

RECENT SIGNIFICANT DECISIONS

AIR21, 29 CFR Part 24, and 29 CFR Part 1978

Whistleblower Cases



December 5, 2001

U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

Thomas M. Burke
Associate Chief Judge for
Black Lung and Traditional

NOTICE: This newsletter was created solely to assist the staff of the Office of Administrative Law Judges in keeping up to date on whistleblower law. This newsletter in no way constitutes the official opinion of the Office of Administrative Law Judges or the Department of Labor on any subject. The newsletter should, under no circumstances, substitute for a party's own research into the statutory, regulatory, and case law authorities on any subject referred to therein. It is intended simply as a research tool, and is not intended as final legal authority and should not be cited or relied upon as such.

Highlights of this issue:

AIR21 Decisions

ARB review; bankruptcy stay exemption; timeliness of hearing request; availability of subpoenas; motion to quash subpoena served on FAA employee

Nuclear and Environmental Decisions

III. Time Limits on Filing

timeliness of complaint runs from date of adverse action

VII. Proceedings Before OALJ

right to file a post-hearing brief; new argument raised in reply brief-- ALJ must provide opposing party opportunity to respond

VIII. Powers, Responsibilities and Jurisdiction of ALJ, Secretary and Federal Courts

standard of review of ALJ's grant of summary decision

XI. Burden of Proof and Production

A. Prima Facie Case

temporal proximity - inference of causal relationship with adverse action precluded where intervening event; stray boastful remark by supervisor insufficient to establish animus where other supervisors were responsible for layoff

B. Articulation of Nondiscriminatory Reason for Adverse Action

complainant's behavior - balancing test; removal after eligibility for disability leave expired

XII. Adverse Action

negative performance evaluation must implicate tangible job consequences; constructive discharge - intolerable conditions - mere dissatisfaction with assignment; refusal to hire following layoff; hostile work environment - *Berkman* test

XVIII. Dismissals

voluntary dismissal before ARB, FRAP 42(b) applies

XXI. Res Judicata/Collateral Estoppel

Res Judicata - Fourth Circuit standards applied

STAA Decisions

II. Procedure

timeliness of request for hearing; standard of review; scope of review

III. Weighing of Evidence and Interpretation of Law, Generally

expert testimony; 29 CFR § 18.702 and *Daubert*

IV. Burden of Proof and Production

D. Dual Motive

dual motive not reach if complainant fails to prove that adverse action was unlawfully motivated

V. Protected Activity

absence of highway use tax sticker; drivers' sleep period broken to move trailers

VII. Employer/Employee

immunity of federal government

X. Settlements

Assistant Secretary's Consent

**AVIATION INVESTMENT AND REFORM ACT
FOR THE 21ST CENTURY ["AIR 21"]
WHISTLEBLOWER DECISIONS**

ARB REVIEW; DELEGATION UNDER SECRETARY'S ORDER 2-96, ¶ 4.c.(39)

In *Bodine v. International Total Services*, 2001-AIR-4 (ALJ Nov. 29, 2001), the ALJ concluded that under Secretary's Order 2-96, ¶ 4.c.(39), 61 Fed. Reg. 19978 (1996), the Administrative Review Board has review authority delegated from the Secretary of Labor for laws, such as AIR21, which by statute provide for final decisions by the Secretary of Labor upon review of recommended decisions issued by ALJs. Noting that regulations had not yet been promulgated by the Department of Labor to implement the AIR21 whistleblower provision, the ALJ forwarded the administrative file to the ARB for review.

Editor's Note: Since implementing regulations are not yet published, parties may be well advised to file protective appeals rather than assume that the ARB will automatically review AIR21 ALJ decisions.

BANKRUPTCY; AUTOMATIC STAY; AIR21 WHISTLEBLOWER CASES EXEMPT

In *Bodine v. International Total Services*, 2001-AIR-4 (ALJ Nov. 20, 2001), the ALJ recommended a finding that the automatic stay provision the Bankruptcy Act, 11 U.S.C. § 362(a)(1), was not applicable to an AIR21 whistleblower proceeding pursuant to the exemption at Subsection 362(b)(4). Subsection 362(b)(4) provides that a bankruptcy petition does not act as a stay "under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." The ALJ found:

In this case, Respondent, who is engaged in airport security operations, fired Complainant after he reported certain alleged "security breaches" by Respondent to various authorities. After an investigation into the complaint, the Secretary found that the "complainant [was] 'protected' under the law for providing information to regulatory agencies about violations or alleged violations of any order, regulation or standard related to air carrier safety." There is no greater example of regulations designed to ensure public safety than those of the AIR which regulate commercial air travel. Certainly, the Department's exercise of their power to investigate and enforce this power through sanctions and other assessments is not subject to the automatic stay provisions of the Bankruptcy Code. Such reasoning would go against the very purpose of the AIR and the automatic stay provision of the Bankruptcy Act.

REQUEST FOR HEARING; TIMELINESS OF

In *Bodine v. International Total Services*, 2001-AIR-4 (ALJ Nov. 20, 2001), the ALJ recommended dismissal of the appeal as untimely where Respondent failed to submit objections to OSHA's Findings and Preliminary Order until over 35 days after OSHA's findings were served by certified mail. The AIR21 statute provides:

not later than 30 days after the date of notification of findings... either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record.

49 U.S.C. § 42121(B)(2)(a). If a party fails to request a hearing within the 30 day period, the preliminary order is deemed a final order that is not subject to judicial review. *Id.* In calculating the period for requesting review, the ALJ applied 29 C.F.R. § 18.43(c)(3) to add five days to the statutory filing period to account for mailing. The ALJ also provided Respondent the opportunity to state a ground for equitable tolling of the filing period, but it failed to respond.

SUBPOENA POWER OF ALJ; CONFLICT BETWEEN *CHILDERS* DECISION AND POLICY DIRECTIVE OF ACTING SOLICITOR OF LABOR

In *Peck v. Island Express*, 2001-AIR-3 (ALJ Aug. 20, 2001), the ALJ was faced with a motion to quash a subpoena issued by the Chief Administrative Law Judge. In ruling on the motion to quash,

the ALJ noted that the subject of administrative subpoenas had recently engendered a legal debate within DOL. The latest ruling from the ARB on the subject was made in *Childers v. Carolina Power & Light. Co.*, ARB No. 98-077, ALJ No. 1997-ERA-32 (ARB Dec. 29, 2000), in which ARB rejected the requirement for "express authorization" by Congress for ALJ subpoena power, reasoning that such power was inherent given that the whistleblower provision of the ERA required DOL to issue an adjudicative order on the record.

The ALJ observed that in a July 2001 directive, the Acting Solicitor for DOL concluded that the reasoning of the ARB in *Childers* was "erroneous" and dictum which is "legally indefensible." According to the Acting Solicitor's directive, the agency should resist complying with subpoenas not specifically authorized by statute in whistleblower cases. The ALJ, however, concluded that, considering the ARB would review his rulings and not the Solicitor, he was bound to apply the *Childers* ruling on subpoena authority. Moreover, the ALJ stated that he agreed with the legal analysis of the ARB in *Childers* in regard to subpoena power where the agency is required to conduct formal hearings.

See also BNA, Daily Labor Report No. 157, Wednesday, August 15, 2001, "Labor Solicitor Rejects Subpoena Use By ALJs in Certain Whistleblower Cases."

SUBPOENA; MOTION TO QUASH; COMPLAINANT'S NEED FOR TESTIMONY OF FAA SAFETY INSPECTOR

In *Peck v. Island Express*, 2001-AIR-3 (ALJ Aug. 20, 2001), Complainant subpoenaed an FAA aviation safety inspector. FAA regulations do not permit its employees to testify in proceedings involving private litigants unless the request for testimony or documents is submitted in accordance with 49 C.F.R. Part 9. Under this provision, the request for testimony and documents is sent to the FAA General Counsel who determines whether the FAA will produce the requested documents and permit the requested individual to testify. In *Peck*, the FAA filed a motion to quash because Complainant's subpoena did not comply with the FAA regulations.

In denying the motion to quash, the ALJ initially determined that subpoenas are available to litigants in AIR21 cases. (see casenote above). Turning to the Complainant's need to depose the FAA employee, the ALJ found that the employee's testimony would be necessary because she was the Complainant's contact at the FAA, and her testimony would go directly to the issue of whether Respondent was aware of Complainant's protected activity. The ALJ also determined that the employee's testimony would assist him in determining whether Complainant's discrimination complaint was frivolous or brought in bad faith. The ALJ found that the subpoena was reasonably specific and not unreasonably burdensome. Finally, the ALJ commented that for the FAA to refuse to provide witnesses, and documents essential to whistleblowers' efforts to prove their employment discrimination complaints would be contrary to the purposes of AIR21.

29 CFR PART 24
NUCLEAR AND ENVIRONMENTAL
WHISTLEBLOWER DECISIONS

III. Time limits on filing

[Nuclear and Environmental Whistleblower Digest III B 2]

TIMELINESS OF COMPLAINT RUNS FROM DATE OF ADVERSE ACTION

Under the environmental statutes, the time for filing a complaint begins to run from the date of the adverse action, not the date the employee engaged in the protected activity. *Erickson v. U.S. Environmental Protection Agency*, ARB No. 99-095, ALJ No. 1999-CAA-2 (ARB July 31, 2001) (citing 29 C.F.R. § 24.3(b)).

In *Erickson*, the ALJ had granted summary decision to Respondent on the ground that the complaint -- filed after Complainant had been denied a promotion -- was untimely as more than three years had elapsed since the alleged whistleblowing activity. The ARB reversed the grant of summary decision, holding: "[W]hile the passage of time between protected activity and adverse action plainly mitigates against the likelihood of retaliation, temporal proximity (or lack thereof) does not by itself determine whether an adverse action was retaliatory." Slip op. at 5 (citation omitted).

[Nuclear and Environmental Whistleblower Digest III C 1]

TIMELINESS; ENVIRONMENTAL COMPLAINT FILED OUTSIDE 30-DAY LIMIT IS TIME BARRED UNLESS EQUITABLE TOLLING APPLIES OR RESPONDENT'S ACTIONS ONLY BECAME APPARENT WITH PASSAGE OF TIME

In *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 1999-WPC-3 (ARB Aug. 28, 2001), Complainant alleged that a series of actions taken by Respondent over a 2 ½ year period constituted hostile acts of a continuing nature so as to provide an equitable exception to the 30-day time limit for filing a complaint under the whistleblower provisions of the CERCLA and the SWDA.

The ARB concurred with the ALJ's statement that claims alleging illegal conduct that occurred more than 30 days prior to the filing of a complaint are time-barred unless either (a) equitable tolling is appropriate or (b) the Respondent's actions constitute a continuing pattern of retaliatory conduct that is apparent only with the passage of time. The Board agreed with the ALJ that none of the grounds for equitable tolling applied to the instance case. The ARB found that Complainant's complaint fared no better under the continuing violation doctrine where there was no prolonged employer decision-making process that made it difficult for Complainant to determine the actual dates of the allegedly discriminatory acts, and there was no evidence of an underlying policy or pattern of discrimination. Rather, the Board found that the acts of which Complainant complained were discrete and varied in kind, were implemented by several different supervisors, and were mostly distant in time from the complaint filed following his termination.

VII. Proceedings before OALJ

[Nuclear and Environmental Whistleblower Digest VII C 1]

MOTION TO DISMISS ACCOMPANIED BY EVIDENCE OUTSIDE PLEADING TREATED AS MOTION FOR SUMMARY DECISION

Where a movant submits evidence outside the pleadings to support a motion to dismiss, the motion must be viewed as a motion for summary decision under 29 C.F.R. § 18.40. *Erickson v. U.S. Environmental Protection Agency*, ARB No. 99-095, ALJ No. 1999-CAA-2 (ARB July 31, 2001).

[Nuclear and Environmental Whistleblower Digest VII D 6]

WHISTLEBLOWER LITIGANTS DO NOT HAVE A RIGHT TO FILE A POST-HEARING BRIEF WITH THE PRESIDING ALJ

In *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 1999-WPC-3 (ARB Aug. 28, 2001), Complainant asserted that the ALJ erred because the ALJ did not give the parties an opportunity to file post-hearing briefs. Complainant's argument was based on the theory that the APA requires that parties be afforded an opportunity to file proposed findings and conclusions with the ALJ. The ARB found that the APA requires that parties to administrative proceedings must be given an opportunity to argue their positions, but provides agencies with flexibility to determine when this will occur during the proceeding. *See* 5 U.S.C.A. §557(c). The ARB ruled that parties may be given an opportunity to file proposed findings and conclusions before a recommended decision is issued, but that alternatively, after a recommended decision is issued by a subordinate decision maker, the agency can provide the parties with an opportunity to file exceptions to the recommended decision.

The ARB held that DOL has clearly taken this second course by creating the Board and allowing parties to petition the Board to review any recommended decision issued by an ALJ under the whistleblower protection provisions of the environmental acts. The ARB also noted that "To the extent that Ilgenfritz expected to file a post-hearing brief with the ALJ, or asserts that he was entitled to file a post-hearing brief 'as a matter of right,' his expectation was unwarranted. The Department's procedural regulations governing whistleblower complaints state, in pertinent part, 'Post-hearing briefs will not be permitted except at the request of the administrative law judge.' 29 C.F.R. §24.6 (e)(3)." Slip op. at 5 n.4.

[Nuclear and Environmental Whistleblower Digest VII E]

NEW ARGUMENT RAISED IN REPLY BRIEF; ALJ MUST PROVIDE OPPOSING PARTY OPPORTUNITY TO RESPOND

In *Erickson v. U.S. Environmental Protection Agency*, ARB No. 99-095, ALJ No. 1999-CAA-2 (ARB July 31, 2001), the ARB held that "[a]t a minimum, ... when a new argument is raised in a reply brief, the other party must be given an adequate opportunity to respond in some manner (*e.g.*, by ordering an additional round of briefing)." Slip op. at 7 (citation omitted).

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

[Nuclear and Environmental Whistleblower Digest VIII B 2 d]

STANDARD OF REVIEW OF ALJ'S GRANT OF SUMMARY DECISION

The ARB reviews an ALJ's grant of summary decision *de novo*. The Board "will affirm the ALJ's recommendation that summary decision be awarded if, upon review of the evidence in the light most favorable to the non-moving party, [the Board] determines that there exists no genuine issue as to any material fact and that the ALJ correctly applied the relevant law." *Erickson v. U.S. Environmental Protection Agency*, ARB No. 99-095, ALJ No. 1999-CAA-2, slip op. at 5 (ARB July 31, 2001) (citations omitted).

XI. Burden of proof and production

A. Prima facie case

[Nuclear and Environmental Whistleblower Digest XI A]

FAILURE OF COMPLAINT OR OTHER PLEADING TO SET OUT A *PRIMA FACIE* CASE

In *Nickerson v. Plains Dairy Products*, 2001-CAA-10 (ALJ July 17, 2001), Complainant was directed in a pre-hearing order to file a detailed complaint alleging how the matter fell within the CAA, his activities that he considered protected activity, and the specific discrimination alleged against the Respondent. Complainant never filed a complaint, but later did file an answer to Respondent's motion for summary judgment/motion to dismiss for failure to state a claim for which the court could grant relief. Complainant's answer, however, did not identify any specific violations. The ALJ, citing caselaw to the effect that although a *pro se* litigant is held to less stringent pleading requirements, must nonetheless meet minimal pleading requirements, and, in a whistleblower case, must set forth a *prima facie* of case retaliation, recommended that the case be dismissed.

[Nuclear and Environmental Whistleblower Digest XI A 2 ii]

TEMPORAL PROXIMITY; INFERENCE OF CAUSAL RELATIONSHIP WITH ADVERSE ACTION PRECLUDED WHERE INTERVENING EVENT

In *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 1997-WPC-1 (ARB July 31, 2001), Complainant whose history as a whistleblower was well known and who had issued several non-conforming reports (which he characterized as "imminent threats) while providing electrical systems inspection services on the Trans Alaska Pipeline System, requested reassignment after Alyeska changed the standards to be used to conduct inspections. Complainant was placed on inactive status, eligible for reassignment. The ALJ found that the closeness in time between Complainant's protected activity and the layoff was compelling evidence of causation. The ARB disagreed:

Temporal proximity may be sufficient to raise an inference of causation in an environmental whistleblower case. *See, e.g., Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). When two events are closely related in time it is often logical to infer that the first event (*e.g.* protected activity) caused the last (*e.g.* adverse action). However, under certain circumstances even adverse action following close on the heels of protected activity may not give rise to an inference of causation. Thus, for example, where the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action, the inference of causation is compromised. Because the intervening event reasonably could have caused the adverse action, there no longer is a logical reason to infer a causal relationship between the activity and the adverse action. Of course, other evidence may establish the link between the two despite the intervening event. As the court held in *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000), "we have ruled differently on this issue [raising an inference of retaliatory motive based on temporal proximity] . . . depending, of course, on how proximate the events actually were, and *the context in which the issue came before us.*" (Emphasis added.)

Here, it is apparent that Tracanna's request for removal from his inspector position on the AKOSH Project was an intervening event of sufficient weight to preclude any inference of causation which otherwise would have been drawn from the nearness of Tracanna's protected activity to his layoff. Clearly, once Tracanna had requested to be removed from his position, ASIS' options were extremely limited. Either ASIS could have placed Tracanna in another position, or it could have laid him off. However, in light of Tracanna's intervening request to be removed from the AKOSH Project, it cannot be assumed that ASIS's decision to place him on layoff status was causally related to his protected activity and retaliatory.

Slip op. at 7-8 (footnote omitted).

[Nuclear and Environmental Whistleblower Digest XI A 2 d]

RETALIATORY ANIMUS; STRAY BOASTFUL REMARK BY SUPERVISOR INSUFFICIENT TO ESTABLISH ANIMUS WHERE OTHER SUPERVISORS WERE RESPONSIBLE FOR LAYOFF, JOB OFFERS MADE TO COMPLAINANT

In *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 1997-WPC-1 (ARB July 31, 2001), Complainant presented testimony to the effect that Complainant's immediate supervisor had boasted that he was the only one with enough guts to get rid of Complainant. The ARB questioned whether there was credible proof that the statement was made, but even assuming it was made, declined to ascribe significance to it, noting that it was made after Complainant had been laid off, and that the supervisor had pressed his supervisors to offer Complainant another position. Moreover, the ARB concluded that other supervisors, and not Complainant's immediate supervisor, were responsible for placing Complainant on layoff, and for making decisions about offering Complainant other positions. Thus, even if the remark had been made "it would not be legally significant in connection with [Complainant's] layoff and subsequent job offers, which were

determined by higher-level ASIS personnel." Slip op. at 12 (citation omitted).

XI. Burden of proof and production

B. Articulation of nondiscriminatory reason for adverse action

[Nuclear and Environmental Whistleblower Digest XI B 2 b iv]

COMPLAINANT'S BEHAVIOR; BALANCING TEST

In a dual motive case, the ALJ found in *Smalls v. South Carolina Electric & Gas*, 2000-ERA-27 (ALJ July 11, 2001), there was evidence that, in addition to discriminatory motive, Complainant was given an unsatisfactory performance evaluation in part based on the need to improve his interpersonal and communication skills. The ALJ found that although Complainant was abrasive and confrontational and frequently accused other of lying, he had not been shown to have used obscene language, trespassed, made threats, or exhibited other erratic behavior, and that the accusation of lying were intrinsically connected to his whistleblowing activity -- his belief that others were lying and conducting a cover-up. Noting that there is a balancing test employed when determining whether a complainant's behavior was so egregious so as to fall outside statutory protection, the ALJ found that the permissible and non-permissible motives for Complainant's discharge in the instant case could not be separated -- and thus Employer had not shown by clear and convincing evidence that it would have given Complainant a less-than-satisfactory performance rating in the absence of his protected activity.

[Nuclear and Environmental Whistleblower Digest XI B 2 c]

REMOVAL FROM EMPLOYMENT AFTER ELIGIBILITY FOR DISABILITY LEAVE EXPIRED FOUND NOT TO CONSTITUTE UNLAWFUL DISCRIMINATION

In *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 1999-WPC-3 (ARB Aug. 28, 2001), Complainant was terminated from employment after he had been unable to perform his job for over a year, and it appeared unlikely that he would ever return to work. Respondent presented testimony from a personnel officer that after an employee is still incapacitated after having been in a leave without pay status for over one year, then it is appropriate to initiate a removal action. Respondent also presented credible testimony that the decision to initiate the removal process was based on the Chief of Public Works' recommendation, and that the Chief made that recommendation based solely on the desire to fill the position with a permanent employee and that it had nothing to do with Complainant's protected activities. On this basis, the ARB found that Complainant's termination was not the result of unlawful discrimination.

XIII. Adverse action

[Nuclear and Environmental Whistleblower Digest XIII A]

ADVERSE ACTION; NEGATIVE PERFORMANCE EVALUATION MUST IMPLICATE TANGIBLE JOB CONSEQUENCES TO BE ACTIONABLE

A negative performance evaluation, absent tangible job consequences, is not an adverse action. *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 1999-WPC-3 (ARB Aug. 28, 2001).

[Nuclear and Environmental Whistleblower Digest XIII B 6]

CONSTRUCTIVE DISCHARGE; CONDITIONS MUST HAVE BEEN INTOLERABLE BECAUSE OF THE UNLAWFUL DISCRIMINATION

In *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 1997-WPC-1 (ARB July 31, 2001), Complainant, whose history as a whistleblower was well known and who had issued several non-conforming reports (which he characterized as "imminent threats") while providing electrical systems inspection services on the Trans Alaska Pipeline System, requested reassignment after Alyeska changed the standards to be used to conduct inspections. Complainant explained that he had philosophical differences with the action taken to change the standards, and he could not ignore the safety problems he and other inspectors had reported. Complainant was placed on inactive status, eligible for reassignment. Following a hearing, the ALJ found that Complainant's request to be removed from this assignment was a constructive discharge. The ARB disagreed:

As developed by the courts, a "constructive discharge" occurs when an employee, who has not been terminated directly by his employer, finds his working conditions objectively so intolerable that it is necessary to resign his employment. However, as the Seventh Circuit Court of Appeals has held:

Establishing constructive discharge is a two-step process. First, "a plaintiff needs to show that his working conditions were so intolerable that a reasonable person would have been compelled to resign." . . . Second, the conditions "must be intolerable **because of unlawful discrimination.**"

Simpson v. Borg-Warner Automotive, Inc., 196 F.3d 873, 877 (7th Cir. 1999), citations omitted, emphasis added....

In the context of an environmental whistleblower case such as this, it is incumbent upon the complainant to establish both that working conditions were objectively intolerable, **and** that those conditions were the result of unlawful retaliation on the part of the employer. Here, the ALJ found that Tracanna had established the first element: He found that Tracanna's working conditions were so unsafe that a reasonable person would have been

compelled to resign. However, the unsafe conditions upon which the ALJ rested his constructive discharge analysis **were not the result of retaliation on ASIS' part**; they were the result of Alyeska's switch from the NEC to the AKOSH and ANSC Codes as standards to be used by ASIS in conducting the electrical inspections at VMT.

Constructive discharge analysis is not applicable to every employment discrimination and retaliation case in which an employee has quit his job because working conditions were so intolerable that a reasonable person would have been compelled to resign; there must be a nexus between the intolerable conditions and discrimination or retaliation. Here that nexus is entirely absent: Tracanna requested removal from the AKOSH Project not because of unlawful discrimination but because of his belief that the AKOSH and ANSC standards were less safe than the NEC guidelines. Therefore, Tracanna's request to be removed from the AKOSH Project did not constitute a constructive discharge.

Slip op. at 6-7 (footnotes and one citation omitted).

[Nuclear and Environmental Whistleblower Digest XIII B 6]

CONSTRUCTIVE DISCHARGE; MERE DISSATISFACTION WITH AN ASSIGNMENT DOES NOT ESTABLISH

In *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 1997-WPC-1 (ARB July 31, 2001), Complainant was laid off when he asked to be removed from his position. Within a matter of days after his layoff, Respondent offered him two positions, both of which he rejected. Other offers followed; however Complainant rejected all but a few temporary positions because the assignments offered to him did not meet his specifications. The ARB found that under these circumstances, Complainant's subsequent resignation was not a constructive discharge. The ARB wrote:

The standard by which an alleged constructive discharge is measured is a stringent one. The Ninth Circuit, in which this case arises, has held that:

To support his claim of constructive discharge, [a plaintiff is] required to demonstrate that . . . a reasonable person in his position would have felt that he was forced to quit because of intolerable and discriminatory working conditions. *See Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1411 (9th Cir. 1996). An isolated incident of mistreatment is not enough; [plaintiff] had to show aggravating factors such as a continuing pattern of discriminatory treatment. *See id.* at 1411-12; *King v. AC & R Advertising*, 65 F.3d 764, 767-68 (9th Cir. 1995) (stating that, to defeat a summary judgment, the claimant "had to show that the conditions giving rise to his resignation were extraordinary and egregious") (applying California law of constructive discharge).

Huskey v. City of San Jose, 204 F.3d 893, 900 (9th Cir. 2000); *Fielder v. UAL Corp.*, 218 F.3d 973, 987 (9th Cir. 2000) (same). Of critical importance here is that dissatisfaction with an assignment, a poor performance rating, or even a demotion "does not by itself trigger a constructive discharge." The plaintiff must show that "the conditions giving rise to his resignation were extraordinary and egregious. . . ." *King v. AC & R Advertising*, 65 F.3d 764, 767-68 (9th Cir. 1995).

[Nuclear and Environmental Whistleblower Digest XIII B 8]

LAYOFF FOR NON-DISCRIMINATORY REASON; COMPLAINANT'S BURDEN SAME AS ANY OTHER REFUSAL TO HIRE CASE

Where an electronic systems inspector was laid-off for reasons that the ARB found were non-discriminatory, when Complainant sought reassignment he stood in no different position than any other inspector who had completed a project and was awaiting reassignment. *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 1997-WPC-1 (ARB July 31, 2001). Thus, Complainant "had the burden of proving both: 1) that he applied for a position that was available; and 2) that he was rejected in circumstances that raise the inference that the rejection was motivated by retaliatory animus." Slip op. at 13 (citations omitted). The ALJ had found that a large amount of inspector work was available and credited the testimony of Complainant's witnesses to that effect. The ARB, however, credited Respondent's witnesses who testified to the effect that no electrical inspector positions had been available that were not offered to Complainant. Moreover, the ARB found that Complainant had placed a number of conditions on his re-employment, and had failed to present any credible evidence that such a position existed. Therefore, Respondent's failure to place Complainant in a permanent position that met Complainant's requirements following his layoff was not retaliatory adverse action.

[Nuclear and Environmental Whistleblower Digest XIII C]

HOSTILE WORK ENVIRONMENT; SUMMARY DECISION APPROPRIATE IF ELEMENT OF *BERKMAN* TEST NOT PRESENTED

In *Moore v. U.S. Dept. of Energy*, ARB No. 99-094, ALJ No. 1999-CAA-14 (ARB July 31, 2001), Complainant alleged that during OSHA's investigation of an earlier complaint, Respondent made certain statements against him and engaged in improper ex parte contacts with the OSHA investigator, which Complainant viewed as retaliatory. The ALJ granted summary decision based on the conclusion that Complainant failed to allege an adverse action. On review, Complainant argued that in a hostile working environment case, he is not required to show a tangible job detriment. The ARB agreed with this proposition, but nevertheless found that summary decision was properly granted because Complainant had not alleged or offered facts to support a hostile work environment case under the five factor test stated in *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2 (ARB Feb. 29, 2000). In a footnote, the ARB rejected Complainant's argument that the ALJ erred in denying him discovery, finding that Complainant had not explained how any amount of discovery could produce evidence that Respondent's conduct during the investigation of the first complaint could amount to pervasive and regular discrimination.

(which one of the elements of the *Berkman* test).

XVIII. Dismissals

[Nuclear and Environmental Whistleblower Digest XVIII A 1]

VOLUNTARY DISMISSAL BEFORE ARB; APPLICATION OF FRAP 42(b)

Where Complainant filed a notice of dismissal, with prejudice, while the case was pending before the ARB, the ARB used Fed. R. App. P. 42(b) to construe Complainant's notice as a motion for voluntary dismissal, granted the motion, and dismissed the complaint. *Doody v. Centerior Energy*, ARB No. 00-051, ALJ No. 1997-ERA-43 (ARB July 26, 2001).

XXI. Res judicata/collateral estoppel

[Nuclear and Environmental Whistleblower Digest XXI B]

RES JUDICATA; REFERENCE TO FOURTH CIRCUIT STANDARDS

In *Erickson v. U.S. Environmental Protection Agency*, ARB No. 99-095, ALJ No. 1999-CAA-2 (ARB July 31, 2001), the ARB remanded the case to the ALJ finding that the ALJ had improperly granted summary decision to Respondent on timeliness issues. Respondent had also raised the assertion that Complainant was precluded from litigating her claim before DOL because she had previously litigated the same issues in other forums. The ALJ had not addressed this issue. The ARB directed on remand that the ALJ address this as a factual issue and consider the facts under the standards in *Sedlack v. Braswell Servs. Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998).

29 CFR PART 1978
SURFACE TRANSPORTATION ASSISTANCE ACT
WHISTLEBLOWER DECISIONS

II. Procedure

[STAA Whistleblower Digest II B 2 d ii]

TIMELINESS OF REQUEST FOR HEARING; OVER NINE MONTHS BETWEEN SECRETARY'S FINDINGS AND REQUEST

In *Tavares v. Swift Transportation Co., Inc.*, ARB No. 01-036, ALJ No. 2001-STA-13 (ARB Oct. 2, 2001), Complainant filed his complaint over nine months after the most recent OSHA determination in a series of three complaints. The OSHA determination letters all provided a notice of the right to request a hearing within 30 days. Complainant argued that the time limit for filing a complaint should be excused because he was not properly served with the determination letters and because as a professional truck driver he is often away from home, as long as one and one-half months. Complainant, however, provided no proof of improper service. Moreover, the ARB found no error in the ALJ's conclusion that even if Complainant's occupation as a professional truck driver prevented him from filing his complaint in a timely fashion, it does not excuse his failure to file his written objections until nearly ten months after he received his most recent notice of findings from the Secretary.

[STAA Whistleblower Digest II H 4 a]

SUBSTANTIAL EVIDENCE STANDARD OF REVIEW OF ALJ'S FINDINGS OF FACT

In *Dalton v. Copart, Inc.*, ARB No. 01-020, ALJ No. 1999-STA-46 (ARB July 19, 2001), the ALJ found that Complainant had refused to drive his truck because he had a reasonable apprehension that to do so would cause serious injury to himself or to the public. Upon review, the ARB reversed, largely based on a very different view of the facts, despite the substantial evidence level of review of the ALJ's factual findings in a STAA case. Applying a reasonable person standard to the STAA work refusal based on a reasonable apprehension of accident, injury or serious impairment to health provision at section 31105(a)(2), the ARB found that substantial evidence did not support the ALJ's findings of fact. In this regard, the Board stated:

In so ruling, we are mindful that the substantial evidence standard of review places a heavy burden upon us. This Board is not free to engage in an independent evaluation of the facts. "If there [is] substantial evidence [in the record] to support the ALJ's findings," it would constitute reversible error for this Board to fail to treat them as conclusive. *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). *Accord Brink's Inc. v. Herman*, 148 F.3d 175, 178 (2d Cir. 1998). However, the substantial evidence standard does not require us to affirm the ALJ's findings of fact merely because there is evidence in the record which would justify them, without taking into account other – contrary – evidence in the record. Rather, as the Supreme

Court held in *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951), "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." With these principles in mind we evaluate all the evidence in the record with regard to the reasonableness of Dalton's apprehension of serious injury.

Slip op. at 7-8 (footnote omitted). Essentially, the ARB found that Complainant's fears were either uninformed or not credible.

[STAA Whistleblower Digest II H 4 b]

ARB STANDARD OF REVIEW OF ALJ'S DETERMINATION THAT COMPLAINANT FAILED TO STATE A CLAIM UPON WHICH RELIEF BE GRANTED IS *DE NOVO*

In *Moore v. U.S. Dept. of Energy*, ARB No. 99-094, ALJ No. 1999-CAA-14 (ARB July 31, 2001), the ARB held that a determination that a complainant has failed to state a claim upon which relief can be granted is a legal conclusion. The Board then noted that under the STAA the ARB reviews an ALJ's legal conclusions *de novo*.

[STAA Whistleblower Digest II H 4 c]

ARB REVIEW; EXHIBITS NOT IN RECORD MADE BEFORE ALJ NOT CONSIDERED BY ARB ON REVIEW

Exhibits submitted with a brief to the Board which were not part of the record developed before the ALJ are not considered by the ARB because the Board's decision is "based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c). *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-21 (ARB July 31, 2001).

III. Weighing of evidence and interpretation of law, generally

[STAA Whistleblower Digest III G]

EXPERT TESTIMONY; 29 CFR § 18.702 AND *DAUBERT*

In *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-21 (ARB July 31, 2001), the ARB made reference to 29 C.F.R. §18.702 (2000), in explaining when expert testimony is admissible. Under that rule expert testimony is admissible where "scientific, technical, or other specialized knowledge will assist the judge as trier of fact to understand the evidence or to determine a fact in issue" and "a witness [is] qualified as an expert by knowledge, skill, experience, training or education."

The Board cited *Daubert v. Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993), for what a trial judge must access when faced with a proffer of expert scientific testimony. The Board quoted the following from *Daubert*:

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Daubert, 509 U.S. at 592-93.

IV. Burden of proof and production

D. Dual motive

[STAA Whistleblower Digest IV D 1]

DUAL MOTIVE; IF FINDING MADE THAT ADVERSE ACTION IS NOT MOTIVATED BY AN UNLAWFUL MOTIVE, COMPLAINANT HAS NOT PROVEN HIS CLAIM AND DUAL MOTIVE ANALYSIS NEED NOT BE REACHED

"[W]here a fact finder affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is not unnecessary to rely on a 'dual motive' analysis." *Mitchell v. Link Trucking, Inc.*, ARB 01-059, ALJ No. 2000-STA-39 (ARB Sept. 28, 2001).

V. Protected activity

[STAA Whistleblower Digest V A 3 and 4]

ABSENCE OF HIGHWAY USE TAX STICKER DOES NOT IMPLICATE SAFETY, BUT TAX ISSUES

In *Forrest v. Transwood Logistics, Inc.*, 2001-STA-43 (ALJ Aug. 7, 2001), the ALJ found that, although the truck Complainant was driving did not have a New York Highway Use Tax sticker, the absence of such a sticker was not a safety matter as alleged by Complainant, but rather related to a tax and not safety. Therefore this issue did not support a whistleblower complaint under section 31105(a)(1)(B)(i). The ALJ also found that no reasonable person could conclude that absence of a HUT sticker established a real danger of accident, injury or serious impairment to health, and therefore a whistleblower complaint under section 31105(a)(1)(B)(ii) was not supported.

[STAA Whistleblower Digest V B 2 a iv]

DRIVER FATIGUE; PRACTICE OF REAWAKENING DRIVERS TO PERFORM BRIEF TASKS; DOL'S CONCERN IS WHETHER SPECIFIC FACTS EVINCE PROTECTED ACTIVITY

In *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-21 (ARB July 31, 2001), the record was replete with evidence and argument about the issue of the human body's daily cycle ("circadian rhythm") and its relationship to a driver's ability to be alert and drive safely. Complainant argued that Respondent's "Custom Night Receiving System" which sometimes required drivers to be awakened from their sleep to perform brief tasks, such as shuttling trailers, is illegal as implemented because it contributes to driver fatigue.

The ARB recognized the importance of the issue of driver fatigue, but held that

To the extent that Stauffer is arguing that a facially lawful scheduling policy does not adequately protect drivers and the public, he effectively is calling for a change in current DOT safety regulations – a remedy beyond the Labor Department's authority under the STAA. As we have noted before, this type of policy argument must be addressed to the DOT, which (unlike the Department of Labor) has both legal authority and technical expertise in the field.

This is not to say, however, that the Department of Labor has no role to play in driver safety complaints. Our concern, however, is comparatively narrow. Rather than addressing the global concern that Stauffer raises (*i.e.*, whether it generally is an unsafe practice to require drivers to operate their vehicles after being awakened from the normal sleep cycle), our concern is whether a *specific* refusal to drive is protected activity under the STAA under the facts presented.

Slip op. at 7-8 (citation omitted). In Complainant's case, the record failed to establish a case under either the "actual or anticipated fatigue causing impairment" analysis (§ 31105(a)(1)(B)(i)) or "reasonable apprehension of serious injury related to fatigue" analysis (§ 31105(a)(1)(B)(ii)).

The ALJ had found Complainant's testimony less than credible because it was argumentative, contradictory and unclear -- and the ARB declined to disturb the ALJ's credibility finding. The ARB also noted that Complainant's claim of impairment due to fatigue was undercut by the fact that he parked the trailer and then drove five miles to another store to spend the night after refusing the assignment to shuttle trailers. Moreover, the ARB found the testimony of Complainant's expert in sleep disorders not to be persuasive because he had not examined or even met Complainant prior to the hearing, because it was equivocal, and because he did not clearly identify the reasoning or methodology underlying his conclusions. Finally, the ARB observed in regard to the reasonable apprehensive issue that neither Complainant nor other drivers who testified could point to any specific instances of fatigue causing a serious injury while shuttling vehicles while working for Respondent.

VII. Employer/employee

[STAA Whistleblower Digest VII A 2 d]

FEDERAL GOVERNMENT IMMUNE FROM SUIT UNDER STAA WHISTLEBLOWER PROVISION

In *Moore v. U.S. Dept. of Energy*, ARB No. 99-094, ALJ No. 1999-CAA-14 (ARB July 31, 2001), the Board re-affirmed its holding in *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB No. 99-022, ALJ No. 1998-CAA-10 (ARB Oct. 31, 2000), to the effect that the STAA definitions of "employee" and "employer" constitute an express invocation of sovereign immunity.

X. Settlements

[STAA Whistleblower Digest X E]

SETTLEMENT; ASSISTANT SECRETARY'S CONSENT MUST BE PRESENTED WHERE ASSISTANT SECRETARY IS PROSECUTING PARTY IN ORDER FOR A SETTLEMENT TO BE APPROVED

Where the Assistant Secretary is the prosecuting party in a STAA whistleblower case, any settlement agreement between Complainant and Respondent must be shown to have been consented to by the Assistant Secretary prior to approval by the ARB or the ALJ. See *Ass't Sec'y & Filer v. Arch Aluminum & Glass, Inc.*, ARB No. 01-053, ALJ No. 1999-STA-12 (ARB Aug. 29, 2001).