

# RECENT SIGNIFICANT DECISIONS

## 29 C.F.R. Parts 24 and 1978 Whistleblower Cases



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## NUCLEAR AND ENVIRONMENTAL WHISTLEBLOWER DECISIONS

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### **VII. Proceedings before OALJ**

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[Nuclear and Environmental Whistleblower Digest VII A 2]  
DISCOVERY; RESTRICTION TO POTENTIALLY DISPOSITIVE PRELIMINARY ISSUE OF  
COVERAGE

In *Plumlee v. Corporate Express Delivery Systems, Inc.*, ARB No. 99-052, ALJ No. 1998-TSC-9 (ARB June 8, 2001), the ARB upheld the ALJ's restriction of discovery to the issue of whether Complainant was a covered employee until that issue was resolved. The ARB noted that it is appropriate to suspend discovery pending a decision on a motion potentially dispositive of the case.

### **VIII. Powers, responsibilities and jurisdiction of ALJ, Secretary and federal courts**

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[Nuclear and Environmental Whistleblower Digest VIII B 2 c]  
ARGUMENT MADE FOR FIRST TIME BEFORE ARB

In *Hasan v. Stone & Webster Engineers & Constructors, Inc.*, ARB No. 01-006, ALJ No. 2000-ERA-14 (ARB May 31, 2001), the ARB declined to consider an argument made for the first time on appeal because the Complainant had not raised it in response to the ALJ's order to show cause why the case should not be dismissed for failure to state a claim upon which relief could be granted. Slip op. at 4 n.4.

### **IX. Miscellaneous procedural issues**

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[Nuclear and Environmental Whistleblower Digest IX K]  
BANKRUPTCY STAY APPLIES NOT ONLY TO COMMENCEMENT OR CONTINUATION  
OF PROCEEDING, BUT ALSO TO DISMISSALS

In *Hasan v. Stone & Webster Engineers & Constructors, Inc.*, ARB No. 01-007, ALJ No. 2000-ERA-10 (ARB May 30, 2001), the ALJ recommended dismissal of Complainant's ERA whistleblower complaint for failure to allege any set of facts upon which relief could be granted. Complainant appealed to the ARB asserting, in part, that the ALJ erred in issuing a decision because Respondent had, prior to issuance of the ALJ's recommended decision, filed for bankruptcy and, as a result, all administrative proceedings against the company are automatically stayed pursuant to 11 U.S.C. §362. The ARB agreed with Complainant, and held that the automatic stay provisions of section 362 apply not only to commencement or continuation of administrative proceedings, but also to the dismissal of cases, thus rendering the ALJ's recommended decision null and void. See *Haubold v. KTL Trucking Co.*, ARB No. 00-065, ALJ No. 2000-STA-35, slip op. at 3-4 (ARB Aug.

10, 2000).

[Nuclear and Environmental Whistleblower Digest IX M 2]  
FRIVOLOUS CASES; DAMAGE TO ADJUDICATORY PROCESS

In *Rockfeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB No. 00-039, ALJ No. 1999-CAA-21 (ARB May 30, 2001), the ARB criticized Complainant's counsel for filed a "largely incomprehensible brief in support of [a] largely frivolous case." The Board wrote:

Every case litigated under the environmental whistleblower provisions requires the investment of time by the parties, the investigating agency, the Office of Administrative Law Judges, and -- if there is an appeal -- this Board. The resources of the Department of Labor are finite; therefore the hearing and appeal of one case means that another case must wait. It is in large part for this reason that frivolous cases are extremely damaging to the adjudicatory process. As then Circuit Judge Breyer explained with reference to the appellate courts, "as a general matter, the more time we spend on frivolous cases, the less time we have for the problems of more serious litigants. Thus, the 'frivolous' appeal hurts other litigants and interferes with the courts' overall mission of securing justice." *Natasha v. Evita Marine Charters*, 763 F.2d 468, 471 (1st Cir. 1985).

Slip op. at 2.

### **XIII. Adverse action**

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[Nuclear and Environmental Whistleblower Digest XIII A]  
ADVERSE ACTION -- COMPLAINANT MUST HAVE SUFFERED HARM TO  
COMPENSATION, TERMS, CONDITIONS OR PRIVILEGES OF EMPLOYMENT

In *Doyle v. Westinghouse Electric Co.*, 2001-ERA-13 (ALJ June 27, 2001), Complainant's complaint included an allegation that Employer's attorney and her employer, a law firm, violated the ERA whistleblower provision when the attorney sent a cover letter to Complainant's attorney transmitting copies of letters Employer prepared in attempting to comply with an ARB order directing the Employer to notify a potential employer that its earlier letter about the reason for Complainant's disqualification from unescorted access was improper, and to provide a neutral reference letter. Complainant alleged that the first letter improperly divulged that Complainant had engaged in protected activity and that the neutral reference letter was in fact, not neutral. The attorney and law firm moved for summary judgment on the ground that they were not "employers" as defined under the Act, that Complainant did not suffer any denial of employment or other adverse action as a result of the letter to Complainant's counsel, and the letter did not violate any provision of the Act, but was merely a courtesy copy sent only to Complainant and Complainant's counsel.

The ALJ granted summary judgment in a recommended decision, finding as a matter of law that neither the attorney nor the law firm were employers to the Act as defined at 42 U.S.C. 5851(a)(2). The ALJ also recommended a grant of summary judgment on the ground that Complainant failed

to allege facts showing that the letter subjected him to adverse employment action with respect to his compensation, terms, conditions or privileges of employment.

[Nuclear and Environmental Whistleblower Digest XIII B 18]  
ADVERSE ACTION; RESTRICTIVE SETTLEMENT OFFER

In *Smyth v. Johnson Controls World, Inc.*, ARB No. 99-043, ALJ No. 1998-ERA-23 (ARB June 29, 2001), Complainant was presented a settlement offer in regard to an earlier whistleblower complaint that contained an offer to rehire when work became available, but which restricted the departments to which he could be rehired. Both Complainant and the ALJ in the earlier proceeding objected to the restriction, and the employer promptly rescinded the offer and replaced it eight days later with a settlement offer with no restrictions on Complainant's eligibility for rehire. Complainant accepted this second letter, but filed an ERA complaint alleging that the first letter constituted an unlawful act of discrimination. This complaint went to hearing, and the ALJ concluded that the restrictive settlement offer was an adverse employment action, even though it had been promptly rescinded.

On review, the ARB held that "[a]lthough actions short of ultimate employment decisions (*e.g.*, hiring, firing or demotion) are actionable under such anti-discrimination laws [as the ERA whistleblower provision], the complained-of action must rise to some threshold level of substantiality in order to be cognizable." Referencing its recent decision in *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 1997-ERA-52 (ARB Feb. 29, 2000), the Board found that the original settlement offer did not constitute an adverse employment action under the ERA whistleblower provision because (1) it had no affect on Complainant's employment status, inasmuch as Complainant was employed elsewhere at a higher salary and not seeking immediate reemployment with the employer, (2) the letter was removed a week later, (3) the letter did not prevent Complainant from obtaining a job with the employer because he was not available for rehire at that time, and it did not affect his recall rights under the collective bargaining agreement, and (5) the reemployment restriction was not announced to the public or to the journeyman pipefitter community, and therefore did not have any demonstrable affect on Complainant's reputation.

[Nuclear and Environmental Whistleblower Digest XIII B 18]  
ADVERSE EMPLOYMENT ACTION; PURPORTEDLY NEUTRAL REFERENCE LETTER

In *Doyle v. Westinghouse Electric Co.*, 2001-ERA-13 (ALJ June 27, 2001), Complainant's complaint alleged that Respondent violated the ERA whistleblower provision in its implementation of an ARB order directing Respondent to notify an employer that its earlier letter about the reason for Complainant's disqualification from unescorted access was improper, and to provide a neutral reference letter. Complainant alleged that the first letter improperly divulged that Complainant had engaged in protected activity and that the neutral reference letter was in fact, not neutral.

The ALJ recommended a grant of summary judgment in favor of Respondent because he found that reference to the prior disqualification in the correction letter to the employer was unavoidable given the passage of 12 years and that the corporate identity of both Respondent and the other employer had changed during that time period. In regard to the reference letter, the ALJ found that there was

nothing threatening, humiliating or offensive in the letter (the letter reported that Complainant performed satisfactorily during a training session with Respondent for work as a Decontamination Technician but that he did not work as a Decontamination Technician).

[Nuclear and Environmental Whistleblower Digest XIII B 18]

ADVERSE EMPLOYMENT ACTION; ALLEGED DESTRUCTION OF DOCUMENTS IN RESPONSE TO FOIA REQUEST FROM COMPLAINANT'S ATTORNEY

In *Rockfeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB No. 00-039, ALJ No. 1999-CAA-21 (ARB May 30, 2001), Complainant had filed a complaint alleging whistleblower violations, based on, *inter alia*, an allegation that the Department of Energy destroyed documents he had requested under a Freedom of Information Act request. The ARB found that this allegation did not "raise a cognizable claim of an adverse employment action [because] [t]he alleged destruction of documents had no effect on [Complainant's] employment status." Slip op. at 3 (citations omitted). The Board also observed that Respondent had filed a supported and uncontradicted assertion that the originals of the documents were not, in fact, destroyed as alleged by Complainant.

#### **XIV. Employer/employee**

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[Nuclear and Environmental Whistleblower Digest XIV A 1]

COVERED EMPLOYEE; DISMISSAL BASED ON LACK OF COVERAGE IS NOT A DISMISSAL FOR LACK OF JURISDICTION, BUT SIMPLY LACK OF COVERAGE

In *Plumlee v. Corporate Express Delivery Systems, Inc.*, ARB No. 99-052, ALJ No. 1998-TSC-9 (ARB June 8, 2001), the ALJ had recommended that the case be dismissed for lack of jurisdiction upon finding that Complainant was not a covered employee. Upon review, the ARB observed that the filing of a whistleblower complaint under the environmental statutes invokes the Department of Labor's jurisdiction to adjudicate the complaint, and that the proper phrasing of the dismissal was simply that the Complainant was not a covered employee under the Environmental Acts.

[Nuclear and Environmental Whistleblower Digest XIV A 2 c]

EMPLOYEE; CONTRACT DRIVER

See *Plumlee v. Dow Chemical Co.*, 1998-TSC-8 and 9 (ALJ Feb. 25, 1999), *aff'd on this ground*, *Plumlee v. Corporate Express Delivery Systems, Inc.*, ARB No. 99-052, ALJ No. 1998-TSC-9 (ARB June 8, 2001), for an application of the *Darden* common law test of "employee" status for a Complainant who supplied driving services to Dow Chemical under a courier service contract with Corporate Express.

[Nuclear and Environmental Whistleblower Digest XIV A 2 d]  
EMPLOYEE; APPLICATION OF *STEPHENSON* TEST; EXTENSIVE CONTROL;  
INTERFERENCE WITH EMPLOYMENT

See *Dempsey v. Fluor Daniel, Inc.*, 2001-CAA-5 (ALJ June 27, 2001), for the ALJ's application of the ARB holding in *Stephenson v. NASA*, ARB No. 98-025, ALJ No. 1994-TSC-5 (ARB July 18, 2000), that a subcontractor's employee might be able to pursue a whistleblower complaint against a general contractor without meeting the common law employment test. In *Dempsey*, the ALJ found that Complainant was a covered employee where Respondent exercised extensive control over the means and manner of subcontractor's work at Respondent's site.

The ALJ also concluded that Complainant was potentially covered under the "interference principle" of *Stephenson*, whereby a respondent is subject to liability if it established, modified or interfered with terms, conditions, or privileges of the complainant's employment. In *Dempsey*, Complainant alleged that Respondent -- the General Contractor -- announced shortly after Complainant's protected activity that it intended to reduce or eliminate its use of the subcontractor which employed surveyors such as Complainant through a union hiring hall. According to Complainant's theory of the case, the subcontractor removed Complainant from the project to appease Respondent. The ALJ found that whether such coverage exists depended on whether the Complainant's allegations were true. The ALJ remanded the case to OSHA because the merits had not been considered by OSHA in the initial investigation (which ended upon OSHA's conclusion that Complainant was not a covered employee), and because the parties indicated to the ALJ that they were not prepared to proceed to hearing on the merits.

[Nuclear and Environmental Whistleblower Digest XIV B 4 j]  
EMPLOYER; RESPONDENT'S ATTORNEY AND LAW FIRM

See the casenote above under Digest XIII A of *Doyle v. Westinghouse Electric Co.*, 2001-ERA-13 (ALJ June 27, 2001), (ALJ found that neither Respondent's attorney nor her law firm were employers as defined at 42 U.S.C. 5851(a)(2)).

## **XVIII. Dismissals**

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[Nuclear and Environmental Whistleblower Digest XVIII C 8]  
FAILURE TO RESPOND TO ARB BRIEFING ORDER; DISMISSAL FOR FAILURE TO PROSECUTE

In *Smith v. Lyondell-Citgo Refining LP*, ARB No. 01-012, ALJ No. 2000-CAA-8 (ARB June 27, 2001), the ALJ issued a recommended decision finding that the complaint was not timely, and Complainant appealed to the ARB. The ARB issued a briefing schedule, but Complainant neither filed a brief nor moved for an extension of the filing deadline. The ARB held:

Although parties appearing *pro se* appropriately may be allowed some leeway, they must nonetheless take appropriate steps to litigate their case. In this case, Smith has requested

review by this Board, but has failed to submit any materials explaining why the ALJ's recommended decision was incorrect. The petition for review therefore is dismissed for failure to prosecute and the recommended decision of the ALJ is the final decision of the Secretary pursuant to 29 C.F.R. §24.7(d).

[Nuclear and Environmental Whistleblower Digest XVIII C 11]  
REPETITIVE CLAIMS; DISCRETION OF ALJ TO DISMISS

In *Rockfeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB No. 00-039, ALJ No. 1999-CAA-21 (ARB May 30, 2001), Complainant had filed a fifth in a series of complaints about the same alleged violations of the employee protection provisions of the CAA and the STAA, together with a new allegation of destruction of evidence. The prior four complaints had been dismissed by the ALJ in recommended decisions. The ALJ dismissed the fifth complaint on the ground of collateral estoppel (issue preclusion). On appeal, Complainant argued that issue preclusion did not apply because the ALJ's decisions in the prior cases were not final but only recommended decisions. The ARB held that regardless of whether Complainant was correct about the stated ground for dismissal of collateral estoppel, the ALJ had the discretion to dismiss a complaint which simply duplicates another pending related action. Moreover, in the interim the ARB had issued a final decision in the prior four cases, therefore making issue preclusion applicable.

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## SURFACE TRANSPORTATION ASSISTANCE ACT WHISTLEBLOWER DECISIONS

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### II. Procedure

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[STAA Whistleblower Digest II D 1]

AMENDMENT OF COMPLAINT TO INCLUDE INDIVIDUAL WHO ACTUALLY FIRED  
COMPLAINANT

Where Respondent's CEO was named as a party-respondent in an amended complaint filed with OSHA, the CEO was a proper party-respondent because he was the person who actually fired Complainant, and the CEO had not shown any prejudice by being included as a party-respondent, the ALJ in *Schemm v. Pro Transportation, Inc.*, 2001-STA-11 (ALJ Jan. 19, 2001), denied the CEO's motion to dismiss him as a party on the ground that he was not named as a party, nor ordered to provide any relief on an individual basis, in the Secretary's Findings.

[STAA Whistleblower Digest II J]

#### E-MAIL NOT RECOGNIZED METHOD OF FILING

In *Vazquez v. Auto Truck Transport*, 2000-STA-27 (ALJ May 25, 2001), the ALJ notified the parties that e-mails are not an accepted means of filing motions, pleadings, etc. The ALJ stated that motions, pleadings, etc., must be filed and served in accordance with the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges at 29 C.F.R. Part 18.

[STAA Whistleblower Digest II M]

#### VITUPERATIVE AND SARCASTIC REMARKS IN APPELLATE BRIEF

In *More v. R & L Transfer, Inc.*, ARB No. 01-044, ALJ No. 2000-STA-23 (ARB June 28, 2001), the ARB declined to strike Complainant's appellate brief on the ground proffered by Respondent that it contained a number of vituperative and sarcastic remarks directed at the ALJ and Respondent's counsel. The ARB noted that it would have stricken the brief if filed by an attorney, but that it would allow more leeway to a *pro se* litigant, and simply disregard the intemperate language. The ARB noted that such language is ultimately self-defeating because it detracts from a complainant's ability to make a sound legal argument.

### **IV. Burden of proof and production**

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[STAA Whistleblower Digest IV A 2 d]

#### EMPLOYER'S KNOWLEDGE OF PROTECTED ACTIVITY

In *More v. R & L Transfer, Inc.*, ARB No. 01-044, ALJ No. 2000-STA-23 (ARB June 28, 2001), Complainant argued on appeal to the ARB that he showed up for a work assignment a few minutes late for the express purpose of avoiding a violation of the eight-hour rule under 49 C.F.R. 395.3(a)(1) (1999). The ARB expressed the belief that this may be a post hoc rationalization for being tardy, but assuming that it could be proven, Complainant's complaint still failed because there was no evidence presented to establish that Respondent had actual or constructive knowledge that Complainant deliberately reported to work late in order to avoid violating the eight hour rule.

## **VII. Employer/employee**

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[STAA Whistleblower Digest VII B 7]

**EMPLOYEE; COMMERCIAL MOTOR VEHICLE; GENERAL CARGO DRIVER MUST ESTABLISH GROSS VEHICLE RATING OR WEIGHT IN EXCESS OF 10,001 POUNDS**

In *Bauman v. U.S. Cargo and Courier Service*, ARB No. 01-016, ALJ No. 1999-STA-45 (ARB June 29, 2001), the ARB adopted the ALJ's finding that a Complainant, who was not involved in transporting passengers or hazardous materials, and who failed to prove that he drove a commercial motor vehicle with a gross vehicle rating or weight in excess of 10,001 pounds, was not within the class of employees protected by the STAA whistleblower provision. Complainant was not within the protected class because the STAA definition of "employee" states that "employee" means a driver of a commercial motor vehicle, 49 U.S.C.A. § 31105, and the term "commercial motor vehicle" is defined in the statute as including vehicles having gross vehicle rating or weight in excess of 10,001 pounds. [The definition of commercial motor vehicle also covers vehicles designed to carry more than 10 passengers including the driver, or vehicles used in transporting hazardous material as defined by the Secretary of Transportation – but those provisions were not applicable because Complainant was engaged only in transporting general cargo.]

## **XI. Dismissals**

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[STAA Whistleblower Digest XI B 3]

**BELLIGERENT BEHAVIOR AT THE HEARING**

In *Bacon v. Con-Way Western Express*, 2001-STA-7 (ALJ May 15, 2001), the ALJ recommended dismissal for Complainant's improper conduct at the hearing -- which eventually lead to his ejection from the courtroom and the federal property where the hearing took place -- and his refusal to prosecute his complaint at the hearing.