In the Matter Of:

MICHAEL E. TIMMONS,                    CASE NO. 95-ERA-40
       COMPLAINANT,            DATE: June 21, 1996

v.

MATTINGLY TESTING SERVICES,           
       RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND ORDER OF REMAND

This case arises under Section 211, the employee protection provision, of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1994). Before this Board for review is the Recommended Decision and Order (R. D. and O.) issued on October 20, 1995, by the Administrative Law Judge (ALJ). The ALJ concluded that Complainant, Michael E. Timmons (Timmons), failed to establish that Respondent, Mattingly Testing Services (MTS), violated the ERA when it terminated him from his employment with MTS as a welding inspector and radiographer. A thorough review of the record, including the submissions filed before this Board by Timmons, indicates that the case must be remanded for a supplemental hearing and for


Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the ARB now issues final agency decisions. A copy of the final procedural revisions to the regulations, 61 Fed. Reg. 19982, implementing this reorganization is also attached.

\[\text{\footnotesize\textsuperscript{2}}\] Section 211 of the ERA was formerly designated Section 210, but was redesignated pursuant to Section 2902(b) of the Comprehensive National Energy Policy Act (CNEPA) of 1992, Pub. L. No. 102-486, 106 Stat. 2776, which amended the ERA effective October 24, 1992.
application of the legal standards relevant to the parties' burdens under the 1992 Amendments to the ERA, see n.2 supra.

DISCUSSION

I. Evidentiary issues

On review before this Board, Timmons has submitted two affidavits and urges that these documents be admitted into evidence at this time and considered in reviewing this case. In the alternative, Timmons requests that the case be remanded for the taking of additional evidence before the ALJ. For guidance in disposing of Timmons’ requests, we look to the regulations provided at 29 C.F.R. Part 24 regarding the investigation and adjudication of complaints filed under Federal employee protection provisions, the Rules of Practice and Procedure for the Office of Administrative Law Judges, found at 29 C.F.R. Part 18, and the Federal Rules of Civil Procedure. See 29 C.F.R. § 18.1; see also Nolder v. Kaiser Engineers, Inc., Case No. 84-ERA-5, Sec. Dec., June 28, 1985, slip op. at 5-6.

In accord with pertinent criteria provided by the foregoing authorities, the affidavit authored by James Simpkin (Simpkin) clearly constitutes newly discovered evidence that was in existence at the time of the hearing and of which Timmons was “‘excusably ignorant.’” See NLRB v. Jacob E. Decker and Sons, 569 F.2d 357, 363 (5th Cir. 1978)(quoting United States v. 41 Cases, More or Less, 420 F.2d 1126, 1132 (5th Cir. 1970)), cited in McDaniel v. Boyd Brothers Transportation, Case No. 86-STA-6, Sec. Ord., Mar. 16, 1987, slip op. at 3-6; see also 29 C.F.R. § 18.54(c); Fed.R.Civ.P. 60(b)(2).

In his statement, Simpkin provides "new and material" evidence, i.e., Simpkin indicates knowledge, which he possessed at the time of the hearing, that is supportive of a finding of retaliatory intent by MTS. Simpkin affidavit at 2-4; cf. Bassett v. Niagara Mohawk Power Corp., Case No. 85-ERA-34, Sec. Dec., Sept. 28, 1993, slip op. at 5 n.3 (noting that evidence proffered post-hearing did not qualify as newly discovered).

The affidavit also indicates that Simpkin's testimony was "not readily available" when the case was before the ALJ. Simpkin affidavit at 3. Although Simpkin had reported the pertinent information to the Nuclear Regulatory Commission (NRC) prior to the hearing in this matter, he

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2/ Section 18.54(c) provides that admission of evidence not timely submitted to the ALJ is limited to "new and material evidence [that] has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c). Rule 60(b)(2) provides relief based on “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).” Fed.R.Civ.P. 60(b)(2).

These provisions thus present similar standards, which have consistently been relied on to dispose of requests that the record be reopened in whistleblower cases pending before the Secretary. See, e.g., Ake v. Ulrich Chemical, Inc., Case No. 93-STA-41, Sec. Dec., Mar. 21, 1994, slip op. at 3.
had done so on a confidential basis only, because of his previous personal association with the owner of MTS. Simpkin affidavit at 2-3. After a decision was rendered by the ALJ adverse to Timmons, Simpkin contacted Timmons and informed him of the evidence that he could provide pertinent to this case. Simpkin affidavit at 3-4.

It is also significant that neither the Respondent's Pre-Hearing Statement of Position nor the Respondent's Supplement to Pre-Hearing Statement of Position lists Simpkin among the witnesses having knowledge pertinent to this case. See Respondent's [8/3/95] Pre-Hearing Statement of Position at 2; Respondent's [8/7/95] Supplement to Pre-Hearing Statement of Position at 1. In addition, there is no mention of Simpkin contained in the investigative reports of record. See CX 2, 5-7. Under these circumstances, Timmons could have become aware of Simpkin's potential as a witness only through extensive discovery. A review of the record indicates that the parties were not afforded an opportunity for such discovery.

In the Notice of Hearing and Pre-Trial Order issued on July 26, 1995, the ALJ noted that the ERA and pertinent regulations provide a relatively brief time frame for investigation and adjudication of complaints by the Department of Labor. Notice of Hearing at 1. The Notice also states, "The short time frame . . . indicates that the usual, often lengthy, discovery proceedings are not available." Id. In a similar vein, the ALJ stated at hearing, without further explanation, that the hearing would be limited to one day. T. 193.4

The statute and regulations do contain provisions concerning the time within which the Department of Labor's investigation and adjudication of ERA complaints should be completed. 42 U.S.C. § 5851(b)(2); 29 C.F.R. §§ 24.4, 24.5, 24.6. Such provisions have been construed as directory, rather than mandatory or jurisdictional, however, Thomas v. Arizona Public Service Co., Case No. 89-ERA-19, Sec. Dec., Sept. 17, 1993, slip op. at 16 n.8, and should not interfere with the full and fair presentation of the case by the parties, in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 554(c), (d), 556(d). Moreover, the full and fair presentation of the case by the parties is crucial to serving the ERA purpose of protecting employees from retaliation for acting on their safety concerns, see English v. General Electric Co., 496 U.S. 72 (1990); Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1163 (9th Cir. 1984). The importance of safety in the handling of radioactive materials cannot be gainsaid; there is a crucial public interest at stake when issues of non-compliance with safety regulations arise. See Hoffman v. Fuel Economy Contracting, Case No. 87-ERA-33, Sec. Ord., Aug. 4, 1989, slip op. at 4; see also Rose v. Sec'y of Labor, 800 F.2d 563, 565 (6th Cir. 1986)(Edwards, J., concurring, describing nuclear technology as "one of the most dangerous" ever invented).

Particularly in view of the limits placed on discovery by the pre-hearing order, it is clear that the Simpkin testimony was "not readily available" prior to hearing. See Thomas, slip op. at 21-22 n.10 (admitting evidence that qualified as "not readily available"); cf. Ake v. Ulrich

4/ The following abbreviations are used herein for references to the record: Hearing Transcript, T.; Complainant's Exhibit, CX; Respondent's Exhibit, RX; ALJ's Exhibit, ALJX.
Such circumstances are distinguishable from those in which a specific item of evidence or segment of testimony has been erroneously excluded by the ALJ. In the circumstances of this case, statements and rulings by the ALJ throughout the hearing reflect the arbitrary nature of the one day limitation placed on the hearing and its detrimental effect on the full and fair presentation of this case by the parties, as is required by the APA. 

Cf. Bass v. Hoagland, 172 F.2d 205, 208-09 (5th Cir. 1949), cert. denied, 338 U.S. 816 (1949)(within context of Rule 60(b) (continued...).
See discussion of relevancy, infra; see Fed.R.Civ.P. 60(b)(4), (6); see also V.T.A., Inc. v. Airco, Inc., 597 F.2d 220, 225 (10th Cir. 1979); see generally Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944)(stating that public interests involved in a patent suit provide support for re-opening of case), cited in Plaut v. Spendthrift Farm, Inc., 115 S.Ct. 1447 (1995)(noting that Rule 60(b) is based in “the courts’ own inherent and discretionary power . . . to set aside a judgment whose enforcement would work inequity.”). Accordingly, on remand the parties must also be provided an opportunity to adduce evidence relevant to the factual issues addressed in the Timmons affidavit.

The time constraints placed on the proceedings before the ALJ directly interfered with the parties’ opportunity for a full and fair presentation of the case at hearing. In conducting the hearing, the ALJ erred in repeatedly limiting testimony and refusing to admit documentary evidence on relevancy grounds. T. 27-28, 115-22, 140-41, 244, 294. These rulings appear to be related to the one day limitation that was placed on the hearing and the apparently rushed nature of the proceedings that resulted. See, e.g., T. 234; see also APA discussion supra. As background for the examination of these erroneous rulings and in the interest of avoiding the repetition of error on remand, the following principles concerning the evaluation of evidence of retaliatory intent in cases arising under the ERA are noted.

As is frequently the case in whistleblower complaints, notwithstanding the Simpkin affidavit, Timmons' allegations of retaliatory intent are founded upon circumstantial evidence. In such cases, the determination of whether retaliatory intent has been established requires careful evaluation of all evidence pertinent to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. See Frady v. Tennessee Valley Authority, Case Nos. 92-ERA-19, 92-ERA-34, Sec. Dec., Oct. 23, 1995, slip op. at 7-10; see also Ellis Fischel State Cancer Hospital v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980)(in employee discrimination cases, "[t]he presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive"), quoted in Mackowiak, 735 F.2d at 1162. As noted by the United States Supreme Court in an employment discrimination case arising under Title VII of the Civil Rights Act of 1964, there will rarely be "eyewitness" testimony concerning an employer's mental processes. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716 (1983). Fair adjudication of a complaint such as this thus requires full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken. 7

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\(^2\) (...continued)
existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 29 C.F.R. § 18.401. Section 24.5(e)(1) provides:

Evidence. Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be Applied. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious.

\(^3\) A complainant is not required, however, to establish disparate treatment in comparison with other employees, or other whistleblowers, in order to establish retaliatory intent. See DeFord v. Sec'y of Labor, 700 F.2d 281, 286 (6th Cir. 1983).
Furthermore, a complete understanding of the testimony of the witnesses, including testimony regarding technical procedures, is necessary for the drawing of pertinent inferences and the resolution of conflicts in that testimony. See generally Zinn and Morris v. University of Missouri, Case Nos. 93-ERA-34, 93-ERA-36, Sec. Dec., Jan. 18, 1996, slip op. at 3 and cases cited therein (adopting findings of fact rendered by ALJ). In the instant case, a proper understanding of the testimony of the witnesses concerning relevant technical procedures requires at least a superficial understanding of the fields of radiography and welding inspection.

The ALJ thus erred in refusing, on relevancy grounds, to hear testimony concerning the technical aspects of the handling of radioactive isotopes at MTS and concerning the technical aspects of bridge girder inspection. See T. 27-28, 115-22. Similarly, the ALJ erred in refusing to hear testimony regarding the quality standards and practices prevailing at MTS prior to Timmons' termination and regarding MTS compliance or non-compliance with NRC safety regulations prior to its investigation by the NRC.\footnote{9} T. 118, 140-41, 244, 294.\footnote{10}

The case must therefore be remanded for a supplemental hearing before the ALJ. Such hearing will provide the parties an opportunity to conduct discovery and adduce evidence relevant to the issues addressed in the Simpkin and Timmons affidavits. In addition, to rectify the erroneous rulings limiting evidence on the foregoing issues, the parties will be allowed to conduct discovery and adduce evidence relevant to those issues.\footnote{11} See generally Lockert, 867 F.2d at 517 (addressing broad discretion of Secretary in remanding case to ALJ).

\footnote{9} The ALJ did not err, however, in refusing to hear testimony concerning corrective measures that MTS has taken \textit{since} Timmons' termination in order to comply with the findings of the NRC, T. 111-12, 115, as such evidence would not be pertinent to the mindset of MTS deciding officials at the time that Timmons was terminated. Evidence of related action, corrective or otherwise, taken by MTS following initiation of the NRC investigation but prior to Timmons' termination is relevant to the issue of the mindset of MTS deciding officials at the pertinent time and may be adduced on remand.

\footnote{10} The ALJ may nonetheless exclude evidence that is "unduly repetitious," as provided under Section 24.5(e)(1). 29 C.F.R. § 24.5(e)(1); see n.4 supra; see also 5 U.S.C. § 556(d); 29 C.F.R. § 18.403.

\footnote{11} Although the hearing need not be conducted in a rigid and overly formal manner, the ALJ should not hesitate to apprise the witnesses of basic standards of conduct during examination by counsel, \textit{e.g.}, that it is not the role of the witness to object on relevancy grounds to a question, or a line of questioning, being posed by counsel. See 29 C.F.R. §§ 18.611 (Mode and order of interrogation and presentation), 18.36 (Standards of conduct), 18.37 (Hearing room conduct); \textit{cf.} T. 255 (Bruno), 276-78 (Kutt). It is noted that Mark and Suzanne Mattingly, the owner of MTS and his wife, appeared without legal counsel at hearing. T. 4-5. In those circumstances, it is appropriate for the party, when being examined as a witness, to raise such objections.
As indicated by the ALJ, complainants are not required to establish actual violations of NRC regulations by employers to establish discriminatory treatment under the ERA. See *Diaz-Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Sec. Dec., Jan. 19, 1996, slip op. at 11-12 nn.7, 8 and cases cited therein. As indicated *supra*, however, it does not necessarily follow that the results of an ensuing NRC investigation would be irrelevant to the issue of retaliatory intent.

At the close of the hearing, MTS indicated that it had acquired evidence since its termination of Timmons that would provide support for the termination. T. 300 (S. Mattingly). Evidence of legitimate grounds for termination that is acquired by an employer after the decision to terminate will not defeat a discrimination complaint, although such evidence is relevant to the issue of damages for which an employer is liable. *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995); see *Smith and Fitzpatrick v. Tennessee Valley Authority*, Case No. 89-ERA-00012, Sec. Ord., Mar. 17, 1995, slip op. at 2-6.

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\(\text{12/}\) As indicated by the ALJ, T. 15, complainants are not required to establish actual violations of NRC regulations by employers to establish discriminatory treatment under the ERA. See *Diaz-Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Sec. Dec., Jan. 19, 1996, slip op. at 11-12 nn.7, 8 and cases cited therein. As indicated *supra*, however, it does not necessarily follow that the results of an ensuing NRC investigation would be irrelevant to the issue of retaliatory intent.

\(\text{13/}\) At the close of the hearing, MTS indicated that it had acquired evidence since its termination of Timmons that would provide support for the termination. T. 300 (S. Mattingly). Evidence of legitimate grounds for termination that is acquired by an employer after the decision to terminate will not defeat a discrimination complaint, although such evidence is relevant to the issue of damages for which an employer is liable. *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995); see *Smith and Fitzpatrick v. Tennessee Valley Authority*, Case No. 89-ERA-00012, Sec. Ord., Mar. 17, 1995, slip op. at 2-6.
ORDER

Accordingly, this case is remanded to the ALJ for further proceedings consistent with this opinion.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member