the ARB found that Respondent had an adequate complaint procedure in place when the hostile work environment developed, and therefore could not be held to have had constructive notice prior to the actual notice. The remedial action taken by upper management included, *inter alia*, cautioning workers against reprisals against whistleblowers and appealing to their sense of teamwork and camaraderie; a shut down of operations for training and review; instructions for the entire staff to complete 40 hours of instruction in team-building and workplace interaction; conducting a "root cause" analysis and adopting an "Employee Concern Action Plan, which included higher management discussions both amongst itself and with supervisors; distribution of a "Team Building Lessons Learned" memo to lower and mid-level managers. The Board noted that upper level managers were personally involved in these remedial efforts and that the efforts were effective in addressing the harassment. Thus, although Complainants had established the existence of a hostile work environment resulting from their protected activity, Respondent was held not liable.

[Nuclear & Environmental Whistleblower Digest XIII C]

HOSTILE WORK ENVIRONMENT; ELEMENTS

In *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002), the ARB stated the elements of a hostile work environment case. In order to establish Respondent's liability for workplace hostility, a complainant must

establish that prohibited harassment created a HWE, through proof, by a preponderance of the evidence, of the following elements:

- 1) that he engaged in protected activity;
- 2) that he suffered intentional harassment related to that activity;
- 3) that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment;
- 4) that the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant.

See *Berkman*, slip op. at 16-17, 21-22; *Freels v. Lockheed Martin Energy Systems*, ARB No. 95-110, ALJ Nos. 94-ERA-6, 95-CAA-2, slip op. at 13 (Sec'y Dec. 4, 1996) (quoting *West v. Philadelphia Elec. Co.*, 45 F.3d 744 (3d Cir. 1996)).

[Nuclear & Environmental Whistleblower Digest XIII C]

LEVEL OF HOSTILITY TO SUSTAIN A HOSTILE WORK ENVIRONMENT COMPLAINT

The ARB decision in *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 (Nov. 13, 2002), contains an examination of the level of hostility that a complainant must establish to sustain a hostile work environment complaint under the ERA. DOL has adopted the Title VII requirement that in order to support a hostile work environment allegation a complainant must establish harassment that is "sufficiently severe or pervasive as to alter the conditions of employment and create an abusive or hostile work environment." The ARB summarized the holding in *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 97-CAA-2, -9 (ARB Feb. 29, 2000), which references Title VII caselaw; in brief, all the circumstances must be considered, with recognition that "actions or remarks that fall within the 'normal range' of conduct in one workplace may be unacceptable in another. The determination regarding whether the harassing incidents rise to an actionable level ultimately turns on the question of how best to serve the whistleblower protection purpose of the ERA, *i.e.*, whether such harassment undermines the raising of safety concerns protected by the ERA. Thus, although the analysis requires consideration of the norms of conduct in the workplace, the determinative factor is the impact of the harassment on the raising of safety concerns protected by the ERA."

In *Williams*, Complainants were technicians engaged in the disassembly of nuclear weapons, a function that required extraordinary attention to detail and involved a high degree of physical risk. The workplace was "rough-and-tumble" where leeway was provided for intemperate remarks by both the technicians and first-line supervisors. Thus, the ARB noted that in analyzing the incidents the Complainants allege constituted a hostile work environment, consideration would be given to whether the events were humiliating, threatening or merely offensive. The ARB also noted that it would analyze how frequently the incidents occurred, to what extent the harassment pervaded the workplace and whether the harassment unreasonably interfered with the respective Complainants' work performance.

[Nuclear & Environmental Whistleblower Digest XIV A 2 g]

EMPLOYEE; MEMBER OF BOARD OF DIRECTORS FOR PUBLIC AUTHORITY

In *Anderson v. Metro Wastewater Reclamation District*, ARB No. 01-103, ALJ No. 1997-SDW-7 (ARB May, 29, 2003), Complainant argued that, while she was not an employee of Respondent as it is commonly defined, she was in fact employed by Respondent as a director for the Denver area wastewater reclamation district and received compensation for her service. The ARB, although not definitively reaching the issue because it was raised for the first time on appeal, strongly suggested in its decision that under the terms of her appointment, she most decidedly did not have an employer-employee relationship with Respondent, and therefore did not have standing as an "employee" under the whistleblower provisions of the ERA and environmental statutes.

[Nuclear & Environmental Whistleblower Digest XIV C]

AUTHORIZED REPRESENTATIVE OF EMPLOYEES; MUST HAVE BEEN ACTING IN REPRESENTATION OF SPECIFIC EMPLOYEES FOR PERSONAL STANDING TO ATTACH

In *Slavin v. Pacific Northwest National Laboratory*, ARB No. 00-081, ALJ No. 2000-ERA-26 (ARB Feb. 27, 2003), Complainant -- an attorney who has represented whistleblowers -- alleged that he was discriminated against under the whistleblower provisions of the ERA and various environmental laws when the administrators of various "listserv" chat rooms (1) required that his future posting be approved or (2) banned him from the chat rooms altogether. Complainant alleged that DOE and its contractors combined and conspired to encourage censorship and blacklisting against him.

The ARB affirmed the ALJ's recommended dismissal of the complaint based on the Complainant's lack

of standing to bring the action either as an employee or authorized employee representative. The ARB, however, clarified the ALJ's decision to the extent that the ALJ was unaware of the ARB's then recent decision in *Anderson v. Metro Wastewater Reclamation District*, ARB No. 98-087, ALJ No. 1997-SDW-7 (ARB Mar. 30, 2000), in which the ARB held that "authorized representative" in environmental whistleblower statutes which prohibit retaliation against such persons "encompasses any person requested by any employee or group of employees to speak or act for the employee or group of employees in matters within the coverage of [those] statutes...."

In the instant case, the ARB found it was not necessary to describe the precise parameters of the term because Complainant had failed to prove "that his alleged protected activity, *i.e.*, his use of listservs, was in furtherance of a specific client-statutory employee's alleged protected activity, rather than in furtherance of Complainant's own personal concerns as a member of the public, albeit an attorney who has represented employees under the whistleblower statutes."

[Nuclear & Environmental Whistleblower Digest XIV C]

AUTHORIZED REPRESENTATIVE OF EMPLOYEES

In *Anderson v. Metro Wastewater Reclamation District*, ARB No. 01-103, ALJ No. 1997-SDW-7 (ARB May, 29, 2003), Complainant was an acknowledged environmental activist and part-time instructor specializing in environmental issues at the University of Colorado. She was appointed to and confirmed as a member of a 59-member board of directors for the Denver wastewater reclamation district (Metro). Complainant was opposed to a settlement plan for pending litigation to accept for treatment wastewater from a Superfund site, and spoke out against it in board meetings, to the public and to the press. Complainant alleged that a number of actions taken by the board were in violation of the ERA and environmental whistleblower laws. Upon review of a ALJ decision recommending finding in favor of the Complainant, the ARB dismissed the complaint, finding that Complainant had failed to establish standing as an "authorized representative" under the pertinent whistleblower statutes.

The ARB first determined that "authorized representatives" are not afforded their own separate causes of action under the SDWA, CAA, TSCA and ERA, even if acting on the request of an employee. The ARB then determined that Complainant was not an authorized representative of metro district employees or union members for purposes of standing under the SWDA, CERCLA and the FWPCA, while serving on the Metro board of directors because the pertinent state law directed representation of the City and County of Denver, not a particular interest group, and because a preponderance of the evidence did not establish that Metro employees or union members authorized her to be their representative during the relevant period.

In regard to the second finding, the ARB indicated that "there must be some tangible act of 'selection' or authorization to enable the representative to perform any actions on behalf of the employees who selected him or her or authorized his or her representation." Slip op. at 12 (citation omitted). The Board indicated that "self-authorization" or public perception is not sufficient. Even if the union viewed Complainant sympathetically, she did not have a mandate to speak for the union members or Metro employees at Board meetings. Although individual union members viewed her as their "voice" on the Metro board, this perception did not confer authority on Complainant to be the union's authorized representative. The ARB also pointed out testimony indicating that Complainant was not an authorized union bargaining agent.

[Nuclear & Environmental Whistleblower Digest XVI B 1]

REINSTATEMENT; PURPOSES TO MAKE WHOLE AND TO PROVIDE DETERRENT

In *Hobby v. USDOL*, No. 01-10916 (11th Cir. Sept. 30, 2002) (unpublished) (case below ARB No. 98-166, ALJ No. 1990-ERA-30), the Eleventh Circuit stated: "In addition to making the whistleblower whole again, reinstatement also serves as an important deterrent to other discriminatory acts that might be committed by the offender."

[Nuclear & Environmental Whistleblower Digest XVI B 4]

REINSTATEMENT; PRACTICALITY; JOB AVAILABILITY; ABSENCE FROM FIELD; ANIMOSITY AND HIGH LEVEL POSITION

In *Hobby v. USDOL*, No. 01-10916 (11th Cir. Sept. 30, 2002) (unpublished) (case below ARB No. 98-166, ALJ No. 1990-ERA-30), the Eleventh Circuit found no error in the ALJ and ARB's reinstatement order. The court found that substantial evidence supported the ALJ's finding that Respondent's witness who testified to her conclusion that Complainant was not qualified for any position at Respondent was not credible because she had omitted several positions from her consideration and ignored much of Complainant's work history.

Respondent argued that Complainant's long absence from the field rendered it impracticable for him to assume a senior management position. The court agreed with the ALJ and the ARB that "[i]t would be patently unfair for [Respondent] to avoid reinstatement because this case has proceeded slowly and, due to the circumstances of his termination coupled with his age, [Complainant] has not been able to find another job in the industry."

The court also rejected Respondent's claim that it was inappropriate to require reinstatement of an employee into a high-level managerial position in certain circumstances involving pervasive animosity between the employer and the employee where the court found no evidence of such animosity, observing that all of people involved in retaliation against Complainant no longer worked for Respondent, and that mere hostility attendance to a lawsuit was not normally preclusive of reinstatement.

[Nuclear & Environmental Whistleblower Digest XVI C 1 c]

BACKPAY; UNCERTAINTIES RESOLVED AGAINST RESPONDENT

In *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002), the ARB adopted the ALJ's analysis and findings on the backpay award. For the fiscal year in question, DOE authorized Respondent to increase the technical staff member payroll by 4%. The ALJ found that Respondent's managers determined each individual's salary increases by weighing several factors that could not be reduced to a precise mathematical formulation, and that there was considerable variability among employees in the same peer group. The ALJ also found that Respondent had failed to take into consideration all of Complainant's duties during the relevant assessment period and that his protected activities resulted in fewer duties. Thus, in light of all these factors and that "uncertainties in determining what an employee would have earned but for discrimination, should be resolved against the discrimination [party]," the ALJ concluded that a 4% pay raise would restore Complainant to the same position he would have been in had there been no discrimination.

[Nuclear & Environmental Whistleblower Digest XVI C 2 b v]

BACKPAY; MITIGATION OF DAMAGES

In *Hobby v. USDOL*, No. 01-10916 (11th Cir. Sept. 30, 2002) (unpublished) (case below ARB No. 98-166, ALJ No. 1990-ERA-30), the Eleventh Circuit reviewed the law in relation to the mitigation of

damages:

The ERA does not explicitly require victims of employment discrimination to attempt to mitigate damages, but the Secretary and the ARB have consistently imposed such a requirement, in keeping with the general common law "avoidable consequences" rule and the parallel body of damages law developed under other anti-discrimination statutes. Georgia Power bears the burden of proving that Hobby did not properly mitigate. ... To meet this burden, it must show that (1) there were substantially equivalent positions available; and (2) Hobby failed to use reasonable diligence in seeking these positions.... "Substantially equivalent employment" would be a position providing the same promotional opportunities, compensation, job responsibilities, working conditions, and status....

Just as the burden of proving a failure to mitigate falls on Georgia Power, so the "benefit of the doubt" ordinarily goes to Hobby. As the Sixth Circuit has observed,

A claimant is only required to make reasonable efforts to mitigate damages, and is not held to the highest standards of diligence. The claimant's burden is not onerous, and does not require him to be successful in mitigation. The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual characteristics of the claimant and the job market.

Rasimas, 714 F.2d at 624 (citations omitted).

* * *

The ARB recognized that the lack of a diligent search has been viewed as dispositive by our precedent in Title VII cases. See *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515 (11th Cir. 1991), superseded by statute on other grounds. The ARB, however, concluded:

Both *Weaver* and *Sellers* were cases under Title VII of the Civil Rights Act of 1964, and not under the Energy Reorganization Act. Although the Secretary and this Board frequently look to case law under Title VII for its persuasive authority (see discussion at 16, *supra*), the anti-discrimination language of Title VII is different from the ERA's employee protection text. In addition, Title VII is designed primarily to vindicate private rights rather than promote the public health and safety enforcement goal of the ERA whistleblower provisions. As such, we do not find the standard articulated in *Weaver* to be controlling in this case; however, we conclude that even under the 2-pronged standard adopted by the Eleventh Circuit in *Weaver*, Georgia Power's argument fails because Hobby actively searched for alternative employment, albeit with limited success.

Hobby, No. 90-ERA-30, slip op. at 26-27 (ARB Feb. 9, 2001). As the above quotation demonstrates, it is not necessary, however, for the Court to determine whether *Weaver* applies to ERA cases. As the ARB held, even were it to apply *Weaver*, Georgia Power has failed to demonstrate that Hobby did not mitigate his damages. On appeal, Georgia Power has failed to show that such factual finding was not supported by substantial evidence.

Slip op. at 20-22 (some citations omitted).

[Nuclear & Environmental Whistleblower Digest XVI D 3 a]

COMPENSATORY DAMAGES; LACK OF MEDICAL EVIDENCE TO SUPPORT ASSERTION OF STRESS

In *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002), the ARB found that Complainant had not established entitlement to compensatory damages where the sole evidence of record dealing with mental suffering or emotional anguish consists of Complainant's own testimony regarding his elevated blood pressure. The ARB held that "absent medical or other competent evidence that the Complainant suffered from high blood pressure that was causally related to the unfavorable personnel actions the Respondent took, [Complainant] failed to meet his burden of proving a causally-related condition, even under the generous evidentiary standards of 29 C.F.R. § 24.6(e)...."

[Nuclear & Environmental Whistleblower Digest XVI D 4 a]

COMPENSATORY DAMAGES; COMPARATIVE AWARD

In *Hobby v. USDOL*, No. 01-10916 (11th Cir. Sept. 30, 2002) (unpublished) (case below ARB No. 98-166, ALJ No. 1990-ERA-30), the ALJ and ARB awarded Complainant \$250,000 in compensatory damages. On appeal to the Eleventh Circuit, Respondent argued that this amount was high in relation to other claims. The court, however, found no abuse of discretion by the ARB in affirming the ALJ's reasoning that Complainant had been in a high level position, that he had been unemployed or underemployed for 8 years following his termination and had found no work in the nuclear field – which had a detrimental effect on future promotion and salary increases, and that Complainant's emotional stress as a result, merited a higher award than those made in other cases at the time (1998).

[Nuclear & Environmental Whistleblower Digest XVI E 4 c]

ATTORNEY'S FEES AND COSTS FOR APPELLATE WORK; SIXTH CIRCUIT

See *Scott v. Roadway Express, Inc.*, ARB No. 01-065, ALJ No. 1998-STA-8 (ARB May 29, 2003) (order granting attorney's fees), casenoted at STAA Digest IX C, *infra* (explaining why *DeFord v. Secretary of Labor*, 715 F.2d 231 (6th Cir 1983), does not bar Secretary from awarding fees and costs for appellate work where the complainant was a party in the appellate case and necessarily defended the ARB decision).

[Nuclear & Environmental Whistleblower Digest XVIII C 6]

DISMISSAL FOR CAUSE; FAILURE TO COMPLY WITH LAWFUL ORDERS

In *Reid v. Niagara Mohawk Power Corp.*, 2002-ERA-3 (ALJ Dec. 26, 2002), the ALJ recommended dismissal of the complaint where Complainant completely disregarded three separate prehearing orders issued by the ALJ, and failed to attend his scheduled deposition without good cause.

[Nuclear & Environmental Whistleblower Digest XVIII C 6]

DISMISSAL FOR CAUSE; FAILURE TO COMPLY WITH LAWFUL ORDERS

In *Puckett v. Tennessee Valley Authority*, 2002-ERA-15 (ALJ Nov. 21, 2002), the ALJ recommended dismissal of the complaint where Complainant's attorney repeatedly refused to comply with the ALJ's orders and displayed contumacious conduct. The attorney, for example, repeatedly refused to comply with the ALJ's direction not to use faxes for the filing of documents; attempted to take control of the scheduling of the case by repeated last minute notifications of alleged conflicts and then refused to answer the court's questions about those alleged conflicts; filed scandalous, disparaging and impertinent remarks about the ALJ of the type about which the ARB warned the attorney in an order denying an interlocutory appeal; rather than complying with the ALJ's order to submit discovery to

Respondent, sent the discovery response to the District Chief ALJ for "safekeeping" to be sent to Respondent only upon its agreement to a simultaneous exchange; and rather than heeding the ARB's warning about unprofessional, offensive exhortation, heightened his verbal assault on the ALJ to include suggestions that the ALJ suffered from diagnosable mental illness. The ALJ found that the attorney's failure to comply with the Scheduling Order "was a deliberate, unjustified delaying tactic and a deliberate expression of contempt for the Court." The ALJ observed that the abuse came from the attorney and not the Complainant himself, but noted that Complainant was served with all documents and thus was aware of his attorney's behavior. Noting the attorney's history of disregard and/or disobedience of orders and warnings from the ALJ in the instant case -- and before other ALJ's, the ARB and federal courts in other cases -- the ALJ concluded that sanctions less severe than dismissal had been ineffective in the past.

[Nuclear & Environmental Whistleblower Digest XX E]

SOVEREIGN IMMUNITY; NO JURISDICTION OVER FEDERAL RESPONDENT UNDER ERA ON CLAIM FOR MONETARY DAMAGES

In *Pastor v. Dept. of Veterans Affairs*, ARB No. 99-071, ALJ No. 1999-ERA-11 (ARB May 30, 2003), the ARB considered the question whether Congress has waived the Federal Government's sovereign immunity against a claim for monetary damages under the whistleblower protection provision of the ERA, 42 U.S.C. § 5851(b). The ARB found that it lacked jurisdiction over the matter because Complainant's complaint for monetary damages is barred by sovereign immunity. In this case, Complainant was not seeking reinstatement and the only relief she was seeking was for monetary damages.

The ARB carefully examined the text of the ERA whistleblower provision and concluded that "under § 5851, '**employers**' are prohibited from discriminating against whistleblowers (and may be relieved of that requirement under certain circumstances), but only '**persons**' who (allegedly) discriminate are subject to the process and remedies for discrimination." (emphasis added). In other words, the ERA refers to "employers" under the substantive prohibition of subsection 5851(a), but to "persons" under the process and remedies description under subsection 5851(b); Federal entities are included in the definition of "employers" but not "persons," and since sovereign immunity must be unequivocally waived, the Federal Government cannot be found to have waived immunity with respect to monetary damages under section 5851. Thus, the ARB found that the Secretary of Labor did not have jurisdiction to adjudicate the complaint.

[Nuclear & Environmental Whistleblower Digest XXI A]

COLLATERAL ESTOPPEL; PRIOR ADJUDICATIONS

In *Farver v. The Lockheed Martin Corp.*, 2000-ERA-29, 2001-ERA-17 (ALJ Apr. 9, 2003), Complainant alleged a variety of adverse employment actions, referencing all prior adverse employment actions as explored in previous whistleblower claims, in addition to the written reprimand and termination underlying the instant complaint. The ALJ in his recommended decision applied principles of collateral estoppel to find that only the more recent reprimand and termination would be considered. The ALJ wrote in regard to the earlier adjudications: "Those complaints are identical to Complainant's prior suit, and they have been finally determined. Complainant cannot bootstrap her former allegations to the instant case. While Complainant is entitled to present her entire history of protected activity, she cannot claim certain conduct of LMES was retaliatory after it has been adjudicated to the contrary and not appealed."

CAA, CERCLA, SDWA, SWDA, TSCA, FWPCA

Environmental Whistleblower Cases

[Nuclear & Environmental Whistleblower Digest II B 1 a]

DEGREE OF SPECIFICITY REQUIRED TO ESTABLISH JURISDICTION

In *Greene v. Environmental Protection Agency*, 2002-SWD-1 (ALJ Feb. 10, 2003), the ALJ concluded that no DOL authority had addressed the degree of specificity needed to establish jurisdiction, but observed that

the Merit Systems Protection Board has addressed this question pursuant to the Whistleblower Protection Act, 5 USC § 1221. See, e.g. *Keefer v. Department of Agriculture*, 82 M.S.P.R. 687, 692 (1999). "[T]o be entitled to protection, disclosures must be specific and detailed, not vague allegations of wrongdoing regarding broad imprecise matter." In another case, the MSPB set forth a more detailed discussion of specificity. In that case the Complainant failed to identify such basic facts as the entities to whom he made disclosures, the specific dates, or the vacant positions about which he had made disclosures. *Becker v. Department of Veterans Affairs*, 76 M.S.P.R. 292, 297 (1997).

The ALJ found that the instant complaint was insufficiently specific in regard to most of the environmental employee protection laws cited because: 1) Complainant had not provided specific information regarding the nature of her protected activity and the circumstances leading to the alleged reprisals; and 2) she had not articulated any relationship between her alleged protected activity and the purpose of any pertinent environmental statute.

[Nuclear & Environmental Whistleblower Digest III A 2]

TIMELINESS; EFFECT OF NOT RAISING THE ISSUE EXPRESSLY DURING THE ORAL EVIDENTIARY HEARING

In *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), the ALJ had considered the case on the merits and recommended dismissal. In regard to an issue relating to the timeliness of the initial complaint, the ALJ questioned whether the issue had been preserved because, although it had been raised initially, it was not raised at the hearing, and given his finding on the merits, found it unnecessary to address the issue. The ARB, however, found that the timeliness issue was not waived, it having been consistently raised by the Respondent, even if it had not been expressly raised during the hearing (presumably through a motion for dismissal or summary decision). The ARB, however, declined to consider the timeliness of subsequent complaints raising new alleged acts of discrimination where the Respondent did not raise that issue in its brief.

[Nuclear & Environmental Whistleblower Digest III C 2]

TIMELINESS; EVIDENCE THAT COMPLAINANT SHOULD REASONABLY HAVE SUSPECTED BLACKLISTING

"The ARB has held generally that the thirty-day statutes of limitation in environmental whistleblower cases begin to run on the date when facts which would support a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his rights." *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ No. 2000-CAA-9 (ARB Apr. 23, 2003).

In *Pickett*, Complainant had worked for TVA, and during his tenure had raised several safety

complaints. Thereafter, he received an injury while at work and filed for, and received those benefits. TVA later investigated and challenged Complainant's eligibility for FECA benefits. OWCP determined that benefits should be terminated, but ECAB reversed that determination.

In regard to his environmental whistleblower complaint, Complainant alleged that he did not learn of blacklisting by Respondent until after he received materials responding to FOIA and Privacy Act requests and that his filing of a whistleblower complaint was timely because it was made within thirty days of his receipt of the FOIA and Privacy Act materials. The ARB, however, found that, assuming arguendo that Respondent had engaged in blacklisting, the circumstances were such that Complainant should reasonably have suspected any such alleged blacklisting before June 1999 - specifically that he had been given a series of allegedly unsuitable job offers, that he had been made aware of Respondent's OIG investigation, his termination from employment, and Respondent's refusal to reinstate him because of alleged downsizing. The ARB noted that Complainant had suspected "stonewalling" by Respondent as evidenced by his communications with his Senator. Thus, the ARB concluded that an adverse course of conduct undertaken by Respondent against Complainant was apparent long before Complainant filed his complaint.

[Nuclear & Environmental Whistleblower Digest III C 3]

CONTINUING VIOLATION; NO-REHIRE DECISION MUST BE TIMELY COMPLAINED OF; LATER REJECTION UNDER NO-REHIRE DECISION DOES NOT CREATE A CONTINUING VIOLATION CAUSE OF ACTION

In *Johnsen v. Houston Nana, Inc.*, ARB No. 00-064, ALJ No. 1999-TSC-4 (ARB Jan. 27, 2003), Complainant alleged that Respondent's refusal to rehire him constituted a continuing violation subject to a new limitations period. Earlier, Complainant had been designated illegible for rehire, and had not taken a timely appeal of that designation. The ARB affirmed the ALJ's grant of summary judgment against the Complainant, holding that the refusal to rehire months later did not constitute a separate discriminatory act. Rather, Complainant had 30 days from the date that he had definitive, final and unequivocal notice of the "no rehire" decision to initiate any complaint that regard.

[Nuclear & Environmental Whistleblower Digest III C 4]

TIMELINESS; HOSTILE WORK ENVIRONMENT AS EXTENSION OF FILING PERIOD

In *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), Complainant argued that the existence of a hostile work environment should cause the 30-day filing period for an environmental whistleblower complaint to be extended. The ARB, referring to its finding after reviewing the entire record that a hostile work environment did not exist, found that the limitations period could not be extended on this basis.

[Editor's note: The ARB noted that if the Complainant had been able to prove the existence of a hostile work environment within 30 days of the date of her complaint, her cause of action would relate back to otherwise stale claims. From a practice note perspective, this means that it is necessary to fully adjudicate a hostile work environment issue before an equitable tolling based on that hostile work environment issue can be decided.]

[Nuclear & Environmental Whistleblower Digest IV C 9]

TIMELINESS OF COMPLAINT; GRIEVANCE PROCEDURES

In *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), Complainant argued that the filing and resolution of a grievance she filed concerning her performance rating should cause the 30-day filing period for an environmental whistleblower complaint to be extended. The ARB held that it was well established that the filing of a grievance does not operate to toll the limitations period for filing a whistleblower complaint.

Likewise, the resolution of the grievance could not provide an extension of the filing period, even if the Complainant was dissatisfied with the outcome. Complainant essentially argued that the grievance procedure had not provided the full extent of the relief she had requested ("a unilateral imposition of inadequate remedies"). The ARB found an absence of authority, however, that would render the grievance resolution decision a separate adverse action.

[Nuclear & Environmental Whistleblower Digest VII A 5]

DISCOVERY; STATES SECRETS PRIVILEGE

In *Jackson v. Northrop Grumman Corp.*, 2002-CAA-15 (ALJ June 24, 2002), Complainant sought discovery, *inter alia*, on production at Respondent's facility, and waste that production generated. Respondent sought a protective order on the ground that the parties had not entered into a confidentiality agreement. Respondent's facility was engaged in the production of munitions.

The ALJ noted authority to the effect that materials containing information concerning national defense or military secrets is protected by the states secret privilege, but also noted that the discovery sought was relevant to Complainant's "good faith" belief that Respondent was violating environmental laws. The ALJ concluded that the information was not critical to the Complainant's case, and granted the protective order in part "so that information regarding the materials used in production and the method of production must be kept confidential between the parties."

[Nuclear & Environmental Whistleblower Digest VII C 3]

MOTION FOR DISMISSAL FOR FAILURE TO STATE A CAUSE OF ACTION; MERE SPECULATION THAT NAMED RESPONDENT MAY HAVE A DISCRIMINATORY MOTIVE IS INSUFFICIENT TO WITHSTAND

In *Gass v. U.S. Dept. of Energy*, 2002-CAA-2 (ALJ Nov. 20, 2002), Complainant alleged that she had been retaliated against by Lockheed Martin Energy Systems (LMES) for protected activity, and had pursued a remedy through the Department of Energy's Office of the Inspector General. She filed a whistleblower complaint with DOL. During the adjudication of this complaint, she filed a FOIA request with DOE seeking documents related to DOE IG's inquiry on her complaint. DOE informed Complainant that the requested information had been destroyed, and Complainant filed the instant whistleblower complaint alleging that the destruction of the documents was a violation of the environmental whistleblower laws. Complainant named LMES among others as a Respondent. In consideration of a FRCP 12(b)(b) failure to state a claim motion, Complainant merely asserted that LMES' "knowledge of and involvement in DOE IG's evidence destruction is a question of fact for trial." The ALJ observed that LMES was presently engaged in other litigation with Complainant and might possibly have benefitted from the destruction of the evidence, but concluded that in the absence of a specific allegation that LMES actually did anything concerning evidence in DOE's possession, a whistleblower complaint against LMES could not be supported.

[Nuclear & Environmental Whistleblower Digest VII D 4]

CREDIBILITY DETERMINATION AS GROUND FOR SHOWING OF BIAS BY ALJ

In *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), the ALJ made a detailed and critical finding about the Complainant's credibility. On review before the ARB, Complainant argued that the ALJ's findings exhibited bias and that his credibility findings should therefore be rejected. The ARB, however, found that the ALJ's credibility determinations were fully supported by the record. The ARB also cited *Liteky v. United States*, 510 U.S. 540 (1994), which holds that a judge may necessarily and properly acquire a negative opinion of a party, which may be necessary to the completion of a judge's task, as in a bench trial.

[Nuclear & Environmental Whistleblower Digest VIII A 2]

SUMMARY JUDGMENT; COURT'S DELAY OF DISCOVERY PENDING RULING ON MOTION

"Rule 56, Fed. R. Civ. P., upon which 29 C.F.R. § 18.40 is modeled, permits a court discretion to delay discovery pending a ruling on a motion for summary judgment in the event that the party against whom judgment is sought fails to alert the court that discovery would aid in overcoming the summary judgment motion." *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ No. 2000-CAA-9 (ARB Apr. 23, 2003) (citations omitted).

[Nuclear & Environmental Whistleblower Digest VIII B 1 d]

ARB REVIEW AUTHORITY; SUBJECT MATTER JURISDICTION - FOIA DISPUTES

In *McQuade v. Oak Ridge Operations Office*, ARB No. 02-087, ALJ Nos. 1999-CAA-8 to 10 (ARB Oct. 18, 2002), Complainant's former counsel filed an appeal of the ALJ's supplemental decision dismissing an application for attorneys' fees. Counsel missed the deadline for filing a brief with the ARB. In response to an order to show cause, Counsel alleged, *inter alia*, that he needed additional time to file the response because OALJ had not made a transcript available which Counsel alleged would support his case for an award of fees, and requested that the ARB order the Chief ALJ to produce the transcript.

The ARB dismissed the appeal for counsel's failure to explain why he did not timely file the brief initially. Thus, the ARB considered the transcript matter moot. Nonetheless, it noted that the reason that the transcript had not been produced appeared to be a dispute over whether Counsel was entitled to a fee waiver under FOIA, and that appeals of such denials do not fall within the coverage of the whistleblower acts under which the Complainants filed the action.

[Nuclear & Environmental Whistleblower Digest VIII B 2 b]

ADDITIONAL EVIDENCE BEFORE THE ARB

In *Trachman v. Orkin Exterminating Company, Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-3 (ARB Apr. 25, 2003), Complainant sought permission for the introduction of additional testimony from a witness to support his allegation that the responsible official of Respondent knew about his safety complaints prior to his discharge. The case had been dismissed by the ALJ for lack of such knowledge. Finding that Complainant knew about the witnesses' potential testimony prior to the hearing, the ARB denied the motion to permit the testimony pursuant to 29 C.F.R. § 18.54(c) (2002), holding that once a record is closed, the rules of procedure permit acceptance of additional evidence only "upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record."

[Nuclear & Environmental Whistleblower Digest IX H 4]

ADVERSE INFERENCE BASED ON SPOILIATION OF EVIDENCE; DESTRUCTION OF DOCUMENTS UNDER FEDERAL RECORDS RETENTION SCHEDULE

In *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ No. 2000-CAA-9 (ARB Apr. 23, 2003), Complainant alleged that Respondent's failure to provide documents he had requested under the FOIA and Privacy Act amounted to the spoliation of evidence, and entitled him to an inference that the evidence was unfavorable to Respondent. The ARB held that the FOIA and Privacy Act issues fell beyond the authority of ALJs in environmental whistleblower cases and that Complainant failed to show that Respondent had engaged in improper conduct in this connection. Respondent had advised that it destroyed certain documents in accordance with its records retention schedules. This destruction was four years before Complainant filed suit, and Complainant did not show that Respondent lacked a routine document destruction policy or that the documents were not destroyed and were being withheld in connection with this litigation. The ARB thus agreed with the ALJ that

Complainant was not entitled to adverse inferences or sanctions under 29 C.F.R. Part 18 as a consequence of his failure to obtain information he sought under the FOIA and Privacy Acts.

[Nuclear & Environmental Whistleblower Digest IX M]

MOTION FOR SUMMARY REVERSAL

In ***Gass v. Lockheed Martin Energy Systems***, ARB No. 03-093, ALJ No. 2000-CAA-22 (ARB May 9, 2003), the ARB granted Complainant's petition for leave to file a motion for summary reversal. The ARB wrote:

However, Complainant is reminded that a party seeking summary disposition has a heavy burden of establishing that the merits of his or her case are so self-evident that further briefing and argument of the issues presented would not benefit the adjudicator and that the merits of the case are so patent that expedited action is warranted. *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987). Accordingly, the briefing schedule **shall not** be held in abeyance pending the filing of any such motion.

(emphasis as in original). *To the same effect: Erickson v. U.S. Environmental Protection Agency, Region 4*, ARB No. 03-064, ALJ Nos. 1999-CAA-2, 2001-CAA-8 and 13, 2002-CAA-3 and 18 (ARB Mar. 13, 2003).

[Nuclear & Environmental Whistleblower Digest IX M]

ALJ IMMUNITY

In ***Slavin v. Office of Administrative Law Judges***, 2003-CAA-12 (ALJ Mar. 10, 2003), Complainant alleged that the Chief ALJ violated a number of environmental whistleblower protection laws when he issued a ruling on a motion to recuse, which Complainant alleged was an abusive, extralegal judicial order. The complaint was summarily dismissed on the ground, *inter alia*, that ALJs have absolute judicial immunity unless they are acting in the clear absence of all jurisdiction.

[Nuclear & Environmental Whistleblower Digest IX M 2]

DUTY OF ALJ TO INQUIRE INTO ALLEGATION OF ATTORNEY CONFLICT OF INTEREST

In ***Duncan v. United States Secretary of Labor***, No. 01-71647 (9th Cir. May 30, 2003) (unpublished) (available at 2003 WL 21259780) (case below ARB No. 99-011, ALJ No. 1997-CAA-12), Complainant alleged that he was denied a fair hearing because of the ALJ's treatment of a letter sent by a co-complainant to the ALJ asserting that their attorney had a conflict of interest and averring that Complainant intended to lie under oath. The court found that the ALJ properly disclosed the letter and pursued an inquiry, noting that an ALJ had a duty to determine whether an attorney should be disqualified for a conflict of interest, citing *Smiley v. Director, OWCP*, 984 F.2d 278, 282 (9th Cir. 1993). The court stated that such an inquiry is well within the "broad discretion" given to judges in supervising trials. The court also noted that the record did not indicate any bias or impartiality on the part of the ALJ.

[Nuclear & Environmental Whistleblower Digest X E]

CREDIBILITY; COMPLAINANT'S LACK OF CREDIBILITY AS A WITNESS AND INSUBORDINATE CONDUCT AS A EMPLOYEE MAY LEND CREDENCE TO RESPONDENT'S CASE

In *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), the ARB when considering whether the Complainant had proved by a preponderance of the evidence that the Respondent intentionally discriminated against her in violation of the whistleblower laws, took into consideration Complainant's credibility and conduct. The ARB agreed with the ALJ that Complainant's credibility and conduct were central to the resolution of the case both because her testimony conflicted with other witnesses, and because, the ARB quoting the ALJ "her perception of events is the principal component in her belief that she has been discriminated against for her protected activity."

Deferring to the ALJ's demeanor based credibility determinations, and finding more than adequate support in the record for the ALJ's findings that Complainant was an exceedingly poor witness and insubordinate and disrespectful employee, the ARB held that her "qualities as a witness cast doubt upon her interpretation of the evidence and give credence to EPA managers' testimony that they made decisions pertaining to her based upon considerations that the law recognizes as legitimate and non-discriminatory."

[Nuclear & Environmental Whistleblower Digest X P]

ADVERSE INFERENCE BASED ON SPOILIATION OF EVIDENCE; DESTRUCTION OF DOCUMENTS UNDER FEDERAL RECORDS RETENTION SCHEDULE

See *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ No. 2000-CAA-9 (ARB Apr. 23, 2003), casenoted at IX H 4, *supra*.

[Nuclear & Environmental Whistleblower Digest XI A 2 a]

KNOWLEDGE OF PROTECTED ACTIVITY; ADJUDICATOR NOT REQUIRED TO RULE ON EVERY INSTANCE OF ALLEGED ACTIVITY WHERE IT WAS CLEAR THAT COMPLAINANT HAD MADE A POINT OF NOTIFYING HER SUPERIORS

Where Complainant had made a point of notifying her supervisors of her activities, the ARB found it safe to assume that Respondent was aware of Complainant's protected activity, even though Respondent may not have had knowledge of every individual activity. *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003).

[Nuclear & Environmental Whistleblower Digest XI B 2 b viii]

ADVERSE ACTION; REQUIREMENT THAT COMPLAINT FOLLOW AGENCY POLICIES REGARDING COMMUNICATION WITH THE PUBLIC

See *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), casenoted at XIII B 18, *infra*.

[Nuclear & Environmental Whistleblower Digest XI B 2 b viii]

ATTORNEY-CLIENT PRIVILEGE/CONFIDENTIALITY

In *Willy v. The Coastal Corp.*, ARB No. 98-060, ALJ No. 1985-CAA-1 (ARB Nov. 6, 2002), the ARB ordered briefing of the application of common law principles of attorney-client privilege in the context of federal whistleblower protection statutes, despite a long procedural history of the case. In *Willy*, much of Complainant's case was based on divulging a memorandum he had written while in-house counsel for Respondent. Respondent argued that use of that memorandum violated evidentiary rules of attorney-client privilege/confidentiality and the ethical duty of client confidentiality.

[Nuclear & Environmental Whistleblower Digest XI B 2 b viii]

INSUBORDINATION

In *Duncan v. United States Secretary of Labor*, No. 01-71647 (9th Cir. May 30, 2003) (unpublished) (available at 2003 WL 21259780) (case below ARB No. 99-011, ALJ No. 1997-CAA-12), the Ninth Circuit found that substantial evidence supported the ALJ's finding that Complainant's insubordination, rather than retaliation for whistleblowing activity, was the cause of the Employer's adverse employment decisions.

[Nuclear & Environmental Whistleblower Digest XI C 2 b]

ULTIMATE QUESTION OF RETALIATORY MOTIVE; PROTECTED ADVOCACY THAT INTERFERES WITH PERFORMANCE OF ASSIGNED DUTIES

In *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), the ARB concluded that although Complainant was "free vigorously to report what she considered to be violations of the environmental laws without reprisal... it was her responsibility to carry out EPA policy as senior management determined it [and] she was not at liberty to disregard or thwart the instructions of her supervisors...." The Board found that Complainant was not removed from certain assignments for her advocacy per se, but on account of her employer's business needs. The Board wrote that it distinguished "between protected complaints and unprotected failures to complete work assignments as requested...."

[Nuclear & Environmental Whistleblower Digest XI C 2 b]

RETALIATORY MOTIVE; RELATIVE NEED TO RESOLVE DISPUTES OVER SCIENTIFIC AND POLICY DISPUTES

The ARB's role is not to resolve scientific or policy questions over which a complainant and her employer may disagree or have differing views of priorities, but to determine whether the respondent retaliated against the complainant for expressing her views. See *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003).

[Nuclear & Environmental Whistleblower Digest XI D 1]

LAWFUL MOTIVE; IMPROPER MOTIVE UNDER NLRA OR OSHA NOT RELEVANT

In *Mourfield v. Frederick Plaas & Plass, Inc.*, ARB Nos. 00-055 and 00-056, ALJ No. 1999-CAA-13 (ARB Dec. 6, 2002), Complainant argued on appeal that, under the dual motive analysis, the "employer bears the burden to show that it would have taken action without its illegal motives. A 'legitimate' reason is a lawful reason...." The ARB rejected this argument, finding that although an employer's motives may be illegal under other laws, such as the NLRA or the OSHA, the employee protection provisions of the environmental laws only protect employees from retaliation if they have reported safety and health concerns addressed by those environmental statutes.

[Nuclear & Environmental Whistleblower Digest XII A]

PROTECTED ACTIVITY; ADJUDICATOR NEED NOT RULE ON WHETHER EACH DOCUMENT PRODUCED BY COMPLAINANT INVOLVED PROTECTED ACTIVITY WHERE EVIDENCE PRESENTED MADE IT SAFE TO ASSUME THAT COMPLAINANT HAD ENGAGED IN SUCH ACTIVITY

[Nuclear & Environmental Whistleblower Digest XII B 2 h]

PROTECTED ACTIVITY; PETITIONING CONGRESS; SEEKING A LEGAL OPINION

In *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), the ARB found that Complainant's petitioning congressional subcommittees about alleged diminished RCRA regulation by the EPA, and complaining internally about inadequate and inappropriate regulation were protected activity. The ARB also held that protection "may" extend to Complainant's efforts to obtain a legal opinion from EPA's Office of General Counsel as to the legality of certain considerations in rulemaking where the effort advanced concern about inappropriate and inadequate regulation.

The ARB found it unnecessary to rule individually on each of numerous documents submitted by the Complainant at the hearing to demonstrate purported protected activity, finding that it was sufficient to find that Complainant had met her burden of showing protected activity.

[Nuclear & Environmental Whistleblower Digest XII D 13]

PROTECTED ACTIVITY; REPORT OF PURPORTED *EX PARTE* COMMUNICATION

In *Greene v. Environmental Protection Agency*, 2002-SWD-1 (ALJ Feb. 10, 2003), the Complainant was an ALJ with the EPA. In her complaint, she alleged that she engaged in protected activity when she reported to the parties in a SWDA matter pending before her that the Chief ALJ of EPA had engaged in a conversation about the case with the supervisory attorney in EPA's Region III office in which the Chief ALJ exhorted the regional office to either aggressively pursue settlement or progress to hearing because the case was unduly overage.

The ALJ who presided over the instant complaint for DOL found that Complainant did not engage in protected activity under the SWDA because the EPA Chief ALJ's communication was not an *ex parte* communication as the EPA Chief ALJ was not the presiding judge and had no decisional authority in the case, and the supervisory attorney was not representing EPA in the case, and because no substantive or important procedural matters were discussed. Moreover, the Complainant was informed about the Chief ALJ's intention to have the discussion, the Chief ALJ provided a memorandum to Complainant recording the substance of the discussion, and the record did not show that anyone thought the discussion was improper at the time. The ALJ found that Complainant, as an experienced ALJ, undoubtedly knew that such a conversation was not an improper *ex parte* communication. Finally, the ALJ found that the complaint did not demonstrate that the conversation had the potential to affect, or did affect the purposes of the SWDA. Accordingly, summary judgment on this issue was granted to Respondent.

[Nuclear & Environmental Whistleblower Digest XIII A]

ADVERSE ACTION; REQUIREMENT OF TANGIBLE EFFECTS

Jenkins v. United States Environmental Protection Agency, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003):

Not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action. ... To be actionable, an action must constitute a tangible employment action," for example "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different

responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). ... Obviously material adverse actions such as discharge, demotion or loss of benefits and compensation are actionable. ... Less obvious actions likewise are actionable, for example stripping an employee of job duties or altering the quality of an employee's duties, if they have tangible effects. ...

USDOL/OALJ Reporter at 20 (citations omitted). Compare *Daniel v. TIMCO Aviation Services, Inc.*, 2002-AIR-26 (ALJ June 11, 2003) (ALJ argues that "tangible consequences" should not be merely ones that impact on narrow pecuniary interests, but also ones likely to stifle protected activity).

[Nuclear & Environmental Whistleblower Digest XIII B 1]

BLACKLISTING; EMPLOYER'S SUPPLYING OF LETTER REQUIRED WHEN IT REJECTED A UNION EMPLOYMENT BID

In *Johnsen v. Houston Nana, Inc.*, ARB No. 00-064, ALJ No. 1999-TSC-4 (ARB Jan. 27, 2003), Respondent did not engage in blacklisting when it communicated to Complainant's union that Complainant was on a "no-rehire" list, where Respondent was required to inform the union in writing of the reason for rejection of employment bids, and where Respondent did not mention or imply that the decision not to rehire was based on protected activity.

[Nuclear & Environmental Whistleblower Digest XIII B 16]

ADVERSE ACTION; REMOVAL OF PROJECT AND REASSIGNMENT; LATERAL TRANSFER

In *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), the ARB observed that as a general matter, lateral transfers not entailing a demotion in form or substance do not rise to the level of a materially adverse employment action.

Such a transfer, however, to a position with different job responsibilities and employment conditions may constitute adverse action even in the absence of a reduction in salary or benefits. For instance, exposure to greater risks, transfer to a job that the employee could not perform, a less desirable shift perceived by co-workers as punishment, all may constitute attributes of a transfer that may be adverse employment action. In *Jenkins*, the Board found that although Complainant may have suffered a "bruised ego" when she was transferred, only her specific assignments were subject to change, and without a showing of consequential loss of promotional opportunities or other perquisites of employment, the reassignment was not adverse action under the circumstances. Although Complainant's assignments were reduced, her performance objectives were accordingly modified, and she was not penalized in her performance rating for the reduced workload.

[Nuclear & Environmental Whistleblower Digest XIII B 17]

ADVERSE EMPLOYMENT ACTION; MUST BE RETALIATORY TO BE ACTIONABLE

Although a negative performance evaluation may constitute an adverse employment action, it is not actionable if it is found not to have been retaliatory. *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003).

[Nuclear & Environmental Whistleblower Digest XIII B 18]

ADVERSE ACTION; REQUIREMENT THAT COMPLAINT FOLLOW AGENCY POLICIES REGARDING COMMUNICATION WITH THE PUBLIC

In *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), Complainant had used her position as an EPA scientist to voice environmental concerns, mostly about the assumed presence and carcinogenic effects of dioxins, and, after Complainant had improperly revealed the existence of an on-going criminal investigation prompted by one of her allegations, the agency added to Complainant's performance standard a requirement that Complainant follow "[a]gency policies concerning communicating with the public."

The ARB held that "[t]he imposition of that requirement, standing alone, does not constitute an adverse action. It reflects a legitimate management prerogative, is not on its face a restriction on protected activity, and has no tangible effect on her employment. As we see it, such a policy does not become an adverse action without a demonstration that the Respondent took punitive action because of the Complainant's protected activity involving public communication."

Compare *Daniel v. TIMCO Aviation Services, Inc.*, 2002-AIR-26 (ALJ June 11, 2003) (ALJ argues that "tangible consequences" should not be merely ones that impact on narrow pecuniary interests, but also ones likely to stifle protected activity).

[Nuclear & Environmental Whistleblower Digest XIII B 18]

ADVERSE ACTION; RULING ON GRIEVANCE

See *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), casenoted at IV C 9, *supra*.

[Nuclear & Environmental Whistleblower Digest XIII B 18]

ADVERSE ACTION; RULING BY ALJ ON MOTION

See *Slavin v. Office of Administrative Law Judges*, 2003-CAA-12 (ALJ Mar. 10, 2003) (ALJ recommended dismissal of complaint alleging that Chief ALJ's order of recusal was an illegal judicial order, finding that as a matter of law, a ruling on a motion could not constitute an adverse employment action).

[Nuclear & Environmental Whistleblower Digest XIII B 18]

ADVERSE ACTION; NEGATIVE PERFORMANCE RATING

In *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003), the ARB observed that "[N]egative performance ratings alone may not constitute adverse action in some venues where proof of material employment disadvantage is necessary to render a complaint actionable...." (citations omitted). Where, however, Complainant established that a negative rating was accompanied by monetary deprivation adverse employment action was established.

[Nuclear & Environmental Whistleblower Digest XIII D]

ADVERSE ACTION; IMMEDIATE RESCISSION WITH NO IDENTIFIABLE HARM NOT ACTIONABLE

Where a demotion is immediately rescinded and Complainant suffered no identifiable harm as a result, the demotion is not an adverse employment action under the whistleblower provision of the FWPCA. *Bostan v. City of Corona*, ARB No. 01-034, ALJ No. 2000-WPC-4 (ARB Mar. 31, 2003) citing *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 1997-ERA-52, slip op. at 10-11 (ARB Feb. 29, 2000).

[Nuclear & Environmental Whistleblower Digest XIV B 1]

EMPLOYER; JOINT EMPLOYEE STANDARD

In ***Gass v. U.S. Dept. of Energy***, 2002-CAA-2 (ALJ Nov. 20, 2002), Complainant alleged that she had been retaliated against by Lockheed Martin Energy Systems (LMES) for protected activity, and had pursued a remedy through the Department of Energy's Office of the Inspector General. She filed a whistleblower complaint with DOL. During the adjudication of this complaint, she filed a FOIA request with DOE seeking documents related to DOE IG's inquiry on her complaint. DOE informed Complainant that the requested information had been destroyed, and Complainant filed the instant whistleblower complaint, alleging that the destruction of the documents was a violation of the environmental whistleblower laws, and that DOE should be considered a "joint employer" with LMES and therefore properly named as a Respondent. The ALJ analyzed in his recommended decision whether DOE was an "employer" under the *Darden* common-law employment standard, and quickly determined that DOE was not Complainant's employer under that standard. The ALJ then turned to the *Stephenson* "acting in the capacity of an employer" (joint-employer) test. The ALJ found that DOE did not change, alter or otherwise interfere with Complainant's employment with LMES within the DOE/LMES contractual framework. The ALJ also found that finding a jurisdictional basis for finding DOE to be Complainant's employer based on theories of adverse inferences based on destruction of evidence and that loss of the evidence so interfered with her case against LMES that it amounted to a substantial interference by DOE of work privilege, relied on unwarranted and unreasonable inferences.

[Nuclear & Environmental Whistleblower Digest XIV B 2]

INDIVIDUAL LIABILITY OF GOVERNMENT OFFICIALS; DIFFERING ANALYSIS FROM DISSENT IN WILLIAMS

In ***Gass v. U.S. Dept. of Energy***, 2002-CAA-2 (ALJ Nov. 20, 2002), Complainant included several Department of Energy employees as named respondents. The ALJ, in a recommended decision, analyzed whether individuals can be held liable under the CAA, SDWA and SWDA. The ALJ concluded that the CAA and SDWA were governed by the Secretary's decision in *Stephenson v. National Aeronautics & Space Administration*, 1994-TSC-5 (Sec'y July 3, 1995), in which the Secretary observed that while several paragraphs in the CAA's whistleblower provisions reference "person," the "substantive prohibition" contained in 7622(a) reference "employer." The Secretary found that "the plain language of these employee protection provisions suggests that they were intended to apply to persons who are employers . . . Any other construction would require a clearer statement of intent . . ." As a result, the Secretary concluded that only employers are subject to the employee protection provisions of the CAA.

The ALJ, however, found the question of individual liability more complex under the SWDA, in part because that statute uses the term "person" rather than "employer" in the prohibition section. The ALJ observed that a dissent in *Williams v. Lockheed Martin Energy Systems, Inc.*, 1995-CAA-10 (ARB Jan. 31, 2001), had concluded that the SWDA provides for individual liability, largely due to the use of the term "person" in substantive prohibition section. The ALJ recognizing that the dissent had logical force, nonetheless concluded that Federal government employees are not subject to personal liability under the SWDA once the entire SWDA employee protection section is considered (noting that analyzing the entire provision was the approach of the Secretary in *Stephenson*).

The ALJ observed that the remedies provided for in the SWDA show an intention to have employers - rather than individuals who are not employers - to make whole a wronged employee. The ALJ also observed that the Secretary's regulations at 29 C.F.R. § 24.2(a) use the term "employer" and that the regulations do not set out any such prohibition for an individual or person who is not an employer. The ALJ also observed that if a violation of the SWDA whistleblower provision was established, it was reasonable to hold the employing agency responsible for the acts of its employees, whereas individual liability would produce respondents without the power to effect the remedies of re-employment or

reinstatement mandated by the SWDA.

[Editor's note: See also **Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 29 CFR Part 1980, 68 Fed. Reg. 31859 (May 28, 2003)** (preamble states that the SOX regulations contain a definition that takes into account SOX's "unique" statutory provisions that identify individuals as well as the employer as potentially liable for discriminatory action).]

[Nuclear & Environmental Whistleblower Digest XIV B 4 e]

AGENCY ITSELF -- NOT OFFICES WITHIN AN AGENCY OR AGENCY SUPERVISORY PERSONNEL -- IS THE EMPLOYER OF AN AGENCY EMPLOYEE

In ***Greene v. Environmental Protection Agency***, 2002-SWD-1 (ALJ Feb. 10, 2003), the Complainant was an ALJ with the EPA. Her complaint named, in addition to EPA itself, the EPA OALJ, EPA OIG, and the Chief ALJ of EPA. The ALJ presiding over the instant whistleblower complaint for DOL held that EPA was the Complainant's employer, but that EPA OALJ, being merely a component of EPA, was not Complainant's employer with the meaning of the environmental whistleblower laws. The ALJ observed that although EPA OIG has some operational independence from EPA, it nonetheless was not Complainant's employer and did not exercise supervisory control over her. Finally, the ALJ found that the EPA Chief ALJ was Complainant's supervisor -- not her employer.

[Nuclear & Environmental Whistleblower Digest XVI B 3]

PRELIMINARY ORDER; ALJ'S OBLIGATION TO ISSUE PRELIMINARY ORDER WHERE COMPLAINT IS MERITORIOUS; JURISDICTION LOST ONCE PARTY FILES PETITION FOR ARB REVIEW

In an ERA whistleblower case, where the ALJ finds that the complaint has merit, the ALJ is required under 29 C.F.R. § 24.7(c)(2) (2002) to issue a preliminary order granting interim relief such as reinstatement, back pay, and such other actions as may be necessary to abate the violation -- but not compensatory damages.

In ***Trueblood v. Von Roll America, Inc.***, ARB Nos. 03-082 and 03-083, ALJ Nos. 2002-WPC-3 to 6 and 2003-WPC-1 (ARB Apr. 30, 2003), the ARB remanded the case where the ALJ had not issued the preliminary order required under 29 C.F.R. § 24.7(c)(2) (2002), until after the Respondent had already petitioned for ARB review of the Recommended Decision and Order. The ARB questioned whether the ALJ retained jurisdiction once the petition for review had been filed, and therefore remanded the case for issuance of the preliminary order with leave to Respondents to refile their petitions for review within 10 days of the issuance of the preliminary order on remand.

In ***McNeill v. Crane Nuclear, Inc.***, ARB No. 02-002, ALJ No. 2001-ERA-3 (ARB Dec. 20, 2002), the Respondent filed a motion with the ARB seeking stay of the preliminary relief order. The ARB denied the motion, however, because the ALJ had not issued a preliminary order.

[Nuclear & Environmental Whistleblower Digest XVI E]

ATTORNEY'S FEE; ATTORNEY'S STANDING TO ASSERT RIGHTS SEPARATE FROM THOSE OF THE COMPLAINANT

In *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1 (ARB Jan. 9, 2003), Complainant's attorney had filed a initial and reply brief before the ARB, but Complainant subsequently determined to represent himself, and the attorney filed an application to intervene for the limited purpose of protecting her right to attorney's fees for hours expended in work before the Board. The ARB issued an Order to Show Cause directing the attorney to brief the ARB's authority in this respect, indicating its concern that there was not any legal authority to support "the proposition that an attorney has a right separately enforceable from that of a complainant to obtain attorney fees under the whistleblower provisions of the [CAA, CERCLA and TSCA].

[Nuclear & Environmental Whistleblower Digest XVIII C 8]

DISMISSAL FOR CAUSE; FAILURE TO FILE TIMELY BRIEF

In *Pickett v. Tennessee Valley Authority*, ARB No 02-076, ALJ NO. 2001-CAA-18 (ARB Oct. 9, 2002) and *McQuade v. Oak Ridge Operations Office*, ARB No. 02-087, ALJ Nos. 1999-CAA-8 to 10 (ARB Oct. 18, 2002), the ARB dismissed appeals based on Complainant's counsel's failure to file a timely brief or request for an extension of time on attorney's fee issues. The ARB grounded the dismissals on the inherent power of a court to dismiss a case for lack of prosecution.

In *McQuade*, the petitioner was Complainants' former counsel, who was seeking review of the ALJ's recommended decision not to award him attorneys' fees. In *McQuade*, counsel missed the ARB's initial deadline for filing a brief. The ARB was not persuaded by counsel's response to an order to show cause, in which he alleged that he had a heavy trial schedule and that OALJ had failed to provide him with a requested transcript. The hearings mentioned by counsel occurred more than a month after the brief due date.

[Nuclear & Environmental Whistleblower Digest XX E]

STATE SOVEREIGN IMMUNITY

The United States Supreme Court has denied a motion to direct the Clerk to file a petition for writ of certiorari out-of-time in *Migliore v. Rhode Island Dept. of Environmental Management*, 2003 WL 1447821, 71 USLW 3609 (Mar. 24, 2003). Case below *Rhode Island Department of Environmental Management v. U.S. Dept. of Labor*, 304 F.3d 32 (1st Cir. Aug. 30, 2002), administrative Case Nos. ARB No. 99-118, ALJ No. 1998-SWD-3.

[Nuclear & Environmental Whistleblower Digest XX E]

STATE SOVEREIGN IMMUNITY; NO ABROGATION BY CONGRESS; NO WAIVER BY STATE MERELY BECAUSE IT ACCEPTED FEDERAL FUNDING

In *Blodgett v. Tennessee Dept. of Environment and Conservation*, 2003-CAA-7 (ALJ Jan. 28, 2003), the ALJ found that sovereign immunity granted to the Respondent under the 11th Amendment of the U.S. Constitution precluded the complainant from filing a federal whistleblower claim against the Respondent, a state agency. The ALJ rejected Complainant's argument that Congress had abrogated state sovereign immunity under whistleblower provision of the CAA. Complainant cited a Committee Proposal stating that the section was applicable to state employees, but the ALJ concluded that without a clear abrogation of state immunity in the Clean Air Act itself, there was insufficient evidence of Congressional abrogation of state sovereign immunity. Complainant also alleged that section 7418 of the CAA was a waiver clause; however, the ALJ concluded that this was a waiver of Federal, not State, sovereign immunity, and then only for the purposes of that section, and not the whistleblower section.

The ALJ also rejected Complainant's argument that Tennessee had waived immunity by accepting millions of dollars in federal funding for environmental programs. The ALJ wrote that "[t]he Supreme Court has held that in deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction. *Edelman v. Jordan et. al.*, 415 U. S. 651,673, 94 S.Ct. 1347, 1361 (1974)" and found no evidence that the State of Tennessee had waived its immunity from federal environmental whistleblower claims.

[Nuclear & Environmental Whistleblower Digest XXI C]

LAW OF THE CASE; EXCEPTIONAL CIRCUMSTANCES STANDARD

In *White v. The Osage Tribal Council*, ARB No. 00-078, ALJ No. 1995-SDW-1 (ARB Apr. 8, 2003), the ARB applied an "exceptional circumstances" standard to determine that it would not deviate from the doctrine of law of the case to reconsider findings it made in a prior remand decision in the case. The ARB cited in this regard *Huffman v. Saul Holdings Ltd. Partnership*, 262 F.2d 1128, 1133 (10th Cir. 2001), for the proposition that exceptional circumstances supporting deviation from law of the case doctrine include "(1) a dramatic change in controlling legal authority; (2) significant new evidence that was not earlier obtainable through due diligence but has since come to light; or (3) if blatant error from the prior . . . decision would result in serious injustice if uncorrected." *White*, slip op. at 2, quoting *Huffman, supra*.

STAA

Surface Transportation Assistance Act

[STAA Whistleblower Digest II B 2]

FILING OF COMPLAINT; VISIT TO OSHA OFFICE

Where Complainant had visited an OSHA office and brought up matters potentially cognizable under the STAA whistleblower law, but the OSHA official told him that a complaint would not be taken until the Complainant had exhausted grievance/arbitration rights, and it was only after the arbitration was completed that Complainant filed a written complaint, Respondent argued that the complaint was not timely because 180 days had already passed. The ARB adopted the ALJ's conclusion that Complainant filed a valid and timely complaint when he first visited the OSHA office. The ALJ had reasoned that although the OSHA official had not followed the OSHA procedural manual's requirements for filing a complaint; the manual was neither a regulation nor a statute; that the STAA regulations do not mandate procedure, form or content for filing a complaint; that the notes made by the OSHA official together with other records at the OSHA office sufficiently identified the essential nature of the complaint and the identity of the parties; and that Respondent had adequate and sufficient notice to prepare for the hearing. ***Harrison v. Roadway Express, Inc.***, ARB No. 00-048, ALJ No. 1999-STA-37 (ARB Dec. 31, 2002).

[STAA Whistleblower Digest II E 4]

FAILURE TO ADMINISTER OATH

In ***Jackson v. Wyatt Transfer, Inc.***, ARB No. 01-076, ALJ No. 2000-STA-57 (ARB Apr. 30, 2003), the ALJ's failure to administer an oath or affirmation to Complainant and to Respondent's president/CEO was such serious error that it required vacating of the Recommended Decision and Order and a remand to the ALJ. The ARB considered caselaw to the effect that where a witness is permitted to testify without being sworn a waiver may be presumed, but found that in the instant case, with both Complainant and Respondent having appeared *pro se*, there could be no finding of waiver. The Board held " ... where a mandatory requirement that witnesses be sworn exists, but none of the witnesses were sworn, and the party claiming the right was not represented by counsel at the hearing, we will not find default. Thus, on appeal Jackson may raise the issue of the ALJ's failure to swear witnesses at the hearing." The Board, however, did not go so far as holding that the testimony given was void or the R D & O was void, ordering a new hearing, or requiring the appointment of a new judge. Rather, the Board merely directed the ALJ on remand to "remedy the defects ... in a manner he deems proper and efficacious."

[STAA Whistleblower Digest II H 4 a]

SUBSTANTIAL EVIDENCE

In ***Dalton v. U.S. Dept. of Labor***, 2003 WL 356780 (10th Cir. Feb, 19, 2003) (unpublished), the 10th Circuit reversed the ARB's order dismissing Complainant's STAA complaint, where the court found that substantial evidence supported dispositive findings by the ALJ, see 29 C.F.R. § 1978.209(c)(3) -- specifically, Complainant's "reasonable apprehension" of serious injury with respect to cables attached to winches on the hauler. The ALJ's findings were based largely on credibility determinations, and the court faulted the ARB for not explaining why it was necessary for the ALJ to have credited certain witnesses. Although there was strong impeaching evidence in the record in regard to Complainant's subjective fear of danger from the condition of the cables, the court found that it was not so damning as to overwhelm other evidence in his favor.

[STAA Whistleblower Digest II H 4 c]

SUPPLEMENTATION OF BRIEF

In *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA-33 (ARB May 9, 2003), the *pro se* Complainant timely submitted a brief, following numerous extensions. Several months later he submitted a letter seeking to supplement the brief. Citing the fact that the briefing period had ended and the Board's need to manage its docket, the ARB returned the filing to the Complainant.

[STAA Whistleblower Digest II H 4 c]

ISSUE RAISED FOR FIRST TIME AFTER ARB DECISION

In *Young v. Schlumberger Oil Field Services*, ARB No. 00-075, ALJ No. 2000-STA-28 (ARB May 1, 2003), the ARB had issued a Final Decision and Order on February 28, 2003. On April 2, 2003, Complainant requested further review, specifying with more particularity the nature of the argument in her *pro se* brief that the ALJ had failed to render adequate assistance, alleging that what she had meant was that the ALJ had acquiesced in evidence tampering by the Respondents legal representative. The ARB found that, without any explanation for the delay in raising this issue, it would decline to further consider the allegation.

[STAA Whistleblower Digest II J]

ARB BRIEFING FORMAT REQUIREMENTS; FAILURE TO COMPLY

In *Roberts v. Marshall Durbin Co.*, ARB No. 03-071, ALJ No. 2002-STA-35 (ARB Apr. 15, 2003), the ARB returned a brief to a *pro se* Complainant who used single spacing rather than double spacing, except in regard to block quotations. The ARB viewed the submission as an attempt to evade its 30 page limitation as specified in the briefing schedule.

[STAA Whistleblower Digest II M]

ATTORNEY MISCONDUCT; USE OF JUDICIAL PROCESS TO INTIMIDATE AND HARASS

See *Somerson v. Mail Contractors of America Inc.*, 2003-STA-11 (ALJ Jan. 10, 2003), casenoted at V A, *infra* (where ALJ concluded that Complainant's attorney was more than a bystander to his client's attempts to intimidate witnesses and opposing counsel, the behavior was reported to the relevant Board of Professional Responsibility).

[STAA Whistleblower Digest II R]

LAW OF THE CASE; REOPENING THE RECORD ON REMAND

In *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 1999-STA-5 (ARB Dec. 30, 2002), the ARB in a prior decision had rejected the ALJ's finding that Complainant's back pay entitlement ended when he declined a position with another trucking firm, holding that Respondent had failed to prove that such job was substantially equivalent to the position Complainant held with Respondent. The ARB had remanded the case for the ALJ to determine if or when the back pay entitlement was tolled with additional instructions.

On remand, the ALJ permitted Respondent over Complainant's objections to supplement the record with evidence regarding the availability of truck driver positions. The ALJ observed that the mandate doctrine (which is a subset of the law of the case doctrine) requires the obedience of inferior courts to the decisions of superior courts, but interpreted the ARB remand order as inviting the taking of new evidence.

On review, the ARB disagreed, holding that the law of the case doctrine prohibited the ALJ from

entertaining new evidence on this issue, finding that in the previous decision it had "unambiguously held that [Respondent] had failed to introduce **any** evidence regarding the availability of other substantially equivalent jobs, and therefore failed to prove this element of its affirmative defense of failure to mitigate." (emphasis as in original). The Board found that its remand order did require the ALJ to evaluate Complainant's job history, and to permit the introduction of evidence regarding the date of reinstatement and Complainant's efforts at employment between the time of the hearing and the reinstatement, but that "the need to fill these factual gaps did not open the door for [Respondent] to introduce evidence regarding ... an issue the Board had finally resolved."

[STAA Whistleblower Digest II S]

DUE PROCESS; THEORY OF LIABILITY FIRST RAISED IN POST-HEARING BRIEF

In *Kelley v. Heartland Express, Inc. of Iowa*, ARB No. 00-049, ALJ No. 1999-STA-29 (ARB Oct. 28, 2002), the ALJ had concluded that due process would be compromised if Complainant's new theories of liability, first raised in his post-hearing brief, were considered, the ALJ noting that these additional issues had not been raised and litigated by the implied consent of the parties. The ARB agreed, writing:

The ALJ's refusal to consider Complainant's new theories of liability after trial is consistent with applicable law. See *Douglas v. Owens*, 50 F.3d 1226, 1235-37 (3d Cir. 1995)(introduction of evidence without objection on one theory of liability did not show trial by consent or fair notice of new theory of recovery); *Carlisle Equipment Co. v. U.S. Secretary of Labor*, 24 F.3d 790, 794-95 (6th Cir. 1994)(due process violation where introduction of evidence did not fairly serve notice that new safety violation was entering case); *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357-59 (6th Cir. 1992)(STAA defendant deprived of due process when Secretary's decision based on theory that was not included in notice to carrier or tried by implied consent of parties).

Complainant would have had ample opportunity to advance his additional theories if he had amended his pleadings prior to the hearing below. 29 C.F.R. § 1978.106(a) and 29 C.F.R. § 18.5(e) (2002). The ALJ held that Kelley failed to do so at his peril. ... We decline to provide Complainant an unwarranted second bite at the apple by remanding his case to the ALJ for a hearing on his new theories, as requested in his brief to this Board.

[STAA Whistleblower Digest III I]

PRO SE LITIGANTS; ALTHOUGH ALJ BEARS A RESPONSIBILITY TO PROVIDE SOME ASSISTANCE, BURDEN OF PROOF ON LITIGANT REMAIN UNCHANGED

In *Young v. Schlumberger Oil Field Services*, ARB No. 00-075, ALJ No. 2000-STA-28 (ARB Feb. 28, 2003), the ARB interpreted Complainant's brief as arguing that the ALJ breached a duty to assist her due to her *pro se* status. The ARB wrote: "We agree with the proposition that ALJs have some responsibility for helping *pro se* litigants. . . . However, 'the burden of proving the elements necessary to sustain a claim of discrimination is no less' for *pro se* litigants than for litigants represented by counsel. . . . Although the ALJ has some duty to assist *pro se* litigants, he also has a duty of impartiality. A judge must refrain from becoming an advocate for the *pro se* litigant. . . ." Slip op. at 9 (citations omitted). The ARB reviewed the record and found that the ALJ had satisfied both his duty to assist the Complainant, while also remaining impartial and fair to both sides.

[STAA Whistleblower Digest IV A 2 a]

PRIMA FACIE CASE; SUMMARY DECISION APPROPRIATE WHERE CAUSAL LINK ELEMENT NOT ESTABLISHED BECAUSE TERMINATION DECISION OCCURRED PRIOR TO PROTECTED ACTIVITY

Where the ALJ found that it was undisputed that the decision to terminate Complainant's employment occurred prior to the alleged protected activity, the ALJ recommended dismissal of the complaint because the essential element of a *prima facie* case – causal link or nexus between the protected activity and the termination - could not be established. Complainant did not address this finding before the ARB, and accordingly, the ARB adopted the ALJ's Decision and Order. ***Bushway v. Yellow Freight, Inc.***, ARB No. 01-018, ALJ No. 2000-STA-52 (ARB Dec. 13, 2002).

[STAA Whistleblower Digest IV B 2 e]

"LEEWAY FOR IMPULSIVE BEHAVIOR" STANDARD DOES NOT APPLY WHERE COMPLAINANT'S ACTIONS WERE CONTINUING AND REASONED

In ***Harrison v. Roadway Express, Inc.***, ARB No. 00-048, ALJ No. 1999-STA-37 (ARB Dec. 31, 2002), Complainant had been "red tagging" (marking as out-of-service) trailers, and after concluding that management had been ignoring his safety concerns when he found that the problems had not been fixed or that tags had evidently been removed, began red tagging without prior supervisory permission as required by Respondent's policy. The ALJ applied the *Kenneway v. Matlack, Inc.*, 1988-STA-20 (Sec'y June 15, 1989), "leeway for impulsive behavior" standard for balancing an employer's right to maintain order and respect for its business by correcting insubordinate against the right to engage in statutorily protected behavior. The ALJ found that Complainant's actions in violating the policy about obtaining permission to red tag was reasonable in light of his good faith belief that his safety concerns were being ignored. The ARB found that resort to the *Kenneway* standard was error.

The ARB first indicated that *Kenneway* does not apply to section 31105(a)(1)(A) "filed a complaint" cases, as opposed to section 31105(a)(1)(B) "refusing to operate a vehicle" cases. The ARB indicated that *Kenneway* and similar DOL decisions should only be applied in cases involving impulsive conduct incidental to the protected activity where the complainant is emotionally motivated – where the conduct is temporary and uncalculated.

In the instant case, Complainant's conduct was "unemotional, sustained and deliberate" and "continuing and reasoned." Thus, *Kenneway* does not apply.

[STAA Whistleblower Digest IV C 5]

PRETEXT; EMPLOYER'S POLICY; WEIGHING COMPETING BUSINESS INTERESTS WITH CONGRESSIONAL PURPOSE TO PROMOTE HIGHWAY SAFETY

In ***Harrison v. Roadway Express, Inc.***, ARB No. 00-048, ALJ No. 1999-STA-37 (ARB Dec. 31, 2002), Respondent had a policy that trailer could be "red-tagged" (put out-of-service for safety related reasons) by yard personnel only after they had communicated with supervisory personnel and been granted permission to apply the tag. The ALJ had applied by analogy the test in *Self v. Carolina Freight Carrier Corp.*, 1991-STA-25 (Sec'y Aug. 6, 1992), to find that Complainant had been retaliated against for his red-tagging activity. The ARB, however, found *Self* to be distinguishable both in regard to the nature of the protected activity and its relation to the employer's policy. The ARB found that in *Self*, the employer's "availability" policy put the driver in the position of either driving while fatigued in violation of federal safety regulations or facing discipline. In the instant case, Complainant was free to make safety complaints – the policy merely restricted Complainant's ability to take equipment out of service.

The ARB also observed that the ALJ had not correctly applied the balancing test found in *Self*, weighing legitimate business interests against Congressional intent to promote road safety. The ALJ

had merely stated the interests, and had not proceeded to determine which of the policies was entitled to greater weight in the particular circumstances of the case. The ARB found that because Complainant was free to voice safety concerns, there was no conflict between competing policies (in fact, since there was no conflict, it was not even necessary to employ the balancing test). Employer's policy in the instant case was to prevent unqualified personnel from pulling equipment out of service unnecessarily.

[STAA Whistleblower Digest IV D 3]

DUAL MOTIVE; EMPLOYER'S PROOF THAT IT WOULD HAVE FIRED COMPLAINANT REGARDLESS OF THE PROTECTED ACTIVITY; PROVOCATION OF COMPLAINANT; REASONABLENESS OF COMPLAINANT'S RESPONSE

In *Korolev v. Rocor International*, ARB No. 00-006, ALJ No. 1998-STA-27 (ARB Nov. 26, 2002), Complainant engaged in protected activity when he refused to drive through a fuel/inspection lane because he was too fatigued and out of hours; however, Respondent legitimately fired the Complainant because during a confrontation over the work refusal, Complainant bumped the night supervisor with his truck as the supervisor was attempting to prevent Complainant from leaving the terminal. Complainant denied the bumping, but the presiding ALJ found that it had occurred and the ARB found that substantial evidence supported that finding. The ARB affirmed the ALJ's finding under the dual motive analysis that Respondent would have terminated Complainant regardless of the protected activity.

Complainant, citing *Moravec v. HC & M Transportation, Inc.*, 1990-STA-44 (Sec'y Jan. 6, 1992), argued that the bumping incident was not a legitimate reason for the firing because the supervisor provoked him by unlawfully insisting that he drive through the fuel/inspection lane. The ALJ, however, had found Complainant acted unreasonably under the circumstances, and the ARB found that substantial evidence supported that finding. The ARB found that *Moravec* was not helpful to Complainant because "it involved an employee challenging a supervisor to a fight, an 'indiscretion,' and not particularly egregious behavior compared to here, an assault with a truck."

[STAA Whistleblower Digest IV C 7]

REHIRING; A RESPONDENT MAY DECLINE TO REHIRE BASED ON POOR PRIOR PERFORMANCE EVEN IF IT HAS KNOWLEDGE OF COMPLAINANT'S PROTECTED ACTIVITY

In *Becker v. West Side Transport, Inc.*, ARB No. 01-032, ALJ No. 2000-STA-4 (ARB Feb. 27, 2003), the ARB wrote:

The employee protection provision of the STAA does not require an employer to reinstate an employee who engages in STAA-protected activity, quits his employment and subsequently changes his mind. Moreover, an employer is not required to rehire an employee when that employer is dissatisfied with the employee's previous work record. See, e.g., *Gibson v. Arizona Public Service Co.*, 90-ERA-29, 46 and 53 (Sec'y Sept. 18, 1995). In *Gibson* a supervisor who had knowledge of a former employee's protected activity did not select that person for rehire. The Secretary ruled that respondent was justified in its refusal to rehire the complainant because the supervisor took into account the complainant's prior performance as an unproductive and uncooperative employee.

In *Becker*, the ARB found that substantial evidence supported the ALJ's finding that Complainant's conduct towards Respondent's employees and managers constituted a legitimate, nondiscriminatory reason for refusing to rehire the Complainant. The ARB found that Complainant's burden was to establish that this reason was pretext, and that he had failed to do so.

[STAA Whistleblower Digest V A]

PROTECTED ACTIVITY; COMPLAINANT'S USE OF E-MAIL AND WEBSITES TO HARASS WITNESSES AND OPPOSING COUNSEL

In *Somerson v. Mail Contractors of America Inc.*, 2003-STA-11 (ALJ Jan. 10, 2003), Complainant asserted that Mail Contractors of America, Inc., its attorney, and that attorney's law firm, acted contrary to the employee protection provisions of the STAA by filing before the administrative law judge in Case No. 2002-STA-44 filings intended to induce the ALJ to dismiss a whistleblower complaint previously filed by Complainant against Mail Contractors. In that prior complaint, Respondent had filed a motion for a protective order, supporting that motion with copies of anonymous e-mails to two witnesses and counsel for Respondent, and websites dedicated to haranguing counsel for Respondent, evidently created by the Complainant. The ALJ in that prior case found that Complainant's intimidation of witnesses and opposing counsel was so severe that he dismissed the claim outright, and certified the facts to the U.S. District Court with a request for appropriate remedy.

The ALJ considering the instant complaint found that it was "completely specious." The ALJ granted the Respondent's motion for summary decision, holding that Respondent's filing of a motion for a protective order was not an adverse employment action (observing, moreover, that Complainant's behavior in the prior ALJ proceeding was not protected activity), and that Respondent's attorney and his law firm were not Complainant's employer.

The ALJ found that Complainant's attorney's response to the motion for summary decision failed to address the legal issues in question and was nothing short of an irrelevant and vicious attack on Respondent's attorneys. The ALJ concluded that Complainant's attorney was more than a bystander to his client's attacks, and therefore reported the behavior to the relevant Board of Professional Responsibility. The ALJ wrote:

Th[e Complainant's attorney's] continuum of attacks, intimidation and harassment under the guise of representing a client constitutes an abuse of the administrative process. It wastes this Office's time and the valuable time of OSHA investigators. It perverts the use of an employee protection statute, the STAA. It violates an attorney's rules of professional responsibility, and constitutes a breach of the duty that an attorney owes his client.

(footnote omitted).

[STAA Whistleblower Digest V A]

COMPLAINTS ABOUT YARD HORSES NOT PROTECTED AS THEY ARE NOT COMMERCIAL MOTOR VEHICLES WHERE THEY DID NOT LEAVE THE TERMINAL YARD

In *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-37 (ARB Dec. 31, 2002), Complainant alleged, *inter alia*, that he engaged in protected activity by "red tagging" (out-of-service tagging) yard horses. The ARB, however, agreed with the ALJ's finding that because the yard horses were used wholly within the terminal, they were not commercial motor vehicles according to FHA regulations, and, therefore, red-tagging of yard horses were not covered by the FMCSR [Federal Motor Carrier Safety Regulations] and, thus, cannot constitute protected activity under the STAA's whistleblower provision. See 49 C.F.R. § 390.5 (definition of "commercial motor vehicle").

[STAA Whistleblower Digest V A 2 a]

PROTECTED ACTIVITY; "FILING A COMPLAINT" REQUIRES COMMUNICATION TO A SUPERVISOR

In *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-37 (ARB Dec. 31, 2002), the ARB reviewed the caselaw relevant to what constitutes "filing a complaint" for purposes of

establishing protected activity under the STAA. In conclusion, the ARB stated: "[T]he 'filed a complaint' language of STAA § 31105 (a)(1)(A) protects from discrimination an employee who communicates a violation of a commercial motor vehicle regulation, standard or order **to any supervisory personnel.**" (citation omitted; emphasis added). The ARB then considered whether Complainant's "red-tagging" of trailers was a protected activity. Based on the sketchy evidence of record, the ARB concluded that red-tagging meant notifying the relay dispatcher and the dock supervisor about any safety problems found with a trailer, obtaining approval for red tagging from Relay, filling out the tag, affixing the tag onto the unsafe trailer, moving the trailer to or from the dock, and, at the end of the shift, turning the bottom half of each tag in to the Relay Department.

The Board then determined that red-tagging was not "filing a complaint" and therefore not protected activity. The ARB wrote: "Filling out the tag and affixing it to a defective trailer so that 'others,' i.e., non-supervisory personnel, might be made aware of his safety concerns is not a communication to a supervisor about a violation of a commercial motor vehicle regulation, standard or order. Furthermore, turning in the bottom of the tag to management at the end of a shift was only a confirmation of Harrison's earlier oral, or computer generated, notification to his supervisors that he had found unsafe equipment." In other words, "filing a complaint" must be a communication to a supervisor concerning the safety of commercial motor vehicles and not merely a confirmation of an earlier safety complaint.

The ALJ had relied on *Schulman v. Clean Harbors Env'tl. Servs., Inc.*, ARB No. 99-015, ALJ No. 1998-STA-24 (ARB Oct. 18, 1999) (filing of Vehicle Inspection Reports (VIRs) constituted protected activity), in finding that the red-tagging was protected activity. The ARB, however, distinguished *Schulman* on the ground that the purpose of VIRs was to apprise management of equipment defects, and the driver was also required to immediately inform an appropriate management official of defects. In contrast, the record in the instant case demonstrated that red tagging trailers did not constitute filing a complaint because it was not a communication to a supervisor concerning commercial motor vehicle safety.

[STAA Whistleblower Digest V A 4 c iii]

COMMUNICATION REQUIREMENT

In *Stout v. Yellow Freight Systems, Inc.*, ARB No. 00-017, ALJ No. 1999-STA-42 (ARB Jan. 31, 2003), the ARB affirmed the ALJ's holding that where "Complainant only made general references to being ill and fatigued, rather than explicitly conveying the extent of his medical impairment and that his refusal to drive was because his ability to do so would result in a danger to himself or the public ... Complainant's statements were insufficient to satisfy the communication requirement of the STAA." *Stout v. Yellow Freight Systems, Inc.*, 1999-STA-42 (ALJ Dec. 3, 1999).

[STAA Whistleblower Digest V B 2 a iv]

WORK REFUSAL; FAILURE OF COMPLAINANT TO GET SUFFICIENT REST; WHETHER THAT FAILURE WAS DELIBERATE IS A MATERIAL ISSUE OF FACT

In *Eash v. Roadway Express, Inc.*, ARB No. 00-061, ALJ No. 1998-STA-28 (ARB Dec. 31, 2002), the ALJ had granted summary judgment on the ground that there was no genuine issue of material fact as to whether Complainant had made himself unavailable for work, accepting Respondent's contention that *Ass't Sec'y of Labor and Porter v. Greyhound Bus Lines*, ARB No. 98-116, ALJ No. 96-STA-23 (ARB June 12, 1998), holds that "[t]he Act does not protect an employee who through no fault of the employer, has made himself unavailable for work."

The ARB, however, essentially found that *Porter* was based on a driver "deliberatively" making himself unavailable for work. In the instant case, although Complainant had not gotten the necessary rest to be ready when called for duty, the ARB concluded that a material issue of fact remained regarding

the circumstances surrounding Complainant's fatigue.

[STAA Whistleblower Digest VI A]

ADVERSE ACTION; "ULTIMATE EMPLOYMENT ACTIONS"

In *Calhoun v. United Parcel Service*, ARB No. 00-026, ALJ No. 1999-STA-7 (ARB Nov. 27, 2002), the ALJ had cited the Fourth Circuit's ruling in *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981), for the proposition that in Title VII cases the question has focused on "whether there has been discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting and compensating" The ARB, although agreeing with the ALJ's conclusions that Respondent had not engaged in adverse employment action under the STAA in the case sub judice, observed that subsequent developments in Title VII law have established that "adverse actions need not rise to the level of 'ultimate employment decisions.' See *Von Gunten v. Maryland*, 243 F.2d 858 (4th Cir. 2001)(Title VII case). In *Von Gunten* the Fourth Circuit stated that adverse action includes not only ultimate employment decisions such as firing or demotion, but also actions that result in "adverse effect[s] on the terms, conditions, or benefits of employment." *Id.* at 866. Similarly, the STAA prohibits an employer from "discharg[ing] . . . disciplin[ing] or discriminat[ing] against an employee regarding pay, terms, or privileges of employment. . ." 49 U.S.C. §31105(a)(1)."

[STAA Whistleblower Digest VI B 4]

ADVERSE EMPLOYMENT ACTION; FILING OF MOTION BY RESPONDENT

See *Somerson v. Mail Contractors of America Inc.*, 2003-STA-11 (ALJ Jan. 10, 2003), casenoted at V A, *supra*.

[STAA Whistleblower Digest VI B 4]

ADVERSE ACTION; PROGRAM TO REDUCE PRE-START INSPECTION TIME

In *Calhoun v. United Parcel Service*, ARB No. 00-026, ALJ No. 1999-STA-7 (ARB Nov. 27, 2002), the ARB considered whether Respondent's program to reduce Complainant's pre-trip inspection time was an adverse employment action taken in retaliation for protected activity. The ARB wrote:

An adverse action under the STAA is an action taken by the employer against an employee that results in the discharge of the employee, or discipline or discrimination against the employee regarding pay, terms, or privileges of employment. 49 U.S.C. 31105(a)(1). The action must have tangible job consequences. See *Shelton v. Oak Ridge National Laboratories*, ARB Case No. 98-100, slip op. at 9 (ARB Mar. 30, 2001), ("We are persuaded that in the absence of any showing that some tangible job consequence flowed from it, the "Oral Reminder" issued to Shelton is not an adverse action.")

Complainant was considered a good driver with an impressive safety record. Respondent, however, in performing an audit of the amount of time spent on pre-trip inspection identified Complainant (and other drivers) as taking well outside the time Respondent considered appropriate in ideal conditions and the large majority of drivers. Drivers were paid for pre-trip inspection time, and Respondent began a program designed to reduce the time spent on this function by drivers whose record was to conduct uncharacteristically long inspections. Complainant alleged that a number of Respondent's actions were in retaliation for protected activity. The ARB found that none of Respondent's actions, however, were retaliatory:

Respondent's audit of Complainant's start work procedures was not retaliatory because they did not discriminate against Complainant in particular, nor did they affect his pay, terms or privileges of employment. The audit was not designed to prevent an

adequate pre-trip inspection but instead to find a reasonable method to reduce the time spend on this function – a legitimate and non-discriminatory purpose. Although Complainant received less pay because his pre-start time was reduced, there was no evidence that Complainant was entitled to such pay.

Similarly found not to be disciplinary or discriminatory were Respondent's pre-assembly and pre-inspection of Complainant's trailers; Respondent's informing Complainant that the mechanics preassembling his trailers would be disciplined if Complainant found defects in his equipment (the ARB finding that this instruction was related to a concern that mechanics perform their tasks properly and that drivers not be slowed down by "break downs on property"); requiring Complainant to attend morning meeting (an accepted business practice for communicating company concerns) and to count restroom breaks against his meal-time allotment (which applied to all drivers at the facility); and written criticisms.

Compare *Daniel v. TIMCO Aviation Services, Inc.*, 2002-AIR-26 (ALJ June 11, 2003) (ALJ argues that "tangible consequences" should not be merely ones that impact on narrow pecuniary interests, but also ones likely to stifle protected activity).

[STAA Whistleblower Digest VI B 4]

ADVERSE ACTION; WRITTEN CRITICISM

In *Calhoun v. United Parcel Service*, ARB No. 00-026, ALJ No. 1999-STA-7 (ARB Nov. 27, 2002), the ARB found that copies of audits and evaluations of Complainant's performance dating back to 1978 had not negatively impacted Complainant's pay, terms or privileges of employment such to violate 49 U.S.C. §31105(a)(1). The ARB stated that "[a]lthough the documents do contain negative comments regarding Calhoun's job performance, the purpose of the documentation was to record that training or instruction took place or to serve management as a tool; these documents do not provide the basis for subsequent employment decisions with respect to discipline, compensation, or job assignments. ... Moreover, the comments contained therein are consistent with Calhoun's own interpretation of his performance. ... Calhoun has failed to show that the criticism was in retaliation for his protected activity and he has failed to show how it has affected his pay, terms or privileges of employment. The Board also finds that UPS had a nondiscriminatory reason for placing these comments in Calhoun's file." (citations omitted). In this regard, the ARB cited *Harrington v. Harris*, 118 F.3d 359, 366 (5th Cir. 1997) and *Shelton v. Oak Ridge National Laboratories*, ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB Mar. 30, 2001), for the proposition that a supervisor's criticism of an employee, without more, does not constitute an adverse employment action.

[STAA Whistleblower Digest VI B 4]

ADVERSE EMPLOYMENT RECOMMENDATION; COMPLAINANT MUST ESTABLISH THAT THE COMMUNICATION WAS IN RETALIATION FOR PROTECTED ACTIVITY

In *Becker v. West Side Transport, Inc.*, ARB No. 01-032, ALJ No. 2000-STA-4 (ARB Feb. 27, 2003), Respondent had reported Complainant's work history to a company that maintains employment histories of commercial truck drivers, and included a statement that Complainant had a record of "excessive complaints." Citing *Earwood v. Dart Container Corp.*, 1993-STA-16 (Sec'y Dec. 7, 1994) and *Leideigh v. Freightway Corp.*, 1988-STA-13 (Sec'y June 10, 1991), for the proposition that communication of an adverse recommendation in retaliation for protected activity is a violation of the STAA, Complainant argued that Respondent violated the STAA by providing negative information about his job performance to the employment history services company.

The ARB, however, distinguished *Earwood* and *Leideigh* insofar in both those cases the communication of an adverse recommendation was shown to be motivated by retaliation for STAA protected activity. The observed that the words "excessive complaints" would not necessarily be understood referencing

STAA-protected activity. Moreover, the ARB found that the record showed that Complainant had made a wide variety of complaints to management, most of which were not STAA-related. Thus, the ARB concluded that Complainant had not shown by a preponderance of the evidence that Respondent had provided the information to the reporting company in retaliation for his STAA-related activity.

[STAA Whistleblower Digest VI D]

HOSTILE WORK ENVIRONMENT; PROGRAM TO REDUCE PRE-START INSPECTION TIME

In *Calhoun v. United Parcel Service*, ARB No. 00-026, ALJ No. 1999-STA-7 (ARB Nov. 27, 2002), the Respondent's program to monitor drivers whose pre-trip inspection time was uncharacteristically long, and to reduce that time was found under the facts of the case not to constitute a hostile work environment, but actions that were "legitimate, logical and effective measures...."

[STAA Whistleblower Digest VII B 5 c]

EMPLOYER; OUTSIDE COUNSEL FOR RESPONDENT

See *Somerson v. Mail Contractors of America Inc.*, 2003-STA-11 (ALJ Jan. 10, 2003), casenoted at V A, *supra*.

[STAA Whistleblower Digest IX B 2 a iii]

BACK PAY; REPRESENTATIVE EMPLOYEE METHOD; UNREALISTIC EXACTITUDE NOT REQUIRED

In *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 1999-STA-5 (ARB Dec. 30, 2002), the ALJ had employed the "representative employee" method for calculating backpay. Respondent argued that such would result in a windfall to Complainant because his attendance record established that he had never earned total wages similar to those of the representative employees. The ALJ declined to make an adjustment, stating that he would not speculate about Complainant's conduct and would resolve uncertainties against the discriminating employer. The ARB affirmed the ALJ, finding that back pay awards need not be rendered with "unrealistic exactitude, and that the evidence did not permit a trier of fact to actually determine the source of the disparities.

[STAA Whistleblower Digest IX B 3 b]

MITIGATION OF DAMAGES; JOB THAT WOULD REQUIRE LOSS OF SENIORITY

Although not reaching the issue, the ARB in *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 1999-STA-5 (ARB Dec. 30, 2002), cast doubt on the ALJ's ruling that union jobs that would have required Complainant to start at the bottom of the seniority list with lower pay than his position with Respondent (where Complainant had over 15 years of seniority) were not substantially equivalent employment. The ARB wrote: "In a significantly unionized industry such as the trucking industry, a complainant would always be required to begin his interim employment with a new company at the bottom of the seniority list, with all that entails. We think it unlikely that those facts in and of themselves, could, particularly after the passage of a reasonable amount of time without employment, protect a complainant from charges that he failed to mitigate his damages." (citations omitted).

[STAA Whistleblower Digest IX B 3 f]

MITIGATION OF DAMAGES; REQUIREMENT TO ACT REASONABLY TO MAINTAIN INTERIM EMPLOYMENT

In *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 1999-STA-5 (ARB Dec. 30, 2002), Complainant was employed with several employers following his unlawful discharge by Respondent. Complainant was discharged from one of those employers because of an incident in which he permitted a cousin to drive the employer's truck in violation of policy. The ARB affirmed the ALJ's finding that the infraction was sufficiently egregious to toll Respondent's back pay liability during the

period when Complainant was without employment following this discharge. The opinion contains a discussion of the standards for determining whether a complainant's conduct in losing a job is a failure to mitigate.

Complainant had also argued on appeal that the termination from the subsequent employer should not toll Respondent's back pay liability but merely result in a deduction in the amount he would have earned had he stayed with the subsequent employer. The ARB disagreed, applying *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1277-79 (4th Cir. 1985), to hold that a break in employment based on unreasonable conduct by a complainant results in reduction of a backpay award to zero until new interim employment is secured.

[STAA Whistleblower Digest IX C]

ATTORNEY'S FEES AND COSTS FOR APPELLATE WORK; SIXTH CIRCUIT

In *Scott v. Roadway Express, Inc.*, ARB No. 01-065, ALJ No. 1998-STA-8 (ARB May 29, 2003) (order granting attorney's fees), the ARB considered whether it had authority to award attorney fees and costs incurred by Complainant in defending the ARB decision and prior fee award in the Court of Appeals. The Board found that 49 U.S.C. § 31105(b)(3)(B) provided authority for making such an award. Because the case was appealed to the Sixth Circuit, the Board considered whether that court's decision in *DeFord v. Sec'y of Labor*, 715 F.2d 231 (6th Cir. 1983) – which arose under the ERA rather than the STAA – constituted an absolute bar to the ARB awarding fees for work before the court of appeals. The Board held that, as it read *DeFord*, "the Secretary is not foreclosed from awarding attorney's fees to a complainant who prevails in his or her own case before the Sixth Circuit." Slip op. at 3. The Board distinguished language in earlier DOL decisions which suggested that *DeFord* may prevent such awards in cases appealed to the Sixth Circuit on the ground that the complainant was not a party to the appeal or that the earlier language was only dicta. The Board also noted that it has exercised authority to award fees for appellate work in circuits other than the Sixth Circuit. Thus, because the Complainant in the instant case was a party and necessarily and successfully defended the Respondent's appeal to the Sixth Circuit, the Board concluded that he was entitled to an award of fees by the ARB.

[STAA Whistleblower Digest XI B 1]

DISMISSAL FOR CAUSE; FAILURE TO ATTEND HEARING

In *Farrar v. Roadway Express, Inc.*, 2001-STA-58 (ALJ Dec. 13, 2002), on the day and time scheduled for hearing, Respondent and its witnesses were in attendance and ready for trial. Complainant's counsel was in attendance, but Complainant phoned in to state that he was on a run and would not be able to attend. Respondent moved for dismissal, alleging that Complainant had ample vacation and compensatory time available. The ALJ issued an order to show cause, and weighing the conflicting responses found that Complainant had not asked for time off in advance or provided any notice that he needed the time off, and had sufficient vacation time available. The ALJ found a lack of good cause for failure to appear, and recommended dismissal of the complaint.

[STAA Whistleblower Digest XI B 3]

DISMISSAL FOR CAUSE; DISRUPTION OF HEARING, FAILURE TO PROSECUTE

In *Bacon v. Con-Way Western Express*, ARB No. 01-058, ALJ No. 2001-STA-7 (ARB Apr. 30, 2003), the ALJ had recommended dismissal based on Complainant's atrocious behavior at the hearing and failure to prosecute the complaint. The Complainant had so disrupted the hearing that the ALJ ultimately had adjourned the hearing and summoned United States Marshalls to escort Complainant from the courtroom. On review, the ARB applied a five part test stated in the Tenth Circuit decision in *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir.1992), for determining whether a dismissal for "want of prosecution" was warranted. The factors are:

- (1) the degree of prejudice to the defendant,
- (2) the amount of interference with the judicial process,
- (3) the culpability of the litigant,
- (4) whether the party was warned in advance that dismissal of the action would be a likely sanction for noncompliance, and
- (5) the efficacy of lesser sanctions.

The ARB noted that these factors are only guidelines.

The ARB affirmed the ALJ's recommendation of dismissal where, *inter alia*, the Complainant made it clear that his interest was as much (if not more) in subjecting witnesses and Respondent's to his invective and abuse than in litigating his complaint. The ARB acknowledged that failure to prosecute typically involves a delay of months or even years, but that while such a delay was not a factor in the present case Complainant's "totally unacceptable conduct and the absence of any expression of apology or avowal to conform his conduct to an appropriate standard in the future is an additional factor that tips the balance in favor of dismissal." The ARB also took into account the ALJ's patience and forbearance, and resort to dismissal only after unsuccessfully attempting to convince Complainant to conform his conduct to acceptable standards and proceed with his case, and only after issuing an order to show cause providing Complainant an opportunity to rectify the situation, which instead the Complainant used as an opportunity to further vilify and excoriate Respondent.

[STAA Whistleblower Digest XI B 3]

DISMISSAL FOR CAUSE; INTIMIDATION OF WITNESSES AND COUNSEL FOR OPPOSING PARTY

In *Somerson v. Mail Contractors of America, Inc.*, 2002-STA-44 (ALJ Dec. 16, 2002), during a suspension of the hearing, Complainant sent anonymous e-mails to two witnesses and counsel for Respondent, and activated websites dedicated to haranguing counsel for Respondent, which the ALJ found all had the unmistakable intent to harass and intimidate. In response to an Order to Show, Complainant defiantly argued that he had a First Amendment right to engage in such conduct. The ALJ found this argument unconvincing, and recommended dismissal of the case pursuant to 29 CFR §18.6(d)(2) because "threatening and harassing witnesses and an officer of the court overtly attempts to impede the administration of justice, and because Complainant previously ha[d] been sanctioned by a U.S. District Court for misbehavior related to a prior hearing before the Office of Administrative Law Judges of the U.S. Department of Labor . . . , and accordingly was on clear notice that such behavior would not be tolerated...." The ALJ found that less severe sanctions would not have been effective given Complainant's past history of misbehavior before DOL ALJs and the response to the Order to Show Cause's absence of respect for the integrity and decorum of proceedings before OALJ or the presiding ALJ. The ALJ certified the Complainant's conduct to a U.S. District Court which had retained jurisdiction over a Consent Order issued in response to Complainant's abusive misbehavior during a prior STAA proceeding.

SOX

Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, P.L. No. 107-204, codified at 18 U.S.C. 1514A

INTERIM SOX REGULATIONS

On May 28, 2003, the Occupational Safety and Health Administration published an Interim Rule implementing the whistleblower provision of the Sarbanes-Oxley Act (SOX). **Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 29 CFR Part 1980, 68 Fed. Reg. 31859 (May 28, 2003)**. These regulations mirror, in most respects, the AIR21 regulations, but also take into consideration the ERA and STAA regulations.

Highlights include: (1) a regulatory definition that takes into account SOX's unique statutory provisions that identify individuals as well as the employer as potentially liable for discriminatory action; (2) a provision that reinstatement may be ordered "where appropriate" [the preamble explains that it may not be appropriate to reinstate an employee, for example, who is a security risk; it also takes the position that in some cases "economic reinstatement" as is frequently used in Federal Mine Safety and Health Act cases may be used]; (3) a provision that an ALJ has broad authority to limit discovery in view of the time limit on DOL proceedings before a complainant may seek a *de novo* hearing in federal court [the preamble noting that a complainant who seeks excessive or burdensome discovery or who fails to adhere to an agreement to delay filing in federal court in order to conduct discovery, might face a finding of bad faith by the federal court]; (4) a decision to follow the ERA model in regard to OSHA participation in an ALJ/ARB proceeding (*i.e.*, not prosecuting the case, but reserving the discretion to participate as a party or *amicus* at any stage in the proceeding) [the preamble, however, invites comments on this "preliminary decision" that OSHA would not ordinarily participate as a prosecuting party]; (4) a provision that ARB review is not a matter of right, but is accepted at the discretion of the Board; (5) a provision to apply the "substantial evidence" standard of review by the ARB of the ALJ's findings of fact [the preamble states that this feature is borrowed from the STAA regulations]; (6) a provision that a complainant must provide 15 days advance notice of an intent to file a Federal court complaint. The preamble suggests that principles of issue or claim preclusion may apply if a complainant seeks Federal court *de novo* review if the ARB issues a decision more than 180 after the filing of the complaint. The preamble also suggests that where an administrative hearing has been completed and is awaiting a decision from the ALJ or the ARB, a Federal court might treat a complaint as a petition for mandamus to order the issuance of a decision under appropriate time frames.

DISTRICT COURT JURISDICTION; FACTORS SUGGESTING THAT THE COURT ASSERT EQUITABLE REMEDIES SUCH AS MANDAMUS OR PROCEED AS A REGULAR FEDERAL QUESTION CASE

In ***Stone v. Duke Energy Corp.***, 3-03-CV-256 (WD NC June 10, 2003) (case below 2003-SOX-12), the complaint had been investigated by OSHA and Complainant requested a hearing before an ALJ. The ALJ scheduled a hearing. Complainant's attorney subsequently informed the ALJ that he would be filing a civil complaint in District Court under 18 U.S.C. § 1514A(b)(1)(B) and would therefore no longer continue with the administrative proceeding. The ALJ issued a ruling that he would retain jurisdiction until such time as he ruled on a pending motion for summary decision or until a district court asserted jurisdiction over the matter. Upon application to the District Court for the Western District of North Carolina, the court observed that more than 180 days had passed since the filing of the complaint and that there was no indication of bad faith or delay on the part of the Complainant. The court then considered how its jurisdiction should be exercised, observing that :

... while the statute provides for a cause of action allowing the Court to hear

the case under its federal question jurisdiction, it does not specifically limit the remedies available to the Court once it exercises jurisdiction. For example, the Secretary of Labor has opined, in a recent interim final rule, that a Court might, upon a finding that significant resources have been expended by the Department of Labor to adjudicate the dispute, and that findings of fact have been made after ample process, choose to exercise its discretion by issuing a writ of *mandamus* compelling the Secretary to complete the administrative proceeding. 29 CFR § 1980.114. Note that the statute specifically authorizes equitable remedies. So both *mandamus* and the stay Plaintiff seeks would be available remedies.

The court determined that *mandamus* would not be appropriate where there was no prospect that the Secretary would issue a final order anytime in the immediate future, and although some administrative resources had been expended on the matter, an initial investigation was all that had yet occurred. Thus, the court ordered the Secretary of Labor's proceeding stayed and took jurisdiction "in the manner of a typical federal question case."

RESPONDENT MUST BE PUBLICLY TRADED COMPANY UNDER SOX WHISTLEBLOWER PROVISION; UNTIMELY ATTEMPT TO ADD PARENT COMPANY REJECTED BY ALJ

In *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ Mar. 5, 2003), Complainant alleged that she was harassed and intimidated by the Respondent in retaliation for voicing concerns about flight and duty time under Federal Aviation Regulations. In addition to an AIR21 whistleblower complaint, Complainant also alleged that the Respondent violated the whistleblower provision of the Sarbanes-Oxley Act because she raised concerns about the accuracy of the Respondent's on-time flight records and the fraudulent impact they had on stockholders. The ALJ granted Respondent motion for dismissal of the SOX complaint on the ground that Respondent is not a publicly traded company. See 18 U.S.C. § 1514A(a)(1).

Complainant attempted to cure this deficiency by adding Northwest Airlines, Inc. to the caption of the case. The ALJ, however, held that Complainant could not "get around the fact that her Employer, Pinnacle, is not a publicly traded company by unilaterally adding another corporate entity that is publicly traded, *i.e.*, Northwest Airlines, Inc. as a respondent, after the investigation and determination by OSHA." The ALJ also found that Northwest had been attempted to be added as a respondent in the hope that it could be found liable for the actions of its indirect subsidiary, Pinnacle. The ALJ wrote that: "However, this ignores the general principle of corporate law that a parent corporation is not liable for the acts of its subsidiaries. In other words, the mere fact of a parent-subsidiary relationship between two corporations does not make one company liable for the torts of its affiliate. *United States v. Bestfoods, et al.*, 524 U.S. 51, 61 (1998). Nor has the Complainant even alleged any facts that would justify piercing the corporate veil and ignoring the separate corporate entities." The ALJ also found that any complaint against Northwest Airlines, Inc. would be untimely, as it was made more than ninety days after the date of the alleged violation.

SOX WHISTLEBLOWER JURISDICTION IN FEDERAL DISTRICT COURT DOES NOT EXEMPT EMPLOYEE FROM MANDATORY ARBITRATION AGREEMENT

In *Boss v. Salomon Smith Barney Inc.*, No. 02 Civ. 7539(RO) (S.D.N.Y. May 16, 2003) (available at 2003 WL 21146653), the Plaintiff filed suit seeking damages and reinstatement when his employer fired him allegedly for his failing to change a draft research report under pressure from the employer.

Plaintiff, however, had signed a mandatory arbitration agreement as a term of employment, and Defendant moved to stay the litigation and compel arbitration. Plaintiff argued that because the Sarbanes-Oxley Act provides for Federal court jurisdiction to hear whistleblower complaints his suit was exempt from mandatory arbitration. The court rejected this argument and granted the relief requested by the Defendant.

[Editor's note: The text of the decision does not state whether the Plaintiff had filed a SOX complaint with OSHA.]

MISCELLANEOUS

[Nuclear & Environmental Whistleblower Digest VII A 1]

[STAA Whistleblower Digest II K]

HIPAA Regulations Governing the Privacy of Health Records

On April 14, 2003, Department of Health and Human Services' "Privacy Rules" governing the release of medical records went into effect for many of entities covered by the regulations. Standards for Privacy of Individually Identifiable Health Information, 45 CFR Parts 160 and 164. The primary purpose of the Privacy Rules is to require health plans and providers to maintain administrative and physical safeguards to protect the confidentiality of health information and protect against unauthorized access. HHS issued the rules in compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

HHS' Office for Civil Rights has established a web page <http://www.hhs.gov/ocr/hipaa/bkgrnd.html> with links to information about the new rules. In addition, a page has been added to OALJ's web site with links to resources specific to the relationship between the Privacy Rules and judicial and administrative proceedings.

The regulations begin with the premise that "[a] covered entity may not use or disclose protected health information, except as permitted or required by [the regulations]." 45 C.F.R. § 164.502(a). Disclosures, however, are permitted in response to an order of a court or administrative tribunal and in response to a subpoena, discovery request, or other lawful process. 45 CFR § 164.512(e). The rule on disclosures in judicial and administrative proceedings contains some important details. For example:

When disclosing information in response to an order issued by a court or administrative tribunal, a covered entity may only disclose the protected health information expressly authorized by such order. 45 CFR § 164.512(e)(1)(i).

In responding to a subpoena or discovery request, a covered entity must "receive[]satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request." 45 CFR § 164.512(e)(1)(ii)(A).

Regulatory history discussing whether employment records are covered by the regulations is found at www.oalj.dol.gov/public/part18/refrnc/HIPAA_reg_history_employment_records.htm.

[Nuclear & Environmental Whistleblower Digest VII E]

FOIA; CRITICAL INFRASTRUCTURE INFORMATION

The Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2135, § 214(a), includes a provision that describes how the new Department of Homeland Security is to treat critical infrastructure information it obtains through voluntary submission. For example, one provision operates as a new "Exemption 3 statute" under the Freedom of Information Act, 5 U.S.C. § 552(b)(3).

According to the Department of Justice, Office of Information and Privacy (OIP), this new law operates similarly to Exemption 4 in the submission of business and financial information. OIP states that "'[t]he term 'covered Federal agency' means the Department of Homeland Security.' Pub. L. No. 107-296, 116 Stat. 2135, § 212(2)...." (emphasis added) For more details, see

www.usdoj.gov/oip/foiapost/2003foiapost4.htm

The new FOIA exemption does not apply to OALJ as the Department of Labor is not part of the Department of Homeland Security; however, it may be relevant if information is submitted into the record from a Homeland Security agency.

[Nuclear & Environmental Whistleblower Digest VIII B 1]

ADMINISTRATIVE REVIEW BOARD; REVISION OF DELEGATION

On October 17, 2002, the Office of the Secretary published Secretary's Order 1-2002, addressing the delegation of authority and assignment of responsibility to the Administrative Review Board. 67 Fed. Reg. 64272 (Oct. 17, 2002). This Order replaces Secretary's Order 02-96, and provides modifications including, an increase in the total membership to a maximum of five members, clarifications of procedural authority, and codification of the ARB's location in DOL organizational structure.