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RECENT SIGNIFICANT DECISIONS

Nuclear, Environmental and STAA Whistleblower Cases

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Associate Chief Judge for Black Lung and Traditional

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NUCLEAR AND ENVIRONMENTAL WHISTLEBLOWER DECISIONS

[Nuclear and Environmental Digest II.B.2.]

UNDERLYING JURISDICTION; CLAIMS OF FRAUD AND UNETHICAL CONDUCT BY INDIVIDUALS IN COURSE OF ADMINISTRATIVE LITIGATION; HANDLING OF FOIA FEE WAIVER REQUEST

In *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 1998- CAA-10 and 11, 1999-CAA-1, 4 and 6 (ARB Oct. 31, 2000), Complainant alleged, *inter alia*, fraud and unethical conduct on the part of several individuals in the course of the administrative adjudication of his first complaint (for example, that Respondents had wrongfully induced the presiding ALJ to recommend dismissal, and that there had been *ex parte* contacts between Respondents, OSHA and the ALJ). The ARB held that it did not have subject matter jurisdiction over these types of claims under the CAA whistleblower provision, which prohibits an employer from taking adverse action against an employee in retaliation for protected activity.

The ARB also found that it did not have subject matter jurisdiction over Complainant's allegation that a DOE attorney had engaged in unethical conduct in providing "undisclosed, self-interested legal advice" to a local DOE office in regard to Complainant's attorney's FOIA fee waiver request.

[Nuclear and Environmental Digest II.B.2.]

COGNIZABLE CLAIM UNDER THE CAA; REFUSAL OF FOIA FEE WAIVER

In *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 1998- CAA-10 and 11, 1999-CAA-1, 4 and 6 (ARB Oct. 31, 2000), Complainant alleged that DOE had retaliated against him in violation of the whistleblower provision of the CAA when it denied his counsel's request for a fee waiver for a FOIA search. The ARB held that "[b]ecause refusal to waive a FOIA search fee is not discrimination with respect to 'compensation, terms, conditions, or privileges of employment,' [Complainant] has failed to state a claim upon which relief can be granted under the CAA. See 29 C.F.R. §18.1(a); Rule 12(b)(6), Federal Rules of Civil Procedure."

[Nuclear and Environmental Digest IV.B.3.]

EQUITABLE TOLLING; WRONG FORUM; BURDEN ON COMPLAINANT

In *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 1998- CAA-10 and 11, 1999-CAA-1, 4 and 6 (ARB Oct. 31, 2000), Complainant asserted that he filed a complaint with the EPA that qualified for the equitable tolling principle under the CAA whistleblower provision of raising the precise statutory claim in issue but in the wrong forum. The ARB found that equitable tolling could not be applied where Complainant failed to adduce supporting evidence. The Board held that "[w]hen a complainant invokes equitable tolling of a statute of limitations, it is the complainant's burden to demonstrate existence of circumstances that would support tolling. Cf. *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 661 (11th Cir. 1993) (plaintiff in Title VII action has burden of proving equitable reasons for failure to comply with limitations period)." Slip op. at 9.

Similarly, the ARB found that equitable tolling could not be applied to Complainant's filing of a MSPB appeal of his discharge by the Department of Energy. The ARB reviewed Complainant's letter of appeal, a memorandum to the MSPB examiner, and the MSPB's ALJ decision, and concluded that Complainant's MSPB whistleblower complaint related only to his assertion that DOE did not follow internal procedural regulations. The ARB wrote that "[w]here the gravamen of a complaint filed in the 'wrong forum' sounds under another, independent remedy and not under the provision under which relief is sought before us, there is no basis for invoking equitable tolling." Slip op. at 10-11.

[Nuclear and Environmental Digest VII.A.1.]

DISCOVERY; GENERAL PRINCIPLES

In *Khandelwal v. Southern California Edison*, ARB No. 98-159, ALJ Nos. 1997-ERA-6 (ARB Nov. 30, 2000), the ARB remanded the case for further proceedings before the ALJ. On review, the parties had urged a number of issues relating to discovery; two Board members declined to rule on these issues in light of the disposition of the case. One member, however, issued a concurring opinion providing direction for the ALJ should it be necessary to rule on the discovery issues on remand. The following is an excerpt from that discussion:

Initially it is noted that the provisions regarding the scope of discovery and the definition of relevant evidence contained in the rules of procedure applicable to ALJ proceedings at Part 18 of Title 29 are generally applicable to this case. ... As discussed by the Board in *Seater [v. Southern California Edison*, ARB No. 96-013, ALJ No. 1995-ERA-13 (ARB Sept. 27, 1996), slip op. at 4- 8], the Section 24.6(e)(1) prohibition against the application of formal rules of evidence is consistent with the broad range of circumstantial evidence that may be probative of retaliatory intent. ...

In employment discrimination cases, the courts have held that discovery should be permitted "unless it is clear that the information sought can have no possible bearing upon the subject matter of the action." ... "In such cases, the plaintiff must be given access to information that will assist the plaintiff in establishing the existence of the alleged discrimination." ... Consistent with this body of case law, the Secretary of Labor and the ALJs have recognized the broad scope of discovery to be afforded parties in whistleblower cases....

Accordingly, ... a broad view of the extent to which employers' records are properly subject to discovery under the FRCP in employment discrimination cases is required. ... In defining the parameters for discoverable materials, Section 18.14 provides for the discovery of unprivileged, relevant information but does not require that the information, or documents, qualify as admissible evidence. 29 C.F.R. §18.14(a),(b). Specifically, Section 18.14 provides that unprivileged information may properly be sought through discovery if the information is "reasonably calculated to lead to the discovery of admissible evidence." This standard, which is adopted from FRCP 26(b)(1), has frequently been addressed by the courts within the context of employment discrimination complaints. ... More to the point, a number of court decisions explore the extent to which an employer's records may be relevant to a complainant's discrimination theory in a case involving a reduction in force termination. ...

Before both the ALJ and this Board, Respondent SCE raised the privacy interests of its employees as a bar to the disclosure of certain personnel information that Khandelwal requested. ... Once the party seeking discovery has demonstrated the relevancy of the information or documents sought, the party seeking to avoid disclosure of information or documents that otherwise qualify for discovery bears the burden of establishing a basis for the denial or limiting of discovery. ... Assuming the party seeking to avoid disclosure meets his burden, as noted in the majority opinion ..., the confidential nature of the information sought may nevertheless be ensured without a denial of discovery. For example, the parties may agree to an order ensuring the confidential use of such information.... If the parties cannot reach agreement on the confidentiality issue, the ALJ should evaluate the question of whether to afford protections under 29 C.F.R. §18.15, including the imposition of restrictions on the use of information obtained in discovery, in accordance with these and other court decisions concerning discovery in employment discrimination cases.

Slip op. at 7-9 (citations and footnote omitted).

[Nuclear and Environmental Digest VII.A.1.]
RIGHT TO HEARING AND DISCOVERY

In *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 1998- CAA-10 and 11, 1999-CAA-1, 4 and 6 (ARB Oct. 31, 2000), Complainant argued that DOL regulations and case law provide a right to take discovery and to be given a fair hearing, and that the ALJ erred in not permitting any discovery or a hearing on the merits. The ARB held that under the circumstances of the cases, Complainant was not entitled to discovery or a trial-type evidentiary hearing. The Board wrote:

The CAA whistleblower protection provision provides that "[a]n order of the Secretary shall be made on the record after notice and opportunity for public hearing." 42 U.S.C. §7622(b)(2)(A). This language does not mean that a trial-type evidentiary hearing must be held in every case. For obvious reasons, evidentiary hearings are required when there are factual issues which must be resolved. Where, as in these cases, it is determined that there is no subject matter jurisdiction over a claim, or that complainant has failed to state a claim upon which relief can be granted, or where there are no material issues of fact in dispute, a trial-type evidentiary hearing is not in order. *See, e.g., U. S. v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971) ("It is settled law that when no fact question is involved or the facts are agreed, a plenary, adversary administrative proceeding involving evidence, cross-examination of witnesses, etc., is not obligatory—even though a pertinent statute prescribes a hearing. In such situations, the rationale is that Congress does not intend administrative agencies to perform meaningless tasks.").

As to the right to take discovery, in appropriate circumstances, a trial judge may suspend discovery pending a decision on a motion potentially dispositive of the case. *See Hahn v. Star Bank*, 190 F.3d 708, 719 (6th Cir. 1999) ("Trial courts have broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined."); *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir.1987) (same); *Wyatt v. Kaplan*, 686 F.2d 276, 284 (5th Cir.1982) (district judge properly granted defendants' protective order barring discovery prior to decision on pending motion to dismiss for jurisdictional defects). Of course, under certain circumstances it is necessary and proper to allow a party to engage in discovery of facts related to jurisdictional issues prior to ruling on jurisdiction. Thus, for example, the Fifth Circuit has stated:

It is true that the factual determinations decisive to a motion to dismiss for lack of jurisdiction are within the court's power, and that no right to a jury trial exists with regard to such issues But still the district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss. Thus, some courts have refused to grant such a motion before a plaintiff has had a chance to discover the facts necessary to establish jurisdiction Other courts have refused to uphold such a motion where -- absent an incurable defect in the complaint -- the plaintiff has had no opportunity to be heard on the factual matters underlying jurisdiction

Williamson v. Tucker, 645 F.2d 404, 414 (5th Cir. 1981). However, in the circumstance of these cases, where the jurisdictional facts are not in dispute, discovery was not warranted.

[Nuclear and Environmental Digest VII.A.6.]

DISCOVERY; PROTECTION OF PERSONNEL RECORDS

In *Khandelwal v. Southern California Edison*, ARB No. 98-159, ALJ Nos. 1997-ERA-6 (ARB Nov. 30, 2000), the ARB commented that "[w]hen an employer's personnel records are sought in discovery, the confidentiality of information that otherwise qualifies as discoverable may be protected through restrictions on the use of that information. See *Lyoch v. Anheuser-Busch Cos.*, 164 F.R.D. 62, 68-69 (E.D. Mo. 1995). Such restrictions may be embodied in a mutual agreement between the parties or a protective order issued under Section 18.15. See *Lyoch*, 164 F.R.D. at 68-69; 29 C.F.R. §18.15."

[Nuclear and Environmental Digest VII.C.1.]

RESPONSIVE PERIOD FOR MOTIONS; 15 DAYS WHEN PLEADING IS SERVED BY MAIL

In *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 1998- CAA-10 and 11, 1999-CAA-1, 4 and 6 (ARB Oct. 31, 2000), the ALJ issued an order to show cause why the complaint should not be dismissed, directing Complainant to respond by November 20, 1998, and permitting all parties until November 27, 1998 to file briefs in support of their positions. Complainant filed a response to the order to show cause; both Respondents filed motions to dismiss as their response to the order permitting them to file briefs. The ALJ issued a recommended decision of dismissal on December 4, 1998, prior to receipt of Complainant's response to the motions to dismiss. Although the ALJ discussed the propriety of dismissal with reference to his show cause order, in the order he also granted the motions to dismiss. On appeal to the ARB, Complainant objected to the ALJ's failure to wait for Complainant's response to the motions to dismiss prior to issuing his recommended decision.

The ARB noted that the OALJ Rules of Practice and Procedure at 29 C.F.R. § 18.6(b) and § 18.4(c)(3) would require an ALJ to wait 15 days before ruling on a motion served by mail. Nonetheless, the ARB found that, under the circumstances where Complainant's response to the order to show cause addressed precisely the same issues raised in the motions to dismiss, the ALJ did not commit reversible error.

[Nuclear and Environmental Digest VII.D.5.]

CONTINUANCES; DISCRETION OF ALJ

In *Khandelwal v. Southern California Edison*, ARB No. 98-159, ALJ Nos. 1997-ERA-6 (ARB Nov. 30, 2000), the ARB held:

The determination whether to grant a continuance is a question committed to the sound discretion of

the ALJ and will not be disturbed absent a clear showing of abuse. In reaching a decision to grant or deny a continuance, the ALJ may properly consider the length of the delay requested, the potential adverse effects of that delay, the possible prejudice to the moving party if denied the delay, and the importance of the testimony that may be adduced if the delay is granted. The ALJ should also take into consideration that complaints filed under the ERA are subject to an expedited process. However, even an expedited process must be applied in a manner that is fundamentally fair and thus provides the parties an adequate opportunity for presentation of the case.

Slip op. at 3 (citations omitted).

In *Khandelwal*, the ALJ had denied a motion for a continuance of the hearing date on remand, rejecting Complainant's stated reasons: time to find an attorney, receipt of a jury summons. The ARB found it was unreasonable for the ALJ to have found that Complainant had adequate time to find counsel. First, Complainant only had 30 days notice of the first hearing. Second, the ALJ should not have expected Complainant to be ready to "hit the ground running" following the remand from the ARB. The ARB found that the ALJ's rejection of the jury duty excuse was arbitrary and prejudicial because the ALJ had not explained why that excuse was not a warranted basis for seeking a continuance. The ARB also faulted the ALJ's discovery order, which set a 30 day period for completion of discovery, but which did not explain how the discovery period was to be allocated between requests and responses, or set a deadline for filing of motions to compel, protective orders, or other discovery conflicts. The Board noted that if the Part 18 rules were to be applied, Complainant's discovery request would have to have been filed with Respondent on the same day that the ALJ issued his prehearing order, to comply with the Part 18 time frames.

[Nuclear and Environmental Digest VIII.B.2.e.]

STANDARD OF REVIEW; ALLEGED PROCEDURAL ERRORS

The ARB will review allegations of procedural errors by the ALJ under the abuse of discretion standard. *Khandelwal v. Southern California Edison*, ARB No. 98-159, ALJ Nos. 1997-ERA-6 (ARB Nov. 30, 2000).

[Nuclear and Environmental Digest VIII.B.5.]

RECUSAL OF ARB MEMBER; ALLEGATION OF APPEARANCE OF IMPROPRIETY In

Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 1998- CAA-10 and 11, 1999-CAA-1, 4 and 6 (ARB Oct. 31, 2000),

Complainant alleged that one of the ARB Board members should not be involved in deciding the case by reason of her name being mentioned in a memorandum written by an OSHA Compliance Director in response to Complainant's counsel's letter raising concerns about OSHA whistleblower investigations. In the Memorandum, the Compliance Director stated that Complainant's counsel had previously written to the Secretary with similar concerns, and asked for the recusal of administrative law judges and made charges against the Chief ALJ and a member of the ARB. Complainant alleged that the memorandum raised a "clear" question as to the existence of *ex parte* communication between the ARB member and

the Compliance Director.

The ARB noted that it must carefully consider the allegation that the ARB member's participation in Complainant's case would raise an appearance of impropriety, but found no evidence support a conclusion that the ARB member or any other member of the ARB's staff had communicated with the Compliance Director. The ARB found the allegation of *ex parte* communication to be baseless.

[Nuclear and Environmental Digest IX.A.]

COMPLAINANT'S CLOSING ARGUMENT AS TESTIMONY; ALJ REOPENS RECORD TO PERFECT RECORD

In *Garcia v. Wantz Equipment*, ARB No. 99-109, ALJ No. 1999-CAA-11 (ARB Oct. 31, 2000), Complainant was discharged, according to Respondent, because he worked on personal projects during duty hours. Complainant alleged that he was discharged in retaliation for contacting an authority about Respondent's practice of purging vapors from gasoline or diesels tankers directly into the atmosphere. At the hearing, two witnesses (who were owners of the Respondent) testified that other employees did not work on personal projects on company time. Complainant attempted to rebut this testimony as part of his closing statement. The ALJ therefore reopened the record on this issue, and accepted Complainant's statement during his closing argument as testimonial evidence and allowed additional testimony from Respondent. In his decision, the ALJ reviewed the testimony and found Respondent's witnesses more credible than Complainant. The ARB found no compelling reason to overturn the ALJ's credibility determination, and finding no evidence of disparate treatment, held that Complainant had not met his burden of proving that this termination violated the employee protection provisions of the CAA.

[Nuclear and Environmental Digest IX.C.]

JOINDER; UNTIMELY PETITION

In *White v. The Osage Tribal Council*, 1995-SDW-1 (ALJ Aug. 10, 2000), the ALJ denied Respondent's motion for joinder of EPA as an additional party. Respondent asserted that EPA was an indispensable party because it allegedly participated in Complainant's termination of employment. The ALJ, however, found that the circumstances did not warrant joinder of additional parties where -- the case was on limited remand for re-calculation of back wages, fees, expenses and costs; the remand proceedings were ripe for decision in the fall of 1997, but placed in abeyance based on Respondent's ultimately unsuccessful appeal to the 10th Circuit; joinder of a new party at this late date would require a trial on all issues to afford the new party due process; the joinder could have been accomplished when the case was initially tried; and the issue of Respondent's liability had already been established.

[Nuclear and Environmental Digest IX.G.]

ADVERSE ACTION; RESPONDENT SERVICE OF ALJ BY EXPRESS MAIL, BUT COMPLAINANT ONLY BY REGULAR MAIL

In *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB Nos. 99-002, 99-063, 99-

067, 99-068, ALJ Nos. 1998- CAA-10 and 11, 1999-CAA-1, 4 and 6 (ARB Oct. 31, 2000), Complainant alleged, *inter alia*, that his rights had been violated because Respondents filed motions to dismiss with the ALJ by Federal Express, but only served him by regular mail. The ARB held that such use of express and regular mail "as a matter of law it cannot constitute discrimination with respect to 'compensation, terms, conditions, or privileges of employment' 42 U.S.C. §7622(a)," and therefore dismissed this complaint.

[Nuclear and Environmental Digest IX.K.]

ABEYANCE OF ARB REVIEW

In *Charvat v. Eastern Ohio Regional Wastewater Authority*, ARB Nos. 98-147 and 98-148, ALJ No. 1996-ERA-37 (ARB Nov. 15, 2000), Respondent requested that the ARB hold its review of the DOL whistleblower matter in abeyance pending resolution of parallel action the Sixth Circuit. The ARB denied the motion, finding that there was no evidence that Complainant's right to freedom of expression under § 1983 suit in federal court was relevant to Complainant's CAA and SDWA whistleblower complaints now pending before the ARB. The ARB also noted that the administrative proceeding was far advanced, a hearing having been conducted, the ALJ having issued a recommended decision, and the parties' objections thereto being fully briefed.

[Nuclear and Environmental Digest IX.K.]

MOTION TO EXPEDITE; PENDING STATE COURT ACTION PRESENTING IDENTICAL ISSUE

In *Doody v. Centerior Energy*, ARB No. 00-051, ALJ No. 1997-ERA-43 (ARB Dec. 4, 2000), Respondent filed to motion to expedite the ARB's review based on an imminent trial date in a state civil action on Complainant's claim of wrongful discharge in retaliation for reporting safety concerns to the NRC. Respondent asserted that the issue before the state court is identical to the issue pending before the ARB, and that the ARB's order would be *res judicata* in the state court action. Respondent argued that expediting review would promote policies such as judicial economy and a uniform result in both proceeding.

The ARB was appreciative of Respondent's position, but was disinclined to expedite the appeal because it would be detrimental to other parties whose cases have been pending longer at the ARB. The ARB suggested that Respondent move for a stay in the state court action.

[Nuclear and Environmental Digest IX.M.2.]

PRACTICE BEFORE ARB; STRIKING OF BRIEF CONTAINING IMMATERIAL, OFFENSIVE EXCORIATION OF ALJ

In *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ Nos. 1999-CAA-25 and 2000-CAA-9 (ARB Nov. 2, 2000), the ARB granted Respondent's motion to strike Complainant's brief where it contained "'personal and vitriolic attacks on a Department of Labor Administrative Law Judge,' *Williams v. Lockheed Martin Corporation*, ALJ Case Nos. 98-ERA-40, 98-ERA- 42; ARB

Nos. 99-054, 99-064; Final Decision and Order, slip op. at 5 (Sept. 29, 2000)." The ARB pointed out that the obligation to represent clients with zeal and fidelity within the rules does not conflict with "the requirement that counsel refrain from immaterial, offensive excoriation of the ALJs before whom he appears." Slip op. at 3, citing Rhesa Hawkins Barkdale, *The Role of Civility in Appellate Advocacy*, 50 South Carolina Law Review 573, 577 (1999). In order not to penalize Complainant for his attorney's professional lapse, however, the Board granted permission to resubmit the brief after all personally disparaging remarks were removed.

Complainant's counsel moved for reconsideration, and for a hearing on the motion for consideration, on the ground that the ARB's order striking the brief violates Complainant's right to free expression. The ARB in *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ Nos. 1999-CAA-25 and 2000-CAA-9 (ARB Nov. 16, 2000), denied the motion, finding that Complainant's counsel misapprehended the order, which addressed the professional obligation of an attorney. An attorney, the ARB wrote, quoting its November 2, 2000 order, "has the right to criticize rulings of the ALJ with which his client disagrees [but] he has no right to engage in disrespectful and offensive attacks upon the ability and integrity of the ALJ; such attacks violate counsel's 'professional obligation to demonstrate respect for the courts.' *Id.* at 6. *Accord* ABA Model Rules of Professional Conduct, Rules 3.5 and 8.2 (1999)."

See also Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6 (ARB Oct. 31, 2000), slip op. at 17 n.10 (describing same attorney's attacks on the presiding judge as factually inaccurate and insulting, and in disregard of Rules 3.5 and 8.2).

[Nuclear and Environmental Digest IX.M.3.]

RELATIONSHIP BETWEEN PART 18 AND PART 24

In *Khandelwal v. Southern California Edison*, ARB No. 98-159, ALJ Nos. 1997-ERA-6 (ARB Nov. 30, 2000), the ARB implied that if an ALJ compresses a discovery period in order to proceed with the hearing on an expedited basis, it may also be necessary for the ALJ to set out the time to be allocated between requests and responses, and set out a deadline for filing of motions to compel, protective orders, or other discovery conflicts. This is necessary because the Part 18 time frames may not be realistic under a compressed discovery schedule. The ARB noted that although the Part 18 rules are generally applicable to Part 24 hearings, they must yield when inconsistent with Part 24 or relevant statutory authority or executive order.

[Nuclear and Environmental Digest X.P.]

SUMMARY REVERSAL OF ALJ; HEAVY BURDEN ON PROPONENT OF MOTION

The ARB denied Complainant's motion for summary reversal of the ALJ's recommended decision in *Mourfield v. Plaas*, ARB Nos. 00-055 and 00-056, ALJ No. 1999-CAA-13 (ARB Nov. 24, 2000). The Board wrote: "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, 297-298 (D.C. Cir. 1987)."

To the same effect: *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ Nos. 1999-CAA-25 and 2000-CAA-9 (ARB Dec. 6, 2000).

[Nuclear and Environmental Digest XIII.B.8.]

ADVERSE ACTION; DISCRIMINATORY FAILURE TO HIRE

In *Hasan v. Commonwealth Edison Co.*, 2000-ERA- 7, 8, 10, 11, 12, 13 and 14 (ALJ Oct. 5, 2000), Complainant filed a series of whistleblower complaints alleging discrimination and relation based on failure to hire. Each of the cases were dismissed for failure to state a claim where Complainant failed to allege a *prima facie* case in any of the various complaints. The recommended decisions focused on the second requirement for a *prima facie* case of retaliation, which requires adverse action on the part of the Respondent. The ALJ wrote that in order to establish a *prima facie* case of discriminatory refusal to hire, the complainant must show: (1) that he applied and was qualified for a job for which the employer was seeking applicants; (2) that, despite his qualifications, he was rejected; and (3) that after his rejection the position remained open and that employer continued to seek applicants from persons of complainant's qualifications. In each of the cases, the ALJ found that Complainant had failed to allege one or more of these elements.

[Nuclear and Environmental Digest XVII.A.]

SETTLEMENTS; WHERE SECRETARIAL APPROVAL IS AND IS NOT REQUIRED

The TSCA, SDWA and CAA require the Secretary of Labor to approve settlements of whistleblower complaints. The WPCA, SWDA and CERCLA do not. *Beliveau v. Naval Undersea Warfare Center*, ARB Nos. 00-073, 01-017, 01-019, ALJ Nos. 1997-SDW-1, 4 and 6 (ARB Nov. 30, 2000).

[Nuclear and Environmental Digest XVII.C.1.]

SETTLEMENTS; ALL SETTLEMENT DOCUMENTS MUST BE PROVIDED TO ARB

In cases where the ARB reviews and approves whistleblower settlements, the ARB requires that settlement documentation for any other claims arising from the same factual circumstances forming the basis of the federal claim be provided, or a certification that the parties entered into no other such settlement agreements. *Beliveau v. Naval Undersea Warfare Center*, ARB Nos. 00-073, 01-017, 01-019, ALJ Nos. 1997-SDW-1, 4 and 6 (ARB Nov. 30, 2000), citing *Biddy v. Alyeska Pipeline Service Co.*, ARB Nos. 96-109, 97-015, ALJ No. 1995-TSC-7 (ARB Dec. 3, 1996), slip op. at 3.

[Nuclear and Environmental Digest XVII.G.2.]

NO-FAULT SETTLEMENT; ATTORNEY'S FEES; PARTIES CANNOT LEAVE IT TO ALJ TO MAKE AN AWARD OF FEES AND COSTS

In *Harris v. Tennessee Valley Authority*, ARB No. 99-004, ALJ Nos. 1997-ERA-26 and 50 (ARB Nov. 29, 2000), the ARB held that a DOL administrative law judge does not have the jurisdiction to award costs, including attorneys' fees, where the parties have entered into a no-fault settlement agreement. In *Harris*, the parties entered into a settlement agreement which provided, *inter alia*, that Respondent would be responsible for attorneys' fees and expenses in an amount to be determined by the presiding ALJ. Respondent filed a petition for review of the ALJ's attorneys' fees

and costs decision.

The ARB found that the settlement was void, holding that the ERA provision covering fees and expenses, 42 U.S.C. § 5851(b)(2)(A) and (B), precludes an attorneys' fees award where there has been no determination of a violation and where the parties by settlement agreement have not expressly provided for payment of fees and costs. The ARB held that the ERA fees and expenses provision provides for an award of such costs to the complainant only where there has been a determination that the respondent violated the ERA anti-retaliation provision, and where there has been an order that respondent provide relief. Moreover, the ARB held that it is black letter law that an administrative body may only exercise authority over matters in its jurisdiction, and that parties cannot vest the agency with that jurisdiction by agreement.

The ARB observed that "a complainant who brings an action and then enters into no-fault settlement agreement is free to negotiate a settlement that includes her attorneys' fees as well." Such settlements are routinely reviewed and approved. The ARB ruled, however, that "where a complainant enters into a no-fault settlement of his or her case without at the same time settling the attorneys' fees issue would he or she be precluded from an award of attorneys' fees."

**[Nuclear and Environmental Digest XVII.C.1.]
SETTLEMENT; DEFICIENCIES**

In *Amato v. Assured Transportation and Delivery, Inc.*, 1998-TSC-6 (ALJ Oct. 31, 2000), the ALJ rejected a settlement agreement submitted by the parties because (1) it did not specify the net amount that Complainant would receive after payment of attorney fees; (2) it failed to specifically and explicitly state whether there are any other claims being settled and if so under what terms; (3) it provided for construction or interpretation of the agreement by California law rather than the statutes and regulations of the United States; and (4) it included a confidentiality provision that did not take into account the FOIA or the Privacy Act. The ALJ ordered the parties to submit a new settlement agreement or be prepared to proceed to a hearing on the merits.

**[Nuclear and Environmental Digest XX.E.]
ELEVENTH AMENDMENT; BARS ADMINISTRATIVE ADJUDICATION UNDER
PART 24 (AS OPPOSED TO INVESTIGATION) UNLESS DOL CHOOSES TO
INTERVENE AS A PARTY**

In *State of Ohio Environmental Protection Agency v. USDOL*, No. C2-00-1157, 2000 WL 1721083 (N.D. Ohio Nov. 14, 2000) (case below "Jayko", ARB No. 01-009, ALJ No. 1999-CAA-5), U.S. District Court judge Edmund A. Sargus issued a declaratory judgment that the regulations set forth in 29 C.F.R. Part 24 relating to claims made by individual complainants against the various States may only be applied consistent with the Eleventh Amendment where the Respondent is a State, if the United States of America Department of Labor elects to intervene as a party once the case proceeds to a hearing before an ALJ. Judge Sargus disagreed with the decision in the similar case of *State of Rhode Island v. USDOL*, No. C.A. 00- 44-T, 2000 WL 1448804 (D.R.I. Sept. 29, 2000), insofar as

that court enjoined any further administrative proceedings, not allowing DOL to decide whether to intervene as a party to the proceedings. Judge Sargus provided DOL 30 days to decide whether it would elect to intervene as a party. Because the record compiled by the ALJ appeared to be thorough and complete, Judge Sargus indicated that he would not rule that DOL could not now rely on the concluded administrative hearing (thus, implying that if DOL chooses to intervene, the case would continue on review by the ARB).

SURFACE TRANSPORTATION ASSISTANCE ACT WHISTLEBLOWER DECISIONS

[STAA Digest I.B.2.]

PURPOSE OF STAA; EXPOSURE OF VEHICLE SAFETY VIOLATIONS OF EMPLOYERS

In *Quintero v. Coca Cola Bottling Co. of N. America*, ARB No. 00-066, ALJ No. 2000-STA-31 (ARB Oct. 26, 2000), Respondent discovered that the medical certificate required by DOT regulation 49 C.F.R. 391.41(a) (physical qualification to drive a commercial motor vehicle) in Complainant's file had expired. Respondent advised Complainant of this deficiency, and he renewed the certificate. Respondent then directed Complainant to provide a medical certificate showing that he had been physically qualified to operate a commercial motor vehicle during the time that the certificate had expired. Complainant was unable to comply, and Respondent gave Complainant the option of either transferring to a non-driver position, or resigning and reapplying for a driving position at a later date. Complainant opted for the transfer.

The ARB adopted the ALJ's finding that Complainant had not engaged in protected activity. The Board wrote: "In our view, the STAA is not a shield that employees can use to immunize themselves against the consequences of their failure to adhere to motor vehicle safety regulations. Instead, the STAA, among other things, is intended to protect employees who expose the motor vehicle safety violations of their employers."

[STAA Digest II.E.7.]

REMAND TO OSHA; OSHA FINDING OF UNTIMELY FILING OVERTURNED, REMAND FOR INVESTIGATION ON MERITS

In *Clement v. Milwaukee Transport Services, Inc.*, 2000-STA-8 (ALJ Aug. 7, 2000), the ALJ granted the Assistant Secretary for OSHA's motion to remand to OSHA for an investigation of the merits pursuant to 29 C.F.R. § 1978.104, where the ALJ had earlier overturned OSHA's original finding that Complainant's complaint was not timely filed.

[STAA Digest II Q]

AMICUS BRIEF; PERMISSIBLE PURPOSES

In *Stauffer v. Walmart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-21 (ARB Dec. 4,

2000), Complainant's attorney filed a motion for leave to file an amicus brief on the grounds that his client, against his advice, wished to file his own brief. The attorney averred that (1) he represented Complainant on a contingent fee basis before the ALJ and therefore has a significant interest in having Complainant prevail, and (2) the disposition of the case may affect the outcome of other proceedings arising under the STAA whistleblower provision in which he represents other truck drivers. Complainant's position was that he had no objection to his attorney filing a brief, but informed the ARB that "[i]f only one brief can be official for the record it must be mine!!"

The ARB denied the motion, finding that the additional brief would be inconsonant with the proper purpose of amici filings. The Board held that "[a]n amicus filing is appropriate where a party is not represented by counsel, or is represented by incompetent counsel, the amicus has an interest in the case that may be affected by the decision or when the amicus has 'unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.' *Ryan v. Commodity Futures Trading Commission*, 135 F.3d 1062, 1063 (7th Cir. 1997)."

[STAA Digest III.J.]

ALTERNATIVE THEORIES OFFERED BY RESPONDENT NOT PROHIBITED

In *Mason v. Potter's Express, Inc.*, ARB No. 00-004, ALJ No. 1999-STA-27 (ARB Nov. 21, 2000), Complainant argued that the ALJ's recommended decision should not be adopted, in part, because Respondent had relied first, on a theory that it did not terminate Complainant's employment, and alternatively, that even if such termination occurred, the discharge was for a legitimate, non-discriminatory reason. The ARB discounted Complainant's argument, finding that Respondent's having presented alternative theories to be of no decisional significance.

[STAA Digest VII A 2 d; VII B.5.c.]

EMPLOYER/EMPLOYEE; GOVERNMENT EMPLOYEE NOT COVERED EMPLOYEE UNDER THE STAA; GOVERNMENT HAS NOT WAIVED SOVEREIGN IMMUNITY UNDER STAA

In *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 1998- CAA-10 and 11, 1999-CAA-1, 4 and 6 (ARB Oct. 31, 2000), the ARB found that an environmental specialist for the U.S. Department of Energy could not maintain a STAA whistleblower complaint against either the Department of Energy nor a private company. The ARB held:

The STAA's definition of "employee" explicitly excludes "an employee of the United States Government," and the definition of "employer" explicitly excludes "the Government." 49 U.S.C. §31101(2)(B), §31101(3)(B). There is no ambiguity in these scope provisions, and therefore we can rely upon their plain meaning. Moreover, the United States is immune from suit absent an explicit statutory waiver of sovereign immunity. *United States Dep't of Energy v. State of Ohio*, 503 U.S. 607, 615 (1992) (any waiver of the government's sovereign immunity must be "unequivocal"). Here we have an explicit statutory invocation of such immunity. Therefore, with

respect to his complaint against DOE, neither Rockefeller nor DOE is covered by the statute.

Slip op. at 6-7. The ARB rejected Complainant's contention that the Secretary's decision in *Flor v. U.S. Department of Energy*, 93-TSC-1 (Sec'y Dec. 9, 1994), is binding precedent for the proposition that government employees may sue their government employers under the STAA. The ARB found that decision in *Flor* did not purport to address or decide that issue