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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

IN THE MATTER OF	)	Docket Nos. 50-390-CivP;
	)	50-327-CivP; 50-328-CivP;
TENNESSEE VALLEY AUTHORITY	)	50-259-CivP; 50-260-CivP;
	)	50-296-CivP
	)	
(Watts Bar Nuclear Plant, Unit 1;	)	
Sequoyah Nuclear Plant, Units 1 &	)	
2; Browns Ferry Nuclear Plant,	)	EA 99-234
Units 1, 2 & 3)	)	

TENNESSEE VALLEY AUTHORITY'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITIES

Pursuant to 10 C.F.R. § 2.730 and § 2.772 (2003), the Tennessee Valley Authority (TVA) moves for leave to file the attached citation of four supplemental authorities. As grounds for its motion, TVA would show (1) that TVA was unaware of these authorities at the time it filed its November 24, 2003, reply brief (in particular, two of the decisions were not issued until after TVA filed its brief and thus were previously unavailable); (2) that the supplemental authorities are directly pertinent to the central issues in this proceeding and are not cumulative on the points for which they are cited; (3) that since TVA has cited these authorities without argument, consideration of the authorities by the Commission will not delay this proceeding. The Commission has the authority pursuant to 10 C.F.R. § 2.772 (a), (c), and (k) (2003), to allow TVA to file its supplemental citation of authorities, since accepting new authorities on matters already briefed (where there is good cause shown) is a minor procedural matter. This proceeding is analogous to an appeal for judicial review in which citation of supplemental

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authorities is specifically authorized by FED. R. APP. P. 28 (j) "Citation of Supplemental Authorities." Therefore, the Commission should grant TVA's motion and accept the attached supplemental citation of authorities.

Respectfully submitted,

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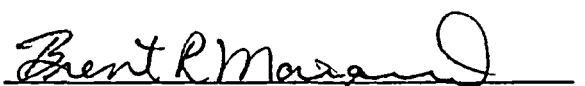

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

IN THE MATTER OF	)	Docket Nos. 50-390-CivP;
	)	50-327-CivP; 50-328-CivP;
TENNESSEE VALLEY AUTHORITY	)	50-259-CivP; 50-260-CivP;
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2; Browns Ferry Nuclear Plant,	)	EA 99-234
Units 1, 2 & 3)	)	

TENNESSEE VALLEY AUTHORITY'S CITATION OF SUPPLEMENTAL AUTHORITIES

The Tennessee Valley Authority (TVA) would like to call the Commission's attention to the following four authorities which have just recently come to our attention.

1. The Supreme Court's decision in *Raytheon Co. v. Hernandez*, No. 02-749, 2003 U.S. LEXIS 8965, 540 U.S. __, (Dec. 2, 2003; copy attached), was unavailable when TVA served its Initial and Reply briefs, since it was not issued until after those briefs were filed. It is on point with several issues in this proceeding. It is TVA's position (Init. Br. at 19-24; Reply Br. at 17) that since this case is based on alleged disparate treatment and is not a dual motive case, the Board should have used a *McDonnell Douglas* analysis. In *Raytheon* the Supreme Court held (at *11, n.3) that *McDonnell Douglas* is the "burden-shifting scheme for [use] in discriminatory-treatment cases." TVA also argues (Init. Br. at 28-29; Reply Br. at 10-11) that McGrath could not have retaliated against Fiser for engaging in protected activity since he lacked knowledge of Fiser's protected activities. The Court's decision in *Raytheon* squarely holds that where the decisionmaker is "unaware that such a disability existed, it would be

impossible for her hiring decision to have been based, even in part, on respondent's disability" (at *19, n. 7). TVA further argues that because Fiser was subject to the same procedures as other employees, that there can be no inference of disparate treatment (Init. Br. at 31; Reply Br. at 4). In *Raytheon* the Court held (at *14) that in a disparate treatment case, "a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA" and that its general application "can, in no way, be said to have been motivated by respondent's disability" (*18-19).

2. In *Pickett v. TVA*, ARB No. 02-056, ALJ No. 01-CAA-18 (ARB Nov. 28, 2003; copy attached), another decision issued after TVA filed its Initial and Reply Briefs, the ARB set forth the standard for a finding of blacklisting. In its brief, the Staff, citing *Earwood v. Dart Container Corp.*, 93-STA-0016 (Sec'y Dec. 7, 1994), argues that the mere reference to Fiser's protected activity requires a finding of discrimination, regardless of the intent of the speaker and regardless of the absence of proof of any injury to the employee. However, the ARB's decision in *Pickett* demonstrates that actionable blacklisting requires that "the communication [referring to a negative reference] must be motivated at least in part by the protected activity" and that "there must be some objectively manifest personnel or other injurious employment-related action by the employer against the employee" (slip op. at 6).

3. The third authority which we would like to call to the attention of the Commission, *Cerutti v. BASF Corp.*, No. 02-3471, 2003 U.S. App. LEXIS 23789 (7th Cir. Nov. 21, 2003; copy of slip opinion attached), was decided only one business day before TVA filed its Reply Brief on November 24, 2003. Since TVA did not receive a digest of the opinion until December 16, 2003, the decision was effectively unavailable when TVA's brief was prepared.

In TVA's main brief, we pointed out (Br. at 19-20) that a plaintiff may prove discrimination using either the direct method (the "dual motive" test) or the indirect method (the *McDonnell Douglas* framework). We further pointed out (Br. at 20) that the direct method requires evidence of a discriminatory attitude bearing directly on the contested employment decision. In *Cerutti* the court reiterated the two methods of

proof of discrimination. It went on to state that under the direct method a plaintiff may rely upon circumstantial evidence, but that such "circumstantial evidence, however, 'must point directly to a discriminatory reason for the employer's action'" (slip op. at 7). The court then went on to analyze the circumstantial evidence offered by the plaintiffs to prove discrimination under the direct method.

We have argued throughout that the "plethora of career-damaging situations" relied upon by the Board are irrelevant to show discrimination in HR's application of procedures and the SRB's nonselection of Fiser, when neither HR nor the SRB were shown to have been influenced by discrimination. In *Cerutti*, the employer used a selection panel to determine which employees should be retained in a reduction. The court expressly held that evidence of "stray workplace remarks" should not be considered since they were "relevant only if there is other evidence from which a reasonable jury could infer that their animus influenced the selection panels' deliberations to such a degree so as to result in the plaintiffs' terminations" (slip op. at 11). As to those remarks, the court held that they were not evidence of discrimination, but were merely "'stray workplace remarks . . . not related to the employment decision in question'" (slip op. at 12).

We have also argued that the remoteness in time of both McArthur's 1993 comment and Fiser's earlier purported protected activities makes them irrelevant to Fiser's 1996 nonselection (Init. Br. at 37-38; Reply at 8). In *Cerutti*, the court noted that many of the allegedly discriminatory remarks in that case were "so dated that they have no temporal proximity to the plaintiffs' terminations, and thus may not be used to support their age discrimination claims" (slip op at 12, n. 7).

Finally, we have repeatedly argued that it was inappropriate for the Board or the Staff to suggest that TVA could have used different processes or to second-guess management judgments as to how it should reorganize. In *Cerutti*, the plaintiffs made the same types of arguments (slip op at 13): that the employer's methodology to measure employee competency was flawed; that the employer should have considered the plaintiffs' performance reviews; that the plaintiffs' scores were lowered by the selection

panels; and that there was no difference between the duties of employees in the restructured and the former organizations. The court rejected all of those arguments noting that whether the plaintiffs or the court believed the employer's methodology to be "fair, prudent, or wise is beside the point"; that "employers, not employees or courts, are entitled to define the core qualifications for a position"; that it "is of no import" that the employer chose not to use "prior written evaluations"; and that "'[w]hat the qualifications for a position are . . . is a business decision, one courts should not interfere with'" (slip op at 14-15).

4. The final authority which we wish to call to the attention of the Commission is *Crosby v. Hughes Aircraft Co.*, No. 85-TSC-2 (Sec'y Aug. 17, 1993), *aff'd sub nom Crosby v. U.S. Dep't of Labor*, No. 93-70834, 1995 U.S. App. LEXIS 9164 (9th Cir. Apr. 20, 1995; copies attached). In this proceeding, the Board and the Staff have argued that Fiser's refusal to institute a procedure to do trending of chemistry parameters was protected activity because he was concerned that there might be a computer failure at some point in the future, that he might be unable to comply with the procedure, and that he might cause a violation of the AEA or Commission regulations (ID at 44-46; Staff Br. at 14). In *Crosby* the employee claimed that his refusal to carry out an assignment to work on a computer program (PPUP) was protected activity because he assumed that a "bug" would occur in the software, that the software could be used on a gas detection device, and that the failure of the device would cause a violation of the

environmental statute. The ARB held that the employee's refusal to work was not protected activity since he "did not have a reasonable perception of a violation" because his "assumptions are both too numerous and too speculative" (*Crosby* No. 85-TSC-2 at 15).

Respectfully submitted,

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2003 U.S. LEXIS 8965, *; 2003 Cal. Daily Op. Service 10328

RAYTHEON COMPANY, PETITIONER v. JOEL HERNANDEZ

No. 02-749

SUPREME COURT OF THE UNITED STATES

2003 U.S. LEXIS 8965; 2003 Cal. Daily Op. Service 10328

October 8, 2003, Argued
December 2, 2003, Decided

NOTICE: [*1]
The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. *Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030, 2002 U.S. App. LEXIS 16163 (9th Cir. Ariz., 2002)*

DISPOSITION: Vacated and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Respondent former employee sued petitioner employer, alleging that the employer refused to rehire the employee, after his discharge based on a positive drug test, in violation of the Americans with Disabilities Act of 1990 (ADA), *42 U.S.C.S. § 12101* et seq. Upon the grant of a writ of certiorari, the employer appealed the judgment in favor of the employee entered in the United States Court of Appeals for the Ninth Circuit.

OVERVIEW: The employer contended that the employee was not rehired based on the employer's policy not to rehire employees who left the company for violating workplace conduct rules. The lower appellate court found, however, that application of the policy was not a legitimate, non-discriminatory reason for the employer's refusal to rehire the employee, since the policy resulted in barring reemployment of drug addicts despite successful rehabilitation in violation of the ADA. The United States Supreme Court held that the lower court improperly determined that the employer's policy had a disparate impact on recovering drug addicts, when the proper issue was whether the employer engaged in disparate treatment in refusing to rehire the employee because of his disability. If the employer did indeed apply a neutral, generally applicable no-rehire policy in rejecting the employee's application, the employer's decision not to rehire the employee could, in no way, be said to have been motivated by respondent's disability. Thus, in finding disparate impact from the policy, the lower court failed to address whether discriminatory disparate treatment was shown as alleged by the employee.

OUTCOME: The judgment in favor of the employee was vacated and the case was remanded for further proceedings.

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions
[HN1] The Americans with Disabilities Act of 1990, *42 U.S.C.S. § 12101* et seq., makes it unlawful for an employer, with respect to hiring, to discriminate against a qualified individual with a disability because of the disability of such individual. *42 U.S.C.S. § 12112*(a).

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions
[HN2] The Americans with Disabilities Act of 1990, *42 U.S.C.S. § 12101* et seq., defines the term "disability" as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. *42 U.S.C.S. § 12102*(2).

Labor & Employment Law > Discrimination > Disparate Treatment > Burden Shifting Analysis
[HN3] The U.S. Supreme Court sets forth a burden-shifting scheme for discriminatory treatment cases. Under the scheme, a plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. If the employer meets

this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual. The U.S. Courts of Appeals consistently utilize this burden-shifting approach when reviewing motions for summary judgment in disparate-treatment cases.

Labor & Employment Law > Discrimination > Actionable Discrimination
[HN4] The U.S. Supreme Court consistently recognizes a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact.

Labor & Employment Law > Discrimination > Actionable Discrimination
[HN5] Disparate treatment is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or other protected characteristic. Liability in a disparate-treatment case depends on whether the protected trait actually motivated the employer's decision.

Labor & Employment Law > Discrimination > Disparate Impact > Neutral Factors
[HN6] Disparate impact claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.

Labor & Employment Law > Discrimination > Disparate Impact > Neutral Factors
[HN7] Under a disparate-impact theory of discrimination, a facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer's subjective intent to discriminate that is required in a disparate-treatment case.

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions
[HN8] Both disparate-treatment and disparate-impact claims are cognizable under the Americans with Disabilities Act of 1990, *42 U.S.C.S. § 12101* et seq. *42 U.S.C.S. § 12112*(b).

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions
[HN9] *42 U.S.C.S. § 12112*(b) defines "discriminate" to include utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability and using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability.

SYLLABUS: After respondent tested positive for cocaine and admitted that his behavior violated petitioner's workplace conduct rules, he was forced to resign. More than two years later, he applied to be rehired, stating on his application that petitioner had previously employed him, and attaching letters both from his pastor about his active church participation and from an Alcoholics Anonymous counselor about his regular attendance at meetings and his recovery. The employee who reviewed and rejected respondent's application testified that petitioner has a policy against rehiring employees who are terminated for workplace misconduct [*2] and that she did not know that respondent was a former drug addict when she rejected his application. Respondent filed a charge with the Equal Employment Opportunity Commission (EEOC), claiming that he had been discriminated against in violation of the *Americans with Disabilities Act of 1990* (ADA). The EEOC issued a right-to-sue letter, and respondent filed this ADA action, arguing that petitioner rejected his application because of his record of drug addition and/or because he was regarded as being a drug addict. In response to petitioner's summary judgment motion, respondent for the first time argued in the alternative that if petitioner applied a neutral no-rehire policy in his case, it still violated the ADA because of that policy's disparate impact. The District Court granted petitioner's motion for summary judgment on the disparate-treatment claim and found that the disparate-impact claim had not been timely pleaded or raised. The Ninth Circuit agreed as to the disparate-impact claim, but held as to the disparate-treatment claim that, under the burden-shifting approach of *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817*, respondent had proffered a prima facie [*3] case of discrimination, and petitioner had not met its burden to provide a legitimate, nondiscriminatory reason for its employment action because its no-rehire policy, though lawful on its face, was unlawful as applied to employees who were lawfully forced to resign for illegal drug use but have since been rehabilitated.

Held: The Ninth Circuit improperly applied a disparate-impact analysis to respondent's disparate-treatment claim. This Court has consistently distinguished between disparate-treatment and disparate-impact claims. The former arise when an employer treats some people less favorably than others because of a protected characteristic. Liability depends on whether the protected trait actually motivated the employer's action. The latter involve facially neutral employment practices that fall more harshly on one group than another and cannot be

justified by business necessity. Such practices may be deemed illegally discriminatory without evidence of the employer's subjective discrimination. Both claims are cognizable under the ADA, but courts must be careful to distinguish between the theories. Here, respondent was limited to the disparate-treatment theory that petitioner [*4] refused to rehire him because it regarded him as disabled and/or because of his record of disability. Petitioner's proffer of its neutral no-rehire policy plainly satisfied its obligation under *McDonnell Douglas* to provide a legitimate, nondiscriminatory reason for refusing to rehire respondent. Thus, the only remaining question before the Ninth Circuit was whether there was sufficient evidence from which a jury could conclude that petitioner did make its employment decision based on respondent's status as disabled despite its proffered explanation. Instead, that court concluded that, as a matter of law, the policy was not a legitimate, nondiscriminatory reason sufficient to defeat a prima facie case of discrimination. In doing so, the Ninth Circuit improperly focused on factors that pertain only to disparate-impact claims, and thus ignored the fact that petitioner's no-hire policy is a quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules. Pp. 7-11.

298 F.3d 1030, vacated and remanded.

JUDGES: THOMAS, J., delivered the opinion of the Court, in which all other Members joined, [*5] except SOUTER, J., who took no part in the decision of the case, and BREYER, J., who took no part in the consideration or decision of the case.

OPINIONBY: THOMAS

OPINION:

JUSTICE THOMAS delivered the opinion of the Court.

The Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, as amended, *42 U.S.C. § 12101 et seq.*, makes it [HN1] unlawful for an employer, with respect to hiring, to "discriminate against a qualified individual with a disability because of the disability of such individual." *§ 12112(a)*. We are asked to decide in this case whether the ADA confers preferential rehire rights on disabled employees lawfully terminated for violating workplace conduct rules. The United States Court of Appeals for the Ninth Circuit held that an employer's unwritten policy not to rehire employees who left the company for violating personal conduct rules contravenes the ADA, at least as applied to employees who were lawfully forced to resign for illegal drug use but have since been rehabilitated. Because the Ninth Circuit improperly applied a disparate-impact analysis in a disparate-treatment case in order to reach this holding, we vacate its judgment and remand the case [*6] for further proceedings consistent with this opinion. We do not, however, reach the question on which we granted certiorari. *537 U.S. 1187, 154 L. Ed. 2d 1018, 123 S. Ct. 1255 (2003).*

I

Respondent, Joel Hernandez, worked for Hughes Missile Systems for 25 years. n1 On July 11, 1991, respondent's appearance and behavior at work suggested that he might be under the influence of drugs or alcohol. Pursuant to company policy, respondent took a drug test, which came back positive for cocaine. Respondent subsequently admitted that he had been up late drinking beer and using cocaine the night before the test. Because respondent's behavior violated petitioner's workplace conduct rules, respondent was forced to resign. Respondent's "Employee Separation Summary" indicated as the reason for separation: "discharge for personal conduct (quit in lieu of discharge)." App. 12a.

n1 Hughes has since been acquired by petitioner, Raytheon Company. For the sake of clarity, we refer to Hughes and Raytheon collectively as petitioner or the company.

More [*7] than two years later, on January 24, 1994, respondent applied to be rehired by petitioner. Respondent stated on his application that he had previously been employed by petitioner. He also attached two reference letters to the application, one from his pastor, stating that respondent was a "faithful and active member" of the church, and the other from an Alcoholics Anonymous counselor, stating that respondent attends Alcoholics Anonymous meetings regularly and is in recovery. *Id.*, at 13a-15a.

Joanne Bockmiller, an employee in the company's Labor Relations Department, reviewed respondent's application. Bockmiller testified in her deposition that since respondent's application disclosed his prior employment with the company, she pulled his personnel file and reviewed his employee separation summary. She then rejected respondent's application. Bockmiller insisted that the company had a policy against rehiring employees who were terminated for workplace misconduct. *Id.*, at 62a. Thus, when she reviewed the employment separation summary and found that respondent had been discharged for violating workplace conduct rules, she rejected respondent's application. She testified, in particular, [*8] that she did not know that

respondent was a former drug addict when she made the employment decision and did not see anything that would constitute a "record of" addiction. *Id.*, at 63a-64a.

Respondent subsequently filed a charge with the Equal Employment Opportunity Commission (EEOC). Respondent's charge of discrimination indicated that petitioner did not give him a reason for his nonselection, but that respondent believed he had been discriminated against in violation of the ADA.

Petitioner responded to the charge by submitting a letter to the EEOC, in which George M. Medina, Sr., Manager of Diversity Development, wrote:

"The ADA specifically exempts from protection individuals currently engaging in the illegal use of drugs when the covered entity acts on the basis of that use. Contrary to Complainant's unfounded allegation, his non-selection for rehire is not based on any legitimate disability. Rather, Complainant's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.

"The Company maintains it's *[sic]* right to deny re-employment to employees terminated for violation [*9] of Company rules and regulations . . . .Complainant has provided no evidence to alter the Company's position that Complainant's conduct while employed by [petitioner] makes him ineligible for rehire." *Id.*, at 19a-20a.

This response, together with evidence that the letters submitted with respondent's employment application may have alerted Bockmiller to the reason for respondent's prior termination, led the EEOC to conclude that petitioner may have "rejected [respondent's] application based on his record of past alcohol and drug use." *Id.*, at 94a EEOC Determination Letter, Nov. 20, 1997. The EEOC thus found that there was "reasonable cause to believe that [respondent] was denied hire to the position of Product Test Specialist because of his disability." *Id.*, at 95a. The EEOC issued a right-to-sue letter, and respondent subsequently filed this action alleging a violation of the ADA.

Respondent proceeded through discovery on the theory that the company rejected his application because of his record of drug addiction and/or because he was regarded as being a drug addict. See *42 U.S.C. § § 12102(2)(B)-(C)*. n2 In response to petitioner's motion [*10] for summary judgment, respondent for the first time argued in the alternative that if the company really did apply a neutral no-rehire policy in his case, petitioner still violated the ADA because such a policy has a disparate impact. The District Court granted petitioner's motion for summary judgment with respect to respondent's disparate-treatment claim. However, the District Court refused to consider respondent's disparate-impact claim because respondent had failed to plead or raise the theory in a timely manner.

n2 [HN2] The ADA defines the term "disability" as:

"(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

"(B) a record of such an impairment; or

"(C) being regarded as having such an impairment."

42 U.S.C. § 12102(2).

The Court of Appeals agreed with the District Court that respondent had failed timely to raise his disparate-impact claim. *Hernandez v. Hughes Missile Systems Co., 298 F.3d 1030, 1037, n. 20 (CA9 2002).* [*11] In addressing respondent's disparate-treatment claim, the Court of Appeals proceeded under the familiar burden-shifting approach first adopted by this Court in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).* n3 First, the Ninth Circuit found that with respect to respondent's prima facie case of discrimination, there were genuine issues of material fact regarding whether respondent was qualified for the position for which he sought to be rehired, and whether the reason for petitioner's refusal to rehire him was his past record of drug addiction. n4 *298 F.3d at 1034-1035.* The Court of Appeals thus held that with respect to respondent's prima facie case of discrimination, respondent had proffered sufficient evidence to preclude a grant of summary judgment. *Id., at 1035.* Because petitioner does not challenge this aspect of the Ninth Circuit's decision, we do not address it here.

n3 [HN3] The Court in *McDonnell Douglas* set forth a burden-shifting scheme for discriminatory-treatment cases. Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. *411 U.S., at 802.* If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual. See *Reeves*

v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). The Courts of Appeals have consistently utilized this burden-shifting approach when reviewing motions for summary judgment in disparate-treatment cases. See, *e.g., Pugh v. Attica, 259 F.3d 619, 626 (CA7 2001)* (applying burden-shifting approach to an ADA disparate-treatment claim). [*12]

n4 The Court of Appeals noted that "it is possible that a drug *user* may not be 'disabled' under the ADA if his drug use does not rise to the level of an addiction which substantially limits one or more of his major life activities." *298 F.3d at 1033-1034, n. 9*. The parties do not dispute that respondent was "disabled" at the time he quit in lieu of discharge and thus a record of the disability exists. We therefore need not decide in this case whether respondent's employment record constitutes a "record of addiction," which triggers the protections of the ADA.

The parties are also not disputing in this Court whether respondent was qualified for the position for which he applied.

The Court of Appeals then moved to the next step of *McDonnell Douglas*, where the burden shifts to the defendant to provide a legitimate, nondiscriminatory reason for its employment action. *411 U.S., at 802*. Here, petitioner contends that Bockmiller applied the neutral policy against rehiring employees previously terminated for violating workplace conduct rules and that this neutral company [*13] policy constituted a legitimate and nondiscriminatory reason for its decision not to rehire respondent. The Court of Appeals, although admitting that petitioner's no-rehire rule was lawful on its face, held the policy to be unlawful "as applied to former drug addicts whose only work-related offense was testing positive because of their addiction." *298 F.3d at 1036*. The Court of Appeals concluded that petitioner's application of a neutral no-rehire policy was not a legitimate, nondiscriminatory reason for rejecting respondent's application:

"Maintaining a blanket policy against rehire of *all* former employees who violated company policy not only screens out persons with a record of addiction who have been successfully rehabilitated, but may well result, as [petitioner] contends it did here, in the staff member who makes the employment decision remaining unaware of the "disability" and thus of the fact that she is committing an unlawful act . . . . Additionally, we hold that a policy that serves to bar the reemployment of a drug addict despite his successful rehabilitation violates the ADA." *Id., at 1036-1037*.

In other words, while ostensibly evaluating [*14] whether petitioner had proffered a legitimate, nondiscriminatory reason for failing to rehire respondent sufficient to rebut respondent's prima facie showing of disparate treatment, the Court of Appeals held that a neutral no-rehire policy could never suffice in a case where the employee was terminated for illegal drug use, because such a policy has a disparate impact on recovering drug addicts. In so holding, the Court of Appeals erred by conflating the analytical framework for disparate-impact and disparate-treatment claims. Had the Court of Appeals correctly applied the disparate-treatment framework, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA. n5 And thus the only remaining question would be whether respondent could produce sufficient evidence from which a jury could conclude that "petitioner's stated reason for respondent's rejection was in fact pretext." *McDonnell Douglas, supra, at 804*.

n5 This would not, of course, resolve the dispute over whether petitioner did in fact apply such a policy in this case. Indeed, the Court of Appeals expressed some confusion on this point, as the court first held that respondent "raised a genuine issue of material fact as to whether he was denied re-employment because of his past record of drug addiction," *id., 298 F.3d at 1034*, but then later stated that there was "no question that [petitioner] applied this [no-rehire] policy in rejecting [respondent's] application." *Id., 298 F.3d at 1036, n. 17*.

[*15]

II

[HN4] This Court has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact. The Court has said that [HN5] "'disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other protected characteristic]." *Teamsters v. United States, 431 U.S. 324, 335, n. 15, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977)*. See also *Hazen Paper Co. v. Biggins, 507 U.S. 604, 609, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993)* (discussing disparate-treatment claims in the context of the *Age Discrimination in Employment Act of 1967*). Liability in a disparate-

treatment case "depends on whether the protected trait . . . actually motivated the employer's decision." *Id., at 610.* By contrast, [HN6] disparate-impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Teamsters, supra, at 335-336, n. 15.* [HN7] Under a disparate-impact theory of discrimination, [*16] "a facially neutral employment practice may be deemed [illegally discriminatory] without evidence of the employer's subjective intent to discriminate that is required in a 'disparate-treatment' case." *Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645-646, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989),* superseded by statute on other grounds, Civil Rights Act of 1991, § 105, 105 Stat. 1074-1075, *42 U.S.C. § 2000e-2(k) (1994 ed.).*

[HN8] Both disparate-treatment and disparate-impact claims are cognizable under the ADA. [HN9] See *42 U.S.C. § 12112(b)* (defining "discriminate" to include "utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability" and "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability"). Because "the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes," *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252, n. 5, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981),* [*17] courts must be careful to distinguish between these theories. Here, respondent did not timely pursue a disparate-impact claim. Rather, the District Court concluded, and the Court of Appeals agreed, that respondent's case was limited to a disparate-treatment theory, that the company refused to rehire respondent because it regarded respondent as being disabled and/or because of respondent's record of a disability. *298 F.3d at 1037, n. 20.*

Petitioner's proffer of its neutral no-rehire policy plainly satisfied its obligation under *McDonnell Douglas* to provide a legitimate, nondiscriminatory reason for refusing to rehire respondent. Thus, the only relevant question before the Court of Appeals, after petitioner presented a neutral explanation for its decision not to rehire respondent, was whether there was sufficient evidence from which a jury could conclude that petitioner did make its employment decision based on respondent's status as disabled despite petitioner's proffered explanation. Instead, the Court of Appeals concluded that, as a matter of law, a neutral no-rehire policy was not a legitimate, nondiscriminatory reason sufficient to defeat a prima facie case of [*18] discrimination. n6 The Court of Appeals did not even attempt, in the remainder of its opinion, to treat this claim as one involving only disparate treatment. Instead, the Court of Appeals observed that petitioner's policy "screens out persons with a record of addiction," and further noted that the company had not raised a business necessity defense, *298 F.3d at 1036-1037,* and n. 19, factors that pertain to disparate-impact claims but not disparate-treatment claims. See, *e.g., Grano v. Department of Development of Columbus, 637 F.2d 1073, 1081 (CA6 1980)* ("In a disparate impact situation . . . the issue is whether a neutral selection device . . . screens out disproportionate numbers of [the protected class]"). n7 By improperly focusing on these factors, the Court of Appeals ignored the fact that petitioner's no-rehire policy is a quintessential legitimate, nondiscriminatory reason for refusing to rehire an employee who was terminated for violating workplace conduct rules. If petitioner did indeed apply a neutral, generally applicable no-rehire policy in rejecting respondent's application, petitioner's decision not to rehire respondent can, in no way, [*19] be said to have been motivated by respondent's disability.

n6 The Court of Appeals characterized respondent's workplace misconduct as merely "testing positive because of [his] addiction." *298 F.3d at 1036.* To the extent that the court suggested that, because respondent's workplace misconduct is related to his disability, petitioner's refusal to rehire respondent on account of that workplace misconduct violated the ADA, we point out that we have rejected a similar argument in the context of the *Age Discrimination in Employment Act.* See *Hazen Paper Co. v. Biggins, 507 U.S. 604, 611, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993).*

n7 Indeed, despite the fact that the Nation's antidiscrimination laws are undoubtedly aimed at "the problem of inaccurate and stigmatizing stereotypes," ibid., the Court of Appeals held that the unfortunate result of petitioner's application of its neutral policy was that Bockmiller may have made the employment decision in this case "remaining unaware of [respondent's] 'disability.'" *298 F.3d at 1036.* The Court of Appeals did not explain, however, how it could be said that Bockmiller was motivated to reject respondent's application because of his disability if Bockmiller was entirely unaware that such a disability existed. If Bockmiller were truly unaware that such a disability existed, it would be impossible for her hiring decision to have been based, even in part, on respondent's disability.

> And, if no part of the hiring decision turned on respondent's status as disabled, he cannot, ipso facto, have been subject to disparate treatment.

[*20]

The Court of Appeals rejected petitioner's legitimate, nondiscriminatory reason for refusing to rehire respondent because it "serves to bar the re-employment of a drug addict despite his successful rehabilitation." *298 F.3d, at 1036-1037*. We hold that such an analysis is inapplicable to a disparate-treatment claim. Once respondent had made a prima facie showing of discrimination, the next question for the Court of Appeals was whether petitioner offered a legitimate, nondiscriminatory reason for its actions so as to demonstrate that its actions were not motivated by respondent's disability. To the extent that the Court of Appeals strayed from this task by considering not only discriminatory intent but also discriminatory impact, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER took no part in the decision of this case. JUSTICE BREYER took no part in the consideration or decision of this case.

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United States Department of Labor
Office of Administrative Law Judges

USDOL/OALJ Reporter

Pickett v. Tennessee Valley Authority, ARB Nos. 02-056 and 02-059, ALJ No. 2001-CAA-18 (ARB Nov. 28, 2003)

U.S. Department of Labor Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

ARB CASE NOS. 02-056, 02-059
ALJ CASE NO. 01-CAA-18
DATE: November 28, 2003

In the Matter of:

DAVID W. PICKETT,
COMPLAINANT,

v.

TENNESSEE VALLEY AUTHORITY,
RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward A. Slavin, Jr., Esq., *St. Augustine, Florida*

For the Respondent:
Maureen H. Dunn, Esq., Thomas F. Fine, Esq., Linda J. Sales-Brent, Esq., *Tennessee Valley Authority, Knoxville, Tennessee*

FINAL DECISION AND ORDER

David W. Pickett filed a complaint against his former employer, the Tennessee Valley Authority (TVA), under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C. § 7622 (1995), Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i) (2003), Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 (1998), Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 (1995), Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971 (1995) and the Department of Labor's (DOL) implementing regulations set out at 29 C.F.R. Part 24 (2002). Pickett alleges that TVA blacklisted him in retaliation for a previous whistle-blower complaint he filed in 1999.[1]

The Administrative Law Judge (ALJ) found that Pickett had established a *prima facie*

case of discrimination and that TVA failed to produce legitimate, non-discriminatory reasons for its action.[2] Accordingly, the ALJ awarded compensatory damages of $5,000.00 and exemplary damages of $10,000.00. TVA timely appealed to the Administrative Review Board (ARB). Pickett cross-appealed.[3] For the reasons discussed below, we disagree with the ALJ's Recommended Decision and Order and dismiss the complaint.

BACKGROUND

Factual and procedural summary

Our previous decision on the claim filed by Pickett in 1999 outlined the factual history of Pickett's employment with TVA, his work injury, and his subsequent receipt of disability benefits. *Pickett, supra*, n. 1, slip op at 4-6. We summarize briefly. Between 1985 and 1988, Pickett worked as an Assistant Unit Operator at TVA's Widows Creek Fossil Plant (Widows Creek) in Stevenson, Alabama, inspecting plant machinery and assisting with its operation. During his tenure there, Pickett allegedly raised concerns about unsafe working conditions including nonworking pollution control equipment.

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On February 11, 1988, Pickett sustained an injury to his left shoulder due to a malfunctioning turbine and began receiving disability benefits under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101-8193. In December 1988, TVA wrote to the Office of Workers' Compensation Programs (OWCP), which administers the federal disability program for DOL, requesting review of Pickett's entitlement to benefits in view of his refusal of a clerical job offer.

OWCP subsequently determined that the clerical position was unsuitable employment due to the excessive commuting distance between Pickett's residence and the plant location. (Pickett was by then living with his parents in the Knoxville area.) TVA terminated Pickett's employment in October 1993 because he had not actually worked in several years, but Pickett continued to receive disability benefits and subsequently obtained a degree in chemical/environmental engineering from a community college through FECA job training.

In 1991 and 1993, TVA's Office of the Inspector General (OIG), which investigates allegations of waste, fraud and abuse, reviewed Pickett's receipt of FECA benefits, first at the request of TVA management and subsequently as the result of an anonymous report that Pickett had engaged in athletic activities inconsistent with his claim of total disability. CX 1. OIG provided TVA with an April 15, 1991 report stating that no further investigation by OIG was warranted but recommending that Pickett's case be monitored. CX 1-5B. A second report dated January 23, 1993 closed the OIG investigation and requested that OWCP continue to monitor the case. CX 1-5E.

In January 1999, OWCP advised Pickett that his benefits would be terminated because its "second opinion" physician had concluded that he was not disabled from his work injury. CX 1. Pickett appealed the benefit termination decision to the Employees' Compensation Appeals Board (ECAB) at DOL, which reversed the termination in November 2000 on the basis that OWCP had failed to meet "its burden of proof to establish by the weight of the medical evidence that physical residuals of the February 11, 1988, employment injury ha[d] ceased." *In the Matter of David W. Pickett and Tennessee Valley Authority,* ECAB No. 99-2220, slip op. at 3 (ECAB Nov. 28, 2000).

Also in 1999, Pickett filed a whistleblower complaint against TVA, contending that TVA

had blacklisted him for raising concerns about unsafe working conditions at Widows Creek. RX 8. An ALJ dismissed that complaint on TVA's motion for summary judgment because he found it to be untimely filed, and the ARB affirmed his decision. *Pickett, supra*, n. 1, slip op. at 12, 14.

As a consequence of the ECAB decision in November 2000, OWCP computed a back payment of disability compensation for Pickett and restored his monthly benefits.[4] CX 1. Pickett then informed OWCP that he had worked part-time in 1999 and 2000 at Oak Ridge Fabricators in Oliver Springs, Tennessee. RX 3. Because of this work, OWCP sent a letter dated March 2, 2001 to Edward Scott Green, the owner of Oak Ridge Fabricators, seeking employment information that would allow it to determine whether Pickett had any wage-earning capacity.[5] TR at 388-92. OWCP asked for the following: job title and brief description of duties performed, number of hours worked per week, inclusive dates of employment, weekly rate of pay exclusive of overtime, and reason for leaving. RX 3.

Because Green did not respond to the letter, an OWCP claims examiner asked Nancy L. Branham, a claims officer in TVA's workers' compensation department, for her help in obtaining the requested information from Oak Ridge Fabricators. TR at 362-66, 380-81. Since OWCP was asking for information about non-TVA employment, Branham called Craig D. Yates, a special agent for TVA's OIG who handled workers' compensation claims, and requested that he obtain the information. Branham sent him a copy of OWCP's letter to Oak Ridge Fabricators. TR at 397.

Yates discussed the request with his supervisor, who confirmed that OIG's investigation file on Pickett's disability claim was closed[6] and advised Yates that he would consider how OIG should respond. TR at 415-18. The supervisor thereafter directed Yates to assist OWCP in obtaining the requested information. TR at 450-51. Yates then went to Oak Ridge Fabricators on March 30, 2001, and spoke with Green for about half an hour. TR at 457. After he left, Green called Pickett and told him of Yates' visit. RX 6; TR at 44-45, 468.

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That same day, Pickett filed a complaint against the OWCP, TVA, its OIG, the TVA Inspector General, investigator Yates, and TVA chairman Craven Crowell, alleging that TVA had retaliated against him for his 1999 whistleblower complaint.[7] ALJX 2. Pickett contended that TVA had harassed him by sending Yates to conduct an "illegal" investigation of his disability claim and that in the course of his March 30, 2001 visit Yates had made "illegal blacklisting remarks" to Green.[8]

Yates passed the information he had obtained from Green to Branham, who advised him that the work done by Pickett at Oak Ridge Fabricators was not sufficient for OWCP to determine that Pickett had wage-earning capacity, because it was not full time and the earnings were minimal. Based on her remarks, Yates decided that it was not necessary to subpoena Green's business records. TR at 70, 72, 466, 529-30.

On April 9, 2001 in response to his supervisor's request, Yates wrote a memorandum regarding his visit to Oak Ridge Fabricators and his conversation with Green. He explained the background behind his visit, described his interaction with Green, and denied making any derogatory remarks about Pickett. RX 5.

OSHA investigated the complaints made in Pickett's claim. On August 15, 2001 OSHA reported that Pickett's complaint had no merit. OSHA found that the evidence failed to support Pickett's allegations. ALJX 2. Pickett requested a hearing before an ALJ, which was held in Knoxville, Tennessee on September 19-21, 2001.

The ALJ concluded that certain statements Yates made to Green during the March 30, 2001 visit—remarks that he found ridiculed Pickett, accused him of malingering, and implied that Green should not hire Pickett again—constituted a *prima facie* case of blacklisting by TVA in retaliation for the 1999 whistleblower complaint Pickett had filed. The ALJ then found that TVA had failed to present any evidence articulating a legitimate, non-discriminatory reason for Yates' statements. R. D. & O. at 27-28, 41-42.

The ALJ concluded that Pickett failed to establish a factual foundation for reinstatement or front or back pay. R. D. & O. at 36-39. However, he awarded $5,000.00 in compensatory damages and $10,000.00 in exemplary damages, along with other equitable relief. R. D. & O. at 40-52.

TVA appealed to the ARB, and Pickett cross-appealed, requesting that he be granted all the relief sought in his complaint. Subsequently, he also filed a petition for attorney's fees with the ARB. *See* n. 3, *supra*.

The parties' contentions on appeal

TVA argues that Yates' actions and conduct during the March 30, 2001 interview were privileged because they were specifically authorized by the regulations implementing FECA. According to TVA, all of Yates' statements to Green were related to Yates' investigative duties and were not related to Pickett's 1999 whistleblower claim. TVA's Initial Brief at 7-8.

TVA also contends that Pickett was not blacklisted or subjected to any adverse action and that the ALJ erred in finding that Pickett had made allegations about Yates in his prior 1999 whistleblower claim and that the allegations motivated Yates to retaliate against Pickett. *Id.* at 10, 21. TVA asks the ARB to find that the record does not support the ALJ's adverse credibility determination regarding Yates. *Id.* at 12.

Further, TVA urges that Pickett failed to establish any causal link between the alleged blacklisting and protected activity. *Id.* at 24. Finally, TVA suggests that if the ARB were to affirm the ALJ, it should reverse the decision on remedies because (as to compensatory damages) Pickett failed to show any concrete damages and because (as to exemplary damages) punitive damages cannot be awarded against TVA, a public agency, because sovereign immunity has not been waived.

In his cross-petition for review, Pickett asks the ARB to remand this case for "upward recalculation" of the ALJ's remedies and reinstatement to TVA employment. Pickett's Reply Brief at 1. Pickett submits that the ALJ's findings of fact are supported by substantial evidence and must be upheld. *Id.* at 12, 24. He contends that TVA's claim of privilege is untenable, *id.* at 22, and that he established a *prima facie* case of blacklisting, which TVA failed to rebut, *id.* at 23.

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ISSUES

I. Whether the record evidence establishes that TVA through Yates blacklisted Pickett.

II. Whether TVA established a legitimate, non-discriminatory reason for Yates' interview of Green.

III. Whether Pickett established that TVA retaliated against him because of

his whistleblowing activity.

JURISDICTION AND STANDARD OF REVIEW

The environmental whistleblower statutes authorize the Secretary of Labor to hear complaints of alleged discrimination in response to protected activity and, upon finding a violation, to order abatement and other remedies. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). The Secretary has delegated authority for review of an ALJ's initial decisions to the ARB. 29 C.F.R. § 24.8 (2002). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, *inter alia*, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in *de novo* review of the recommended decision of the ALJ. *See* 5 U.S.C. § 557(b); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

The Board is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). *See generally Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. United States Dep't of Agriculture*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) in rejecting argument that higher level administrative official was bound by ALJ's decision). An ALJ's findings constitute a part of the record, however, and as such are subject to review and receipt of appropriate weight. *Universal Camera Corp.*, 340 U.S. at 492-497; *Pogue v. U.S. Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991); *NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 964 (7th Cir. 1988).

In weighing testimony, the fact-finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony and the extent to which the testimony was supported or contradicted by other credible evidence. *Jenkins, supra*, slip op. at 10 (citations omitted). The ALJ, unlike the ARB, observes witness demeanor in the course of the hearing, and the ARB defers to an ALJ's credibility determinations that are explicitly based on such observation. *Phillips v. Stanley Smith Security, Inc.*, ARB No. 98-020, ALJ No. 96-ERA-30, slip op. at 10 (ARB Jan. 31, 2001).

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However, when the ALJ fails to explain his assessment of witness credibility or his findings are not objectively supported by the record, the ARB will review the evidence and make its own credibility conclusions. *See Masek v. The Cadle Co.*, ARB No. 97-069, ALJ No. 1995-WPC-1, slip op. at 13 (ARB Apr. 28, 2000) (ALJ's finding that one of Respondent's witnesses was not credible rejected because the totality of his testimony did not support a conclusion that he lied or that the employer's explanation for complainant's termination was pretext and untrue). "Further, if the Secretary disagrees with the ALJ, the appellate court will 'defer to the inferences that the Secretary derives

from the evidence, not to those of the ALJ.'" *Varnadore v. Secretary of Labor*, 141 F.3d 625, 628 (6th Cir. 1998).

DISCUSSION

I. The record does not establish that TVA blacklisted Pickett through Yates.

A. Definition of blacklisting

To prevail under the whistleblower protection provisions of the environmental statutes, Pickett must establish by a preponderance of the evidence that TVA is subject to the statutes, that he engaged in protected activity of which the employer was aware, that he suffered adverse employment action and that the protected activity was the reason for the adverse action, *i.e.*, that a nexus existed between the protected activity and adverse action. *Shelton v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-100, ALJ No. 95-CAA-19, slip op. at 6-7 (ARB Mar. 30, 2001); *Hasan v. Sargent and Lundy*, ARB No. 01-001, ALJ No. 02-ERA-7, slip op. at 3 (ARB Apr. 30, 2001). Failure to establish any of these elements defeats a complaint under the applicable whistleblower statutes. *Jenkins, supra*, slip op. at 16.[9]

In this case, the parties stipulated that TVA formerly employed Pickett, that he engaged in protected activity by filing a previous whistleblower claim in 1999, and that TVA and Yates were aware of Pickett's protected activity. R. D. & O. at 6. Thus, Pickett must establish whether (1) TVA took adverse action against him, and if so (2) whether the adverse action was motivated by his protected activity. We find that the record evidence does not establish that Yates engaged in blacklisting Pickett and that the alleged blacklisting was motivated by Pickett's protected activity.[10]

The implementing regulations for the environmental statutes under which this complaint was filed specifically mention blacklisting as a violation of the employee protection provisions. *See* 29 C.F.R. § 24.2(b).

A blacklist is defined as a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate. *Leveille v. New York Air National Guard*, Case No. 94-TSC-3, slip op. at 18-19 (Sec'y Dec. 11, 1995); *see Black's Law Dictionary* 154 (5th ed. 1979). As *Black's* explains, a trade union may blacklist workers who refuse to conform to its rules, or a commercial agency or mercantile association may publish a blacklist of insolvent or untrustworthy persons.

A blacklisting may also arise "out of any understanding by which the name or identity of a person is communicated between two or more employers in order to prevent the worker from engaging in employment." 48 Am. Jur. 2d, *Labor and Labor Relations* § 669 (2002). Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. *Barlow v. U.S.*, 51 Fed.Cl. 380, 395 (2002) (citation omitted).

Blacklisting assumes that an employer covertly follows a practice of discrimination. *Black's Law Dictionary* 163 (7th ed. 1999) ("to put the name of (a person) on a list of those who are to be boycotted or punished"). *Cf. Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975) ("[s]ecret preferences in hiring and even more subtle means of illegal discrimination, because of their very nature, are unlikely to be readily apparent to the individual discriminated against").

The ARB has stated that blacklisting is the "quintessential discrimination," often "insidious and invidious [and not] easily discerned." *Leveille, supra,* slip op. at 18; *Egenrieder v. Metropolitan Edison Co.*, Case No. 85-ERA-23, slip op. at 8 (Sec'y Apr. 20, 1987). The Secretary stated in *Earwood v. Dart Container Corp.*, Case No. 93-STA-16, slip op. at 5 (Sec'y Dec. 7, 1994) that "effective enforcement of the Act requires a prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment opportunities as a result."

However, in *Odom v. Anchor Lithkemko*, Case No. 96-WPC-1, slip op. at 13 (ARB Oct. 10, 1997), the ARB emphasized that an employer is not prohibited from providing a negative reference simply because an employee has filed a whistleblower complaint. To be discriminatory, the communication must be motivated at least in part by the protected activity. In *Odom*, the complainant failed to prove that either criticisms of his work performance or a statement of his ineligibility for rehire was based on or motivated even in part by any of his protected activity. *Cf. Gaballa v. Arizona Public Service Co. and The Atlantic Group*, Case No. 94-ERA-9, slip op. at 3 (Sec'y Jan. 18, 1996) (the employer explicitly mentioned the employee's whistleblower complaint to a reference checking company).

In addition, blacklisting requires an objective action—there must be evidence that a specific act of blacklisting occurred. *See Howard v. Tennessee Valley Authority*, Case No. 90-ERA-24 (Sec'y July 3, 1991), *aff'd sub nom., Howard v. U.S. Dept. of Labor*, 959 F.2d 234 (6th Cir. 1992) (table) (the existence of a memorandum and status report on whistleblower complaints was insufficient to establish blacklisting without further indications of specific adverse action). Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place. *See Bausemer v. Texas Utilities Electric*, Case No. 91-ERA-20, slip op. at 8 (Sec'y Oct. 31, 1995) (an employer's letters to contractors requesting notice of any discrimination cases filed against them did not constitute blacklisting of complainant).

Under *Smith v. Tennessee Valley Authority*, Case No. 90-ERA-12, slip op. at 4 (Sec'y Apr. 30, 1992), an allegation of blacklisting must include some form of detriment to the complainant. Thus, there must be some objectively manifest personnel or other injurious employment-related action by the employer against the employee, proved directly or circumstantially, to support a claim of illegal action under the statute. *McDaniel v. Mead Corp.*, 622 F. Supp. 351, 358 (W.D. Va. 1985), *aff'd*, 818 F.2d 861 (4th Cir. 1987) (table).

B. Components of Pickett's blacklisting claim

Pickett's claim that he was blacklisted rests on the comments and conduct of Yates during the March 30, 2001 meeting between Yates and Green.[11] Yates and Green differ over exactly what was actually said at that meeting, but we find that under either version, the statements attributed to Yates are insufficient to constitute any adverse action by TVA or Yates. Thus, we agree with TVA that Pickett failed to establish that he was blacklisted by TVA or Yates. Respondent's Initial Brief at 10.

The statements attributed to Yates by Green may be described as gratuitous personal observations, conversational gambits designed to elicit information, or malicious remarks aimed at blacklisting Pickett. The statements fall into three categories: (1) Yates' alleged dislike of Pickett and accusation of malingering; (2) Yates' supposed ridicule of Pickett for living at home; and (3) Green's potential re-employment of Pickett. We will discuss each in turn as factually insufficient to support the inferences drawn by the ALJ.

(1) Accusation of malingering

Pickett's allegations that Yates did not like Pickett and that he accused Pickett of malingering rest on the following exchanges as related by Green at the hearing. According to Green, who admitted that he was a "very good friend" of Pickett's, TR at 43, he could tell that Yates "basically didn't like David, seemed like to me. I mean, he was real, you know – he made comments to me like, you know, 'I get up and go to work every, my knees and back hurt,' and you know, just stuff like that. I could see he wasn't real fond of David, let's put it that way, or agreeable to whatever David's doing." TR at 33.

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Pickett's allegation that Yates called him a malingerer was specifically based on Green's declaration, ALJX 24, and Green's testimony on what Yates said about Pickett's doctors. The exchange was as follows:

> Yeah, he said that he had doubts about David's [disability] case, that you know, their doctors said he wasn't hurt, but David's doctors said he was hurt. And you know, he – and that's basically it.
>
> What did he say about our doctors?
>
> He just said our doctors. You know, I wasn't real – just said our doctors say he's not hurt and his say he is hurt. He asked me how I'd feel if one of my workers was, you know, saying his back was hurting, wasn't working and he went to work for somebody else. I said I didn't know. TR at 37-38.

Yates denied that he said anything about Pickett's doctors, TR at 467, and added that the bad back remark was made in the context of talking about workers' compensation generally in response to Green's questions. TR at 464.

The comments Green recounted, if made, could be interpreted as possibly supporting an inference of malingering. They also could be interpreted as a ploy to motivate Green to provide full employment information about Pickett, or as gratuitous remarks.[12] The evidence is therefore equivocal on this point.

(2) Ridicule of Pickett for living at home

Asked if Yates made any remarks about Pickett living with his parents, Green responded: "Yeah, he said he couldn't believe somebody thirty-six years old still lived at home. You know, he had a son. And when he told him – when he moved out, he paid his own way. And he couldn't understand why somebody that old lived at home. I said well, he didn't really have any money." TR at 39-40.

Taken at face value, Yates' alleged remark—that he couldn't understand somebody Pickett's age living at home—is responsive to Green telling him that Pickett had moved in with his parents. TR at 466-67. Even if Yates' comment could be interpreted negatively, any implication from his statement does not relate to Pickett's desirability as an employee. The fact that Yates, according to Green, couldn't understand why a 36-year-old man was living with his parents may indicate a lack of empathy for Pickett, but it is not evidence of blacklisting. Living at home at whatever age is simply unrelated to employment qualifications.

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We note that Yates testified that he made no derogatory statements about Pickett living with his parents. TR at 78, 467. He added that he had asked Green where Pickett was living, and Green told him. Yates did admit that he talked about his son, who played college basketball and was happy to be on his own "part of the time." TR at 80-81, 465. Under Yates' version of the conversation, there was no ridicule. Under either version, these statements do not constitute blacklisting.

(3) Green's potential re-employment of Pickett

Asked how Yates' questions made him feel, Green stated that Pickett was his friend, and "I took it personal. I was just trying to help David get a little bit of income. I mean, he made all of all of fifteen hundred and some dollars working for me. It wasn't nothing." Pickett's counsel then asked Green:

> Q. If you didn't know David, how would Mr. Yates' statements have made you feel about him as an employer, sir?
>
> A. I wouldn't hire him. [Objection] There's no way.
>
> Q. Let me ask you to assume, sir, that you didn't know Mr. Pickett personally. And an agent with a badge came to your office asking the kind of questions that Mr. Yates did on March the 30th.
>
> A. I mean, there's no way I would hire him again. If I didn't know him, there's no way.[13] I mean, my shop worker, he [Yates] asked to see his [Pickett's] payroll records. I mean, you don't think that's going to be all over town? I mean, there's no way. Just to have to come over here and do this, I mean, there's no way.

TR at 38-39. In this exchange, Green indicated that the mere fact that Yates came to the shop and asked to see Pickett's payroll records would have motivated Green not to re-employ Pickett if he didn't know him personally. Clearly, Yates' request for the employment information identified in OWCP's letter would not constitute blacklisting. Similarly, the fact that Yates came to Green's place of business is unrelated to any form of blacklisting. Further, Green testified that he would rehire Pickett whenever there was enough work, TR at 42, thus supporting TVA's argument that Green's testimony in this regard was purely speculative. Therefore, in considering whether blacklisting occurred, we put little weight on Green's testimony that after Yates' visit he would have been unwilling to rehire Pickett if he had not known him personally.

Even if Yates thought Pickett was malingering, and conveyed this impression to Green, the evidence linking Yates' personal opinion to preclusion of re-employment by Green—"I wouldn't hire him"—is speculative at best, because Green was well aware of Pickett's capabilities and admitted he would hire him back. Further, since early in their conversation, Green told Yates that he was Pickett's friend and didn't want to get him in trouble, it appears unlikely that Yates expected Green not to re-employ Pickett as a consequence of his remarks.[14] TR at 33, 458.

Green also testified that Yates' visit."just tore him [Pickett] up. I mean, he – I know he can't feel good walking around town, because I know everybody knows. I mean, people got big mouths in our town. That's just the way it is. I know it's bothered him." TR at 40.

Small town proclivities for gossip aside, this testimony does not establish that Yates stated or even intimated that Green should blacklist Pickett and not hire him in the future.[15] Nor does it support any inference that TVA had blacklisted Pickett for re-employment. Green's beliefs that Yates' visit would "be all over town" and that Pickett could not feel good walking around town simply have no bearing on whether Yates or TVA blacklisted Pickett. Likewise, Pickett's reaction to Yates' visit—expressed in his irate telephone call to Yates the same day, RX 6; TR at 161, 163-66—is immaterial to the issue of blacklisting.

Under Yates' testimony, no blacklisting of any sort occurred. Rather, Yates' testimony reflects his efforts to obtain information from the individual—Green—who had failed to respond to OWCP's inquiry. Following OIG policy on conducting interviews,[16] Yates introduced himself and tried to establish rapport with Green. RX 5. Yates testified that the tone of his conversation with Green was casual, that his questions "didn't seem to bother" Green, and that he wasn't offended by Yates' remarks about getting a subpoena for Pickett's employment records, but rather seemed to want such a document before he would release any of Pickett's records. TR at 57-59, 451-52. Yates stated that he talked with Green "in generalities" about the workers' compensation system and people going to work with bad backs as well as softball and other sports. TR at 464.

Yates, a TVA special agent since 1992, explained at the hearing that obtaining relevant information during an interview in workers' compensation cases required conversational gambits designed both to put the interviewee at ease and elicit facts about the injured employee. TR at 464, 531-32.

For example, to allay Green's apprehension about releasing employment information on Pickett, Yates related that Pickett had reported some earnings, that his situation was not like most cases investigated by Yates, and that Pickett "had done nothing wrong." TR at 460. Yates told Green that his visit was "really just a very informal inquiry, . . . to verify the information." TR at 531. Yates added that Green asked questions and "we talked in generalities a little bit. That happens very often in the very normal course of business [with] the people I inquire or talk to." TR at 531-32.

Having carefully reviewed the record, including the hearing transcript, we find that the evidence adduced by Pickett fails to resolve the ambiguous conclusions that could be drawn from the March 30, 2001 interview of Green by Yates. Pickett has the burden of proof to establish by a preponderance of the evidence that TVA blacklisted him. For the reasons set forth above, we find the evidence insufficient to establish blacklisting.[17]

II. TVA has established a legitimate, non-discriminatory reason for Yates' interview of Green.

The FECA regulation at 20 C.F.R. § 10.118 contemplates that an employer may investigate the extent of an employee's disability and will monitor an employee's medical care. It requires the employer to provide to OWCP relevant documents it obtains. *See* 20C.F.R. § 10.123(b); 20 C.F.R. § 10.140 (1998), superseded by 20 C.F.R. § 10.118; 20 C.F.R. § 10.506 (2002).

OWCP's procedure manual provides guidelines for claims examiners to obtain information from employers whose workers are injured. Where fraud is not involved, as in this case, investigation may be requested as a routine matter.[18] The claims examiner may request a limited investigation to secure the necessary evidence where only a few items are needed.[19] The manual provides the methods by which a claims examiner may obtain needed information, including factual and medical evidence in the possession of an employer and earnings reported to the Social Security Administration.[20]

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When an employee such as Pickett cannot return to his pre-injury job, but does report alternative employment, the claims examiner must determine whether his earnings fairly and reasonably represent the employee's wage-earning capacity.[21] The manual clearly states that sporadic or intermittent earnings should not be the basis of a wage-earning capacity determination, but should be deducted from the disability compensation being paid to the injured worker.[22]

Pickett argues that Yates' action was an "illegal investigation" of him, but we find no evidence that OWCP, TVA, or the OIG did anything illegal. As Yates explained to Green, Pickett's situation was different from the usual disability cases he investigated.[23] TR at 460. Pickett had reported some income to OWCP during the two years his benefits were terminated. OWCP computed the retroactive compensation due him after ECAB reversed OWCP's termination decision, but needed to verify the information he reported and obtain the particulars of Pickett's employment during that period to determine whether a wage-earning capacity decision was necessary. Accordingly, OWCP followed its usual procedures, and sent a form letter to Green requesting employment information. TR at 389-92.

When the letter produced no response, the OWCP claims examiner called Branham, a claims officer with TVA's workers' compensation department, which served as TVA's liaison with OWCP. CX 11-A; TR at 380. As Branham explained, she gets daily requests from OWCP for information on injured TVA workers. TR at 381, 408. Because this request sought information which was not in TVA's files but rather in the possession of an outside source—Oak Ridge Fabricators—Branham discussed the request with her manager and then asked TVA's OIG, specifically Yates, to help because she had worked with him in the past. TR at 380-81, 393, 397-98; *see* RX 3.

Because Yates knew that the disability investigation file on Pickett had been closed and that Pickett had filed a complaint against TVA in 1999, he consulted his supervisor, Charles Dale Hamilton, before proceeding. Hamilton checked with the head of OIG and then instructed Yates to set up the interview because he was the "logical choice" to work on it.[24] TR at 416-18, 429-30. Thus, it appears that Yates' visit to Oak Ridge on March 30, 2001 was properly authorized as a discretionary function within the scope of his authority as an OIG special agent.

Yates' interaction with Green can be seen as within the scope of his duty to obtain information about Pickett's employment. OWCP needed this information to determine whether Pickett had any wage-earning capacity, which would affect the amount of disability benefits he received. Even crediting the testimony of Pickett's witnesses, none of the statements Yates made concerning Pickett's employment records with Green, OWCP's request that he interview Green, or the statement that he was not there for TVA, exceeded the scope of Yates' employment.

Further, the peripheral questions and statements alleged by Green were arguably within the scope of Yates' duties because, as discussed previously, they could have been connected to Yates' ultimate goal of obtaining relevant information concerning Pickett's wage-earning capacity.

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Pickett has not shown that TVA's explanation is not credible or is pretext for discrimination. Thus, we conclude that TVA has provided a legitimate non-discriminatory

explanation for Yates' interview with Green—OWCP's request for employment informatior so that it could determine Pickett's wage-earning capacity.[25]

TVA argues that its actions in sending Yates to interview Green were privileged and therefore cannot be the basis of a whistleblower claim, citing *Billings v. Tennessee Valley Authority*, Case No. 91-ERA-12, slip op. at 12-14 (ARB June 26, 1996). In that case the sole factual issue was whether TVA discriminated against the complainant by persuading OWCP to terminate his disability benefits. The ARB agreed with the ALJ that TVA's actions in communicating with OWCP and asking for a review of Billings' eligibility for disability benefits did not violate the Energy Reorganization Act, 42.U.S.C. § 5851 (1988), and were specifically authorized by the regulations implementing FECA.

Although there is no statutory provision governing privilege in the environmental whistleblower statutes or the FECA, a privileged communication in the context of defamation law is one that, except for the occasion on which or the circumstances under which it is made, would be defamatory and actionable. 100 ALR 5th, *Libel and Slander—Immunity,* § 2 (2002).

In determining whether a qualified privilege exists, the nature of the subject, the right, duty, and interests of the parties, the time, place, and circumstances of the occasion, and the nature, character, and extent of the communication should be considered. 50 Am Jur 2d, § 276. Thus, the elements of this privilege include good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner to proper parties. *Id.* For public officials, the generally recognized elements are the performance of a discretionary function in good faith within the scope of the employee's authority. 100 ALR 5th, *Libel and Slander—Immunity,* § 2 (2002).

The privilege also attaches to accusations or comments about an employee by his employer to a person having an interest, which is direct and legitimate in, or as a duty as to, the matter to which the communication relates. 50 Am. Jur. 2d, *Libel and Slander*, § 328. Thus, statements made by former employers to state departments or offices or to various other entities have been covered by a qualified privilege if they do not go beyond the scope of the inquiry. *See Judge v. Rockford Memorial Hospital*, 150 N.E. 2d 202, 207 (App. Ct. Ill. 1958) (letter from director of nursing to nurses' grievance committee was covered by qualified privilege because no malice was proven).

While the factual circumstances of this case meet some of the requirements of common-law privilege, we have found that TVA has set forth a legitimate, non-discriminatory reason for Yates' interview of Green. We have also concluded that Pickett has not established that he was blacklisted. Therefore, we need not decide whether the March 30, 2001 interview was protected by any kind of qualified privilege.

III. Pickett has not established by a preponderance of the evidence that the alleged blacklisting was motivated by Pickett's protected activity in filing the 1999 complaint.

Even if we were to construe Yates' behavior as blacklisting, Pickett has failed to establish by a preponderance of the evidence that the blacklisting was motivated in whole or in part by Pickett's protected activity under the environmental whistleblower statutes. *See Odom, supra*, slip op. at 12. Rather, the record shows that if Yates had any actual animus toward Pickett, it stemmed only from his disability case. Thus, if Yates' remarks are interpreted as conveying negative views of Pickett, including that Pickett was a malingerer, it appears that the source of such animus, if it existed, was Pickett's receipt of disability benefits under the workers' compensation system.

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The ALJ found a causal connection between Pickett's protected status as a prior whistleblower and his blacklisting by Yates based on certain "facts," the most significant of which was that Pickett had made charges against Yates personally in his 1999 whistleblower complaint.[26] The ALJ noted that Pickett's 1999 complaint "involved investigations conducted by Yates" and "allegations that derogatory statements were spoken by Yates." Based on these findings, the ALJ determined that Yates had a motive for retaliating against Pickett and further determined that Yates' desire for retaliation, coupled with the opportunity afforded by the 2001 investigation, constituted the requisite causation. R. D. & O. at 40. Our review of the evidence convinces us otherwise.

As part of his job, Yates had investigated Pickett's activities in late 1992 in connection with his receipt of disability benefits. Yates' November 17-18, 1992 memorandum explained that Yates had called Pickett twice to set up a time for an interview concerning an allegation about his physical activities. Pickett was unavailable, and an interview was finally arranged for December 2, 1992. CX 1-5D. Yates, along with fellow investigator Curtis Phillips, went to Pickett's parents' home and interviewed Pickett in the presence of his father. Yates taped the interview and later wrote a report for the OIG. CX 1-5D. The report is a factual account of what Pickett told Yates about his physical and athletic activities, and contains no language or conclusions detrimental to Pickett.

The December 2, 1992 report and the November 17-18, 1992 memorandum by Yates were attached as exhibits to Pickett's 1999 whistleblower complaint, in which Pickett accused two other TVA employees, George Prosser and Donald Drumm,[27] of blacklisting him and lobbying OWCP to terminate his disability benefits in retaliation for his whistleblower activity.[28] The two documents were described as follows: "November 17 & 18 1992 TVA IG 02 by Agent Craig A. Yates and December 1992 TVA IG Form 02 by Agents Curtis Phillips and Craig A. Yates regarding their 'investigation' of alleged 'anonymous' concerns about Mr. Pickett being on FECA compensation." CX 1. Because Pickett had charged in his 1999 whistleblower complaint that TVA, *i.e.*, Prosser and Drumm, initiated the 1992 investigation to harass Pickett, Yates was briefly called into a meeting of TVA's attorneys in 1999 to describe his investigation of Pickett's disability claim. However, Yates had no further involvement regarding Pickett's 1999 complaint. TR at 492.

The ALJ erred in finding that there was an allegation against Yates personally in Pickett's 1999 complaint. Based on the record before us, Pickett did not accuse Yates of anything in his 1999 complaint. Yates' name is on the November 17-18, 1992 memorandum and the December 2, 1992 report of Pickett's activities and appears in the description of these documents. But Pickett's quarrel was with Prosser and Drumm, and their 1991 letter and memo. While Yates' December 2, 1992 report was sent to DOL and was part of the investigation by TVA's OIG, which was closed in January 1993, the report, in Pickett's own words, revealed nothing derogatory about him. It simply states what Pickett told Yates and Curtis. The statement in Pickett's claim about the "investigation" and the attached copies of Yates' memorandum and investigative report—were not derogatory of Yates. The 1999 complaint made no charges against Yates personally. It did not impugn Yates' integrity or identify any impropriety in his conduct of his portion of the OIG investigation in 1992.

Thus, the evidence linking Yates with Pickett's 1999 whistleblower action consists of the following: Yates' actions in investigating Pickett's disability claim in 1992, his participation in the meeting with TVA counsel in 1999, and his knowledge that Pickett had filed a whistleblower suit against TVA. These are insufficient to establish that Yates was motivated to engage in retaliatory blacklisting because of Pickett's whistleblowing activity.[29]

We observe, moreover, that in his conversation with Green on March 30, 2001, Yates made no mention of Pickett's whistleblowing activity. Even accepting as credible Green's version of the conversation, neither Green nor Yates referred to Pickett's whistleblowing activities or the whistleblower protection complaint Pickett filed in 1999. Yates and Green discussed only the FECA claim and Pickett's conduct and history as a beneficiary of disability compensation. Further, there is no other evidence that Yates had animus against Pickett because of his 1999 whistleblower complaint. The only accusations Pickett made against Yates are contained in the 2001 complaint, which was filed after Yates had visited Green on March 30, 2001.

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Indeed, if Yates' remarks are interpreted as conveying negative views of Pickett, including that Pickett was a malingerer, it appears that the source of any animus on Yates' part was Pickett's continued receipt of disability benefits. From his 1992 investigation, Yates was well aware of the varied physical activities which TVA subsequently cited in seeking an OWCP review to determine whether Pickett was in fact still disabled. He was also well aware of the general framework of the federal workers' compensation program and had investigated many cases in which claimants receiving disability benefits were either earning income from other sources or engaging in activities that reasonably belied the work injury for which they were receiving compensation. As an experienced investigator of workers' disability claims, Yates might have been skeptical of Pickett's continued disability for work.

Also, all of the conversation with Green as to Pickett's status related to Pickett's work for Green and his receipt of workers' compensation. TR at 42-43. Green's responses support an inference that any reluctance on his part to rehire Pickett would not be based on his whistleblowing, but rather because he was involved with litigation over his disability claim. *See Mourfield, supra*, slip op. at 4 (any blacklisting resulted from the employer's displeasure with complainant's pro-union activity and was not related to his whistleblower complaint). *See also Odom, supra*, slip op. at 13 (negative work reference, made with the knowledge that the employee had filed a whistleblower complaint, did not constitute blacklisting communication); *Webb v. Carolina Power & Light Co.*, Case No. 96-176, slip op. at 10-11 (ARB Aug. 26, 1997) (negative remarks made to complainant's friend did not constitute blacklisting).

Pickett has alleged additional "facts" upon which the ALJ relied to find causation. *See* n. 26, *supra*. These allegations do not support a conclusion that the alleged blacklisting was motivated by the 1999 complaint. Further, TVA has offered legitimate, non-discriminatory reasons for its actions with respect to Yates' participation in the 1999 meeting with TVA counsel, TVA's alleged failure to investigate fully Pickett's charges against Yates in the 2001 complaint, and OWCP's request for employment information being referred to Yates. Pickett has not shown that any of TVA's reasons for its actions are not credible. In fact, TVA's explanations of its actions in investigating Pickett are well supported in the record. We therefore find that Pickett has not established by a preponderance of the evidence that Yates blacklisted him because he had engaged in protected activity under the environmental whistleblower laws.

CONCLUSION AND ORDER

Because we do not find that blacklisting occurred, it is unnecessary for us to rule on either Pickett's cross-petition, which requests additional relief for the alleged blacklisting, or on TVA's motion to dismiss Pickett's cross-petition and to strike his April 24, 2002 brief. *See Solnicka v. Washington Public Power Supply Systems*, ARB No. 00-009 (Apr. 25, 2000) (order dismissing appeal because of petitioner's failure to file an initial brief); *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ Nos. 99-CAA-025, 00-CAA-

009, slip op. at 2 (by refusing to comply with the ARB's format requirements for briefs, counsel risks return of his non-conforming pleadings).

For the foregoing reasons, we do not adopt the ALJ's findings and recommendations with respect to blacklisting, and we **DISMISS** Pickett's complaint.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

[ENDNOTES]

[1] *See Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ No. 00-CAA-9 (ARB Apr. 23, 2003) (dismissing the complaint as untimely filed).

[2] The following abbreviations are used herein: Claimant's Exhibit, CX; Respondent's Exhibit, RX; hearing transcript, TR; Recommended Decision and Order, R. D. & O.; and Administrative Law Judge's Exhibit, ALJX.

[3] Pickett filed a Protective Cross-Petition for Review, in which he asked that the ARB review "any and all issues on which he did not fully prevail or receive the full remedies requested." ARB Case No. 02-059. He also filed a Petition for Review of the award of attorney's fees. Because of our disposition of this case, there is no need for us to address these petitions. Therefore, we will not review the ALJ's findings regarding (1) Pickett's failure to prove a prior pattern of conduct by TVA, R. D. & O. at 5-8; (2) Robert E. Tyndall's statement, R. D. & O. at 27-29; (3) TVA's ex parte submission to OSHA after Pickett filed his complaint, R. D. & O. at 29-32; (4) TVA's internal investigation of Yates' conduct, R. D. & O. at 32-34; and (5) any of the recommended remedies, including attorney's fees, R. D. & O. at 36-52.

[4] OWCP terminated Pickett's disability benefits again on July 14, 2001, based on new medical evidence. Respondent's Motion for Summary Judgment, Exhibit 4.

[5] Section 8115(a) of the FECA provides that the wage-earning capacity of an employee is determined by his actual earnings if they fairly and reasonably represent the employee's ability to earn wages. 5 U.S.C. § 8115(a). Typically, an injured employee's wage-earning capacity declines, compared with the earnings of his pre-injury job. OWCP's determination of wage-earning capacity governs the amount of disability benefits the employee receives. *See In the Matter of Dan C. Boechler and Department of the Interior*, Docket No. 01-1621 (ECAB May 24, 2002).

[6] Yates had interviewed Pickett in December 1992 regarding his disability claim. CX 1-5D. Yates testified that the case was closed shortly after he made his report on Pickett's activities at the time. TR at 415-18, 442-49; CX 1-5E.

[7] The ALJ dismissed OWCP, TVA's OIG, Yates, and Crowell as parties, finding that only TVA was an employer as defined by the environmental acts. R. D. & O. at 5.

[8] Pickett stated in his complaint that TVA had harassed him by sending Yates to interview his former employer. He alleged that Yates made "illegal blacklisting remarks" to Green, violating Pickett's whistle-blower and privacy rights by stating that Pickett was

a malingerer and that TVA doctors had determined that Pickett was not hurt and could go back to work. Pickett also accused Yates of making fun of him for living with his parents at age 36 and violating his right to confidentiality by revealing that he was receiving full disability and that TVA had recently cut him a check for $50,000.00. Pickett alleged that Yates repeatedly demanded to see Green's payroll and computer records, and improperly claimed that OWCP had sent him to investigate. Also, he alleged that Yates asked how much money Pickett made and told Green about specific details of Pickett's case, as well as activities inconsistent with his disability claim, such as his playing softball. The complaint stated that Yates repeatedly threatened Green with a subpoena for his business records and opined that Pickett's case would not look good in front of a jury, which would find him to be a malingerer. According to the complaint, Yates also told Green that his back hurt but he went to work every day and asked Green how he would feel if he were paying full disability to an employee who went to work for someone else. Finally, Pickett accused Yates of obsessing on the issue of Pickett living at home. ALJX 2.

[9] If the complainant establishes that the protected activity was a motivating factor for the adverse action by the respondent, it may nonetheless avoid liability by showing by a preponderance of the evidence that it would have taken the adverse action in any event. *Mourfield v. Frederick Plaas & Plaas, Inc.*, ARB Nos. 00-055 and 00-056, ALJ No. 1999-CAA-13, slip op. at 4 (ARB Dec. 6, 2002).

[10] The ALJ discussed the evidence in terms of Pickett's burden to establish a *prima facie* case and TVA's failure to rebut it. Once a case is tried by the ALJ, the issue is whether the complainant sustained his burden of proof by a preponderance of the evidence that the respondent discriminated because of protected activity. *USPS Bd. of Governors v. Aikens,* 460 U.S. 711, 715 (quoting *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. at 253); *Carroll v. Bechtel Power Corp.,* Case No. 91-ERA-0046, slip op. at 11 (Sec'y Feb. 15, 1995) (Secretary's order enforced *sub nom, Carroll v. United States Dep't of Labor,* 78 F.3d 352 (8th Cir. 1996)). Thus, after a whistleblower case has been fully tried on the merits, the ALJ does not determine whether a prima facie showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the employer retaliated against him because of protected activity. We continue to discourage the unnecessary discussion of whether a whistleblower has established a prima facie case when a case has been fully tried. *See Williams v. Baltimore City Pub. Schools Sys.,* ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at 3 n.7 (ARB May 30, 2003).

[11] Pickett alleged in his complaint that Yates told Green Pickett's case would not look good in front of a jury, which would find him to be a malingerer. He also alleged that Yates said that OWCP sent him to investigate and not TVA. ALJX 2. In a written declaration, Green alleged that Yates discussed Pickett's case in front of Green's secretary, charged Pickett with being "a malingerer," and "repeatedly threatened" Green with a subpoena for his records. Green added that Yates made no appointment and interviewed him while he had "customers waiting." ALJX 24. Neither the record nor the hearing transcript corroborates or supports any of these allegations. Green did not testify about the alleged jury comment or Yates' actual use of the term malingering. Nor did he indicate at the hearing that his secretary was present during the interview or that he had customers waiting. He did testify, however, that Yates showed him his TVA badge and asked the same questions that OWCP had asked in its letter to him. And Green stated twice at the hearing that he did not feel threatened by Yates' remarks about a subpoena. *See* TR at 29, 35-38, 44, 457, 479.

[12] Green stated in his September 14, 2001 declaration that Yates called Pickett a malingerer, that Yates' interview was "intimidating," and that, based on "the strength" of Yates' feelings, "he intended to hurt" Pickett's reputation. ALJX 24. At the hearing, Green did not testify directly about the alleged accusation of malingering. Green stated that he "could tell" Yates wasn't "real fond of" Pickett, but did not explain how or why.

TR at 33. Green added that he took Yates' questions "personal," TR at 38, but admitted that Yates never "threatened me personally," TR at 44. We note that Yates' alleged remark that Pickett's doctors said he couldn't work and TVA's doctors said the opposite was factually correct. Although it may have suggested to Green an innuendo that Pickett was malingering, it does not corroborate the statement Green made in his declaration, that Yates called Pickett a malingerer outright.

[13] In response to a later question, Green stated: "If I didn't know David, I would come away thinking terrible of him." TR at 49.

[14] Yates testified that he knew that Pickett and Green were "extremely good friends" and had shared an apartment at one time. "I wasn't about to sit there and say things about [Pickett] that were not appropriate in front of his best friend." RX 5; TR at 466.

[15] In fact, we can find no motivation for Yates to suggest to Green that he not hire Pickett. Under FECA, TVA is charged with the amount of Pickett's disability compensation. If Pickett were to be hired by Green, TVA would benefit because Pickett's earnings could be offset against the disability benefits TVA currently pays.

[16] The OIG manual provides the following guidelines for special agents conducting an interview:

> A well-planned interrogatory is the key to a successful interview. The [special agent] needs to carefully formulate questions to be asked during the interview and be prepared for the person's responses. After properly identifying yourself and showing your credentials, the agent should try to put the person being interviewed at ease by asking background questions first before addressing more important questions. The questions should be simple, short, understandable, and direct, and the agent should maintain absolute control of the interview and should lead or direct the discussion. Private and sensitive matters, such as financial matters, drinking or drug habits, and sexual matters are discussed only to the extent that they directly relate to the matter under investigation. CX 9.

[17] Because of our determination that Pickett has not established any adverse action of blacklisting, even crediting Green's evidence, it is not necessary for us to address the ALJ's credibility findings. However, we note that the evidence cited by the ALJ for finding Yates' testimony not credible depends on drawing unwarranted inferences.

For example, the ALJ faulted Yates because he testified that he did not know what a protected activity was. R. D. & O. at 30. The transcript reveals that Yates' expertise was in workers' compensation cases and that he had never worked or been trained in whistleblower cases. TR at 428, 541-50. Thus, it is understandable that he would not be able to define this term of art, even though he was aware of Pickett's whistleblower complaint when he attended the 1999 meeting with TVA's attorneys. Further, his role there was limited to explaining his investigation of Pickett's disability claim in 1992.

Similarly, the ALJ found Yates less than candid because he testified that he did not remember the "exact details" of Pickett's disability claim or whether he had won his appeal of the termination of his benefits. R. D. & O. at 30. Yates, testifying 11 years after his 1992 investigation, stated that opposing counsel's description of Pickett's work injury (which occurred in 1988) sounded "fairly close." TR at 108-09. He stated that he didn't recall whether he knew in November 2000 that Pickett had won his appeal because he was working on his active cases and Pickett's disability case investigation had been closed in early 1993. TR at 73-74, 443-44. It is reasonable that in 2001 Yates would not recall details of a case closed in 1993, especially in view of the fact that he had handled 70 to 100 cases since that time. TR at 440. Moreover, he would not have

had any cause to follow Pickett's case since the investigation was closed.

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Security and the Prevention of Fraud and Abuse*, Chapter 2-402.6 (April 1995).

[19] *Id.*, Chapter 2.402.6.a.(2) (April 1995).

[20] *Id., Development of Claims*, Chapter 2-800.7 (April 1993); *Periodic Review of Disability Cases*, Chapter 2-812.10-11 (June 2003).

[21] *Id., Reemployment: Determining Wage-Earning Capacity*, Chapter 2-814.7 (December 1993).

[22] *Id.*, Chapter 2-814.7.d.(3) (June 1996).

[23] Usually, disability cases that are investigated involve individuals who are receiving benefits and are also working or engaging in other activities inconsistent with being disabled. TR at 460. Under FECA, such individuals may face termination of benefits and criminal charges. *See generally,* 5 U.S.C. §§ 8106(b), 8148 (1993).

[24] As Hamilton explained, Yates was the logical choice because he was one of three agents assigned to workers' compensation cases, he had received the request from OWCP's Branham, and he had worked on the previous Pickett case, which was closed in January 1993. TR at 416-18.

[25] [Editor's note: no text appears at footnote 25 in the original slip opinion]

[26] The ALJ listed the following:

> 1) Yates and TVA knew that Pickett had filed a complaint in 1999;
> 2) Yates also knew that Pickett had made charges against him in that complaint;
> 3) Pickett told Yates of TVA's environmental violations during the 1992 interview regarding his disability compensation;
> 4) Neither Yates nor TVA investigated these charges;
> 5) Yates attended a 1999 meeting on Pickett's complaint and explained the investigation he conducted relating to Pickett's eligibility for benefits due to disability;
> 6) TVA failed to investigate fully Pickett's charges against Yates in his 2001 complaint;
> 7) The OWCP inquiry was referred to Yates because of the pending 1999 complaint; and
> 8) Yates' 2001 investigation was an opportunity to retaliate against Pickett.

Although the ALJ stated that Pickett made allegations in the 1999 complaint against Yates personally, he did not identify the specific charges purportedly made. R. D. & O. at 35-36.

[27] George T. Prosser was TVA's manager of fraud investigations in the OIG and Donald K. Drumm was the manager at Widows Creek Fossil Plant, where Pickett worked. CX1-5B, 5C. The 1999 complaint also accused Drumm of "bearing animus" against Pickett for years and stated that Prosser had fabricated an anonymous complaint to support an "illegal" investigation of Pickett's disability case. Both managers were charged with conspiring to have Pickett's disability compensation terminated. RX 8; *see* n. 1.

[28] The September 10, 1991 memorandum by Drumm stated: "Mr. Pickett has successfully sidestepped the return to work issue for three years by manipulating both OWCP and TVA. His apparent success in abusing the compensation system should be questioned and corrected." CX 1-1. Prosser stated in an October 18, 1991 memo referring to an anonymous call to the OIG Hotline alleging that Pickett's activities were inconsistent with those of a disabled person: "Fraud on Pickett's part did not appear to be a factor, but OWCP handled the case poorly." CX 1-5C.

[29] Pickett alleges that he told Yates in 1992 of his whistleblowing activities at Widows Creek and that Yates had done nothing about investigating his complaints about unsafe conditions. TR at 157-58. Yates did not recall receiving this information. TR at 506-08. Even if Pickett had conveyed his concerns about the plant, Yates had no obligation or authority to investigate because his assigned responsibilities were related to disability compensation investigations. TR at 107, 418. Therefore, no adverse inferences flow from his failure to investigate Pickett's charges of unsafe working conditions at TVA's Widows Creek plant in 1992.

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 02-3471 & 02-3700

TERRY CERUTTI, DANIEL ALLEN, RODNEY BRYANT, ET AL.,

Plaintiffs-Appellants/Cross-Appellees,

v.

BASF CORPORATION, GERARD SABO, KATHY REARDON, ET AL.,

Defendants-Appellees/Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 01 C 8966—George W. Lindberg, *Judge.*

ARGUED MAY 14, 2003—DECIDED NOVEMBER 21, 2003

Before POSNER, RIPPLE, and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* In February 2000, BASF Corporation decided to restructure its styrenics operating unit. As part of this corporate reorganization, BASF terminated 23 employees at its styrenics manufacturing plant in Joliet, Illinois. Ten of those employees filed suit against BASF, alleging that the company fired and declined to rehire them

on the basis of age, race, or national origin in violation of the Age Discrimination in Employment Act ("ADEA") and Title VII. Some of the plaintiffs also brought claims against three individual BASF employees, alleging that they intentionally interfered with the plaintiffs' employment relationships because of their race or national origin in violation of 42 U.S.C. § 1981. The defendants filed a motion for summary judgment, which the district court granted. The defendants also filed a motion for sanctions against the plaintiffs' counsel, which the district court denied. The plaintiffs appeal the district court's decision granting the defendants' motion for summary judgment, and the defendants cross-appeal the court's denial of their motion for sanctions. We affirm.

I.

BASF Corporation is headquartered in Mount Olive, New Jersey, and is comprised of 19 operating units, one of which is devoted to the company's styrenics production ("NPR Unit").[1] The products for BASF's NPR Unit are manufactured at plants throughout North America, including one in Joliet, Illinois, which manufactures various forms of polystyrene. As a result of financial losses suffered by the company's NPR Unit, BASF implemented a program of "Site Process Optimization" in 1998, which was completed in early 1999. Despite this program, the NPR Unit's performance for 1999 was still slightly negative and only a modest return on assets was projected for 2000. This resulted in BASF developing a new business plan that included the reorganization of virtually the entire NPR Unit, the purpose

[1] Styrene plastics are all-purpose plastics that can be found in thousands of different products: automobiles, CD cases, packaging, computer housing, monitors or printers (to name just a few).

of which was to "reduce the number of personnel and repopulat[e] the organization with individuals who demonstrated specific behavioral skills and attributes that BASF believed were necessary to [the unit's] future success, and who, going forward, 'could do more with less' in order to achieve the necessary [return on assets]." In February 2000, BASF formally notified the Joliet facility employees of its intention to restructure the NPR Unit.

In the first phase of the restructuring process, BASF offered a Voluntary Special Early Retirement Program ("VSERP") to all employees aged 53 or over who had ten or more years of service with the company as of December 2000. During the second phase, all employees who desired to continue their employment with the NPR Unit, young and old alike, were assessed to determine whether they possessed the "competencies" the company believed were necessary to effectively restructure the unit. Employees who lacked these competencies would be "deselected," i.e., terminated. To assist it with the assessment process, BASF retained the services of Development Dimensions International ("DDI"), a leader in the behavioral assessment field.

BASF began the restructuring process by categorizing all of the employees from its NPR Unit into "job families." Nine of the plaintiffs were placed in the "Operators" Job Family, i.e., hourly plant or lab workers, and one plaintiff, Pearl Adams, was placed in the "Individual Contributor" Job Family, which was designated for salaried, non-supervisory employees. Key competencies for each job family were then defined. Some of the competencies were developed through the joint efforts of BASF and DDI, whereas others were designed solely by BASF.

Shortly thereafter, DDI assessed personnel at the various NPR facilities nationwide. At the Joliet plant, 83 Operators and 13 Individual Contributors were evaluated with iden-

tical standard assessment techniques—i.e., problem-solving exercises, role-plays and targeted interviewing. These assessments were done over the telephone and DDI employees were not informed of the age, race or national origin of the BASF employees being evaluated. DDI forwarded its results to BASF for further consideration by the company's selection panels.[2] The selection panels were committees formed by BASF (and were comprised of individuals selected for leadership roles in the new organization) to act as the final arbiters on the competency levels of those individuals currently employed by the company in its NPR Unit. The six-member selection panel assembled to assess the competencies of employees in the Operators Job Family at the Joliet facility included: Kevin Biehle (a defendant in this action), Lawrence Brandin, Rich Harris, Gerard Sabo (also a defendant), Troy Shaner, and Thad Zdunich. The five-member selection panel for the Individual Contributors Job Family at the Joliet facility consisted of: Biehle, Brandin, Sabo, Shaner, and Rick Lee. Katherine Reardon, a defendant and BASF's Director of Human Resources for the Polymers Division (which includes the company's NPR Unit), attended all of the panel meetings held at the Joliet facility to oversee the implementation of the selection process and to ensure that the relevant guidelines were consistently applied.

The purpose of each selection panel was twofold: (1) to review DDI's scores and integrate them with the panels' collective knowledge of each employee's workplace behavior and performance; and (2) to evaluate additional

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[2] The employees' scores were reported to BASF on "profile sheets" based on a three-point scale: "3" indicated a strength, "2" indicated a proficiency, and "1" indicated a developmental need.

competencies of each employee not considered by DDI. In reviewing DDI's competency evaluations, the selection panels applied the same three-point scale utilized by DDI to evaluate whether the scores given to an employee were consistent with his or her actual exhibited workplace behavior and performance. If no panel member voiced disagreement with a score assigned to an employee by DDI, it became final for that particular competency. Panel members who disagreed with a competency score were required to identify specific instances of workplace conduct that called into question the accuracy of the score given by DDI to the employee. This was then followed by a panel discussion on the behavioral examples cited by the objecting panel member(s). If the panel reached a consensus that the DDI score did not accurately reflect an employee's on-the-job behavior or performance, the score was increased or decreased accordingly.[3] The initial findings of the selection panels were then reviewed by BASF's legal department and analyzed by Roland DeLoach, BASF's Manager of Equal Employment Opportunity, for possible adverse impact. BASF was advised that the tentative results of the assessment process employed by the company did not have a statistically significant impact on any protected group. Upon being so advised, BASF finalized the decisions made by the selection panels, which were then conveyed to NPR Unit employees on June 2, 2000.

Thereafter, Pearl Adams, Daniel Allen, Rodney Bryant, Terry Cerutti, Richard Clinton, Steven Davis, Anita Krantz, James Perona, Steve Real, and Michael Severado—all of whom were terminated for having six or more developmen-

[3] At the time the selection panels rendered their decisions, its members were not aware that BASF had tentatively concluded that all employees with 6 or more developmental needs (out of the 14 competencies assessed) would be terminated.

tal needs—filed suit against BASF, Kevin Biehle, Kathy Reardon, and Gerard Sabo. All ten of the plaintiffs alleged that BASF fired and declined to rehire them because of their age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* Plaintiff Steve Real (who is Hispanic) and plaintiffs Pearl Adams, Daniel Allen, and Michael Severado (all of whom are black), also filed claims against BASF, alleging that the company fired and declined to rehire them on account of their race or national origin in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and against Biehle, Reardon, and Sabo, alleging that they intentionally interfered with these plaintiffs' employment relationships because of their race or national origin in violation of 42 U.S.C. § 1981. The defendants filed a motion for summary judgment, which the district court granted. The defendants also filed a motion for sanctions against the plaintiffs' counsel, which the court denied. The plaintiffs appeal the district court's decision granting the defendants' motion for summary judgment, and the defendants cross-appeal the court's denial of their motion for sanctions.

II.

The plaintiffs argue that the district court erred in granting the defendants summary judgment for their age, race, and national origin discrimination claims. We review de novo the district court's decision to grant summary judgment, construing all facts, and drawing all reasonable inferences from those facts, in favor of the plaintiffs, the non-moving parties in this case. *Peele v. Country Mut. Life Ins. Co.*, 288 F.3d 319, 326 (7th Cir. 2002). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56.

A plaintiff may prove employment discrimination under the ADEA, Title VII, and § 1981, using either the "direct method" or "indirect method."[4] *Cianci v. Pettibone Corp.*, 152 F.3d 723, 727-28 (7th Cir. 1998). Under the direct method of proof, a plaintiff may show, by way of direct or circumstantial evidence, that his employer's decision to take an adverse job action against him was motivated by an impermissible purpose, such as race, national origin, or age. *Id.* at 727. Direct evidence is evidence that, if believed by the trier of fact, would prove discriminatory conduct on the part of the employer without reliance on inference or presumption. *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir. 2003); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997). In short, "[d]irect evidence 'essentially requires an admission by the decision-maker that his actions were based upon the prohibited animus.'" *Rogers*, 320 F.3d at 753 (citation omitted). A plaintiff can also prevail under the direct method of proof by constructing a "convincing mosaic" of circumstantial evidence that "allows a jury to infer intentional discrimination by the decisionmaker." *Id.*; *see also Troupe v. May Dept. Stores, Inc.*, 20 F.3d 734, 736 (7th Cir. 1994). That circumstantial evidence, however, "must point directly to a discriminatory reason for the employer's action." *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 939 (7th Cir. 2003).

If a plaintiff cannot prevail under the direct method of

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[4] We employ essentially the same analytical framework to employment discrimination cases whether they are brought under the ADEA, Title VII, or § 1981. *Robin v. Espo Eng'g Corp.*, 200 F.3d 1081, 1088 (7th Cir. 2000); *Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799, 806 (7th Cir. 1999).

proof, he must proceed under the indirect method, i.e., the familiar *McDonnell Douglas* framework. *Adams*, 324 F.3d at 939. In the context of a large-scale workplace restructuring or reorganization (i.e., where the employer is "cleaning house" and essentially no one's job is safe), a plaintiff proceeding under the indirect method must, as an initial matter, show that: (1) he is a member of a protected class (e.g., race, national origin, age); (2) he was qualified to be retained or rehired; (3) he was discharged, not rehired, not promoted, or the like, as a result of the workplace restructuring or reorganization; and (4) similarly situated employees outside of his protected class were treated more favorably by the employer.[5] *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 889-90 (7th Cir. 1997); *see also Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1011-12 (7th Cir. 2000). If the plaintiff establishes a prima facie case of age, race, or national origin discrimination, the employer, to avoid liability, must then produce a legitimate, nondiscriminatory reason for the adverse employment decision. *Peele*, 288 F.3d at 326. If the employer offers a legitimate, nondiscriminatory explanation for its decision, the plaintiff must then "rebut that explanation by presenting evidence sufficient to enable a trier of fact to find that the employer's proffered explanation is pretextual [i.e., a lie]." *Id.* A plaintiff does not reach the pretext stage, however, unless he first establishes a prima facie case of discrimination under the indirect method. *Id.*

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[5] An ADEA plaintiff who shows that someone "substantially younger" was retained need not prove that the replacement is outside the protected class. *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 321 (7th Cir. 2003). This variation of *McDonnell Douglas*, however, is not at issue in this case because none of the plaintiffs attempts to make such a showing.

However, whether a plaintiff proceeds under the direct or indirect method of proof, the ultimate standard is the same: the plaintiff must demonstrate that the employer would not have made the adverse employment decision in question but for his membership in a protected class. *Patton v. Indianapolis Pub. Sch. Bd.*, 276 F.3d 334, 339 (7th Cir. 2002); *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 571 (1998). With the foregoing principles in mind, we now consider the merits of the plaintiffs' respective claims.

A. ADEA Claims

All ten plaintiffs allege that they were terminated and not rehired by BASF because of age discrimination. Specifically, the plaintiffs argue that they offered evidence sufficient to establish age discrimination under either the direct or indirect method of proof. In support of their direct method argument, the plaintiffs contend that: (1) the early retirement offer made by BASF to certain older employees in the first phase of the restructuring process was discriminatory and not truly voluntary; (2) either Jay Kline, the head of the NPR Unit, or Kathy Reardon, the director of human resources for the NPR Unit, stated at a restructuring meeting with employees: "There's no other way; it's going to be out with the old and in with the new"; and (3) several ageist statements were made by Thad Zdunich and Troy Shaner to plaintiff Daniel Allen (e.g., "[Allen] is going to handle the young pups" and "How is the old man doing today?"). For the reasons that follow, we conclude that the preceding evidence, even when viewed in its most favorable light, is insufficient to allow the plaintiffs to maintain claims against the defendants for age discrimination under the direct method.

To begin with, the plaintiffs' argument that BASF engaged in age discrimination simply by offering some of its older workers early retirement packages is a nonstarter. *Robinson v. PPG Industries, Inc.*, 23 F.3d 1159, 1163 (7th Cir. 1994) (holding that "[t]ruly voluntary retirements do not give rise to an inference of age discrimination"). Rather, "an offer of incentives to retire early is a benefit to the recipient, not a sign of discrimination." *Henn v. National Geographic Soc.*, 819 F.2d 824, 828 (7th Cir. 1987). Nor is it reasonable to infer that the retirement program offered by BASF in the first phase of the restructuring process was discriminatory or involuntary merely because some of the employees who accepted the company's offer did so out of a fear that they would not make the grade after being assessed. *Id.* at 828-29. The ADEA was not enacted to immunize older employees (i.e., those 40 and over) from being terminated for legitimate reasons (e.g., poor social skills, bad attitude, incompetency), but was instead designed to protect them from being discriminated against on the basis of their age. *Mullin v. Raytheon Co.*, 164 F.3d 696, 703 (1st Cir. 1999) (noting that " '[t]he ADEA was not intended to protect older workers from the often harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings and relocations') (citation omitted); *Allen v. Diebold, Inc.*, 33 F.3d 674, 677 (6th Cir. 1994) (same).

The plaintiffs' reliance on the "out with the old, in with the new" statement allegedly made by either Kline or Reardon is also misplaced. First, neither Kline nor Reardon was involved in the decisionmaking process that resulted in the plaintiffs' terminations (and served as the basis for their not being rehired). Kline was not a member of either selection panel and Reardon merely sat in on the selection panel meetings as a moderator of sorts. Thus, any statement

made by either of these individuals "'that amount[s] to mere speculation as to the thoughts of the decisionmaker [is] irrelevant' to an inquiry of discrimination." *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 986 (7th Cir. 2001) (citation omitted); *see also Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 397 (7th Cir. 1997) (same). Second, even if Kline and Reardon could be characterized as decisionmakers for purposes of the plaintiffs' ADEA claims, there is nothing inherently discriminatory about the colloquialism "out with the old, in with the new," and the plaintiffs offer no evidence upon which a reasonable jury could infer that this phrase was used by Kline or Reardon in a discriminatory manner. *Rogers*, 320 F.3d at 753.

Finally, the stray workplace remarks that the plaintiffs attribute to Shaner and Zdunich offer no support to their claims of age discrimination. Although Shaner and Zdunich both participated in the decisionmaking process that led to the plaintiffs' terminations,[6] they did so as members of selection panels—the actual decisionmakers in this case. *Shager v. Upjohn*, 913 F.2d 398, 405 (7th Cir. 1990) (noting that a committee can act as a decisionmaker in the employment discrimination context). Thus, the plaintiffs' evidence of Shaner or Zdunich's alleged animus toward older workers is relevant only if there is other evidence from which a reasonable jury could infer that their animus influenced the selection panels' deliberations to such a degree so as to result in the plaintiffs' terminations. *Shager*, 913 F.2d at 405. In sum, the plaintiffs were required to show a causal link between the prejudicial views allegedly expressed by Shaner and Zdunich and the plaintiffs' termi-

[6] Shaner and Zdunich were both on the six-member "Operators" selection panel, and Shaner was also on the five-member "Individual Contributors" selection panel.

nations—i.e., that "the committee's decision to fire [them] was tainted by . . . [this] prejudice." *Id.* The plaintiffs have presented no such evidence, however, and therefore they cannot rely on any statements made by Shaner and Zdunich to support their age discrimination claims. But even if the plaintiffs could make use of the stray remarks they attribute to Shaner and Zdunich (e.g., "How's the old man doing today?"), it would do them little good because these statements are clearly not sufficient to establish cases of age discrimination under the direct method of proof.[7] *Adams*, 324 F.3d at 939 (7th Cir. 2003) (noting that circumstantial evidence under the direct method "must point *directly to a discriminatory reason for the employer's action*") (emphasis added); *Cianci*, 152 F.3d at 727 (noting that " 'before seemingly stray workplace remarks will qualify as . . . evidence of discrimination [under the direct method of proof], the plaintiff must show that the remarks were related to the employment decision in question' ") (citation omitted).

The plaintiffs also argue, however, that they presented evidence sufficient to establish prima facie cases of age discrimination under the indirect method. As with most cases proceeding under the *McDonnell Douglas* framework, only

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[7] We also note that many of the allegedly ageist remarks attributed to Shaner and Zdunich are so dated that they have no temporal proximity to the plaintiffs' terminations, and thus may not be used to support their age discrimination claims. *Markel v. Board of Regents*, 276 F.3d 906, 910 (7th Cir. 2002) (holding that statements made two months before termination were not contemporaneous, and therefore did not constitute circumstantial evidence under the direct method of proof); *Gleason v. Mesirow Fin., Inc.*, 118 F.3d 1134, 1140 (7th Cir. 1997) (holding that statement made "as much as three months" before termination was not contemporaneous).

the second and fourth requirements of the test are at issue here—i.e., the "legitimate expectations" and "similarly situated" prongs. The plaintiffs contend that they were qualified to be retained or rehired by BASF and that similarly situated younger employees were treated more favorably by the company in the workplace restructuring or reorganization process. We disagree. It is undisputed that BASF established six or more developmental needs as the standard for being "unqualified" to remain with the company, and that each of the plaintiffs was terminated after the selection panels concluded that they possessed six or more developmental needs. The plaintiffs do not contest either of these facts, but instead maintain that they were qualified to be retained by BASF because: (1) the methodology used by the company to measure the competency of its employees was inherently flawed; (2) their prior positive performance reviews demonstrate that they were qualified to be retained; (3) many of them were found to be competent in areas by DDI, but had their scores lowered by the selection panels; and (4) there is no appreciable difference between the job duties of employees in the restructured organization and those performed by employees under the former regime. Almost all of these arguments, however, are merely an attempt by the plaintiffs to characterize the assessment process utilized by BASF in restructuring its NPR Unit as a pretext for age discrimination. But a plaintiff is not entitled to call into question the veracity or motives of his employer unless he first demonstrates that he was meeting the employer's legitimate workplace expectations. *Peele*, 288 F.3d at 328 (noting that "[i]f a plaintiff fails to demonstrate that she was meeting her employer's legitimate expectations, the employer may not be 'put to the burden of stating the reasons for [her] termination' ") (citation omitted); *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1179 (7th Cir. 1997) (same). "A plaintiff does not reach the pretext stage [of *McDonnell Douglas*], however, unless she first establishes a

prima facie case of discrimination." *Peele*, 288 F.3d at 326. To the extent the plaintiffs' contentions could possibly be interpreted as arguments that they were qualified to be retained or rehired by BASF, or that the company applied its legitimate employment expectations in a discriminatory manner,[8] we will address them.

At the outset, we note that one of the primary purposes of the restructuring process implemented by BASF was to determine whether its current employees possessed the skills necessary to perform *prospectively* in a manner consistent with the company's newly devised, increased workplace expectations. That BASF chose to make such determinations by utilizing a process that did not take into account the plaintiffs' prior written performance evaluations is of no import. *Scott v. Parkview Memorial Hosp.*, 175 F.3d 523, 525 (7th Cir. 1999) (emphasizing that employers are not required "to prefer paper-heavy evaluations over contextual assessments by knowledgeable reviewers, *or to exalt an assessment of past conduct over a prediction of future performance*") (emphasis added). Indeed, whether the plaintiffs or this court believe that BASF's prescribed methodology for gauging the prospective abilities of its employees was fair, prudent, or wise is beside the point. Employers, not employees or courts, are entitled to define the core qualifications for a position, so long as the criteria utilized by the company are of a nondiscriminatory nature. *Leisen v. City of Shelbyville*,

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[8] We have held that "[w]hen a plaintiff produces evidence sufficient to raise an inference that an employer applied its legitimate employment expectations in a disparate manner (i.e., applied expectations to similarly situated . . . younger employees in a more favorable manner), the second and fourth prongs merge—allowing the plaintiff to stave off summary judgment for the time being, and proceed to the pretext inquiry." *Peele*, 288 F.3d at 329.

153 F.3d 805, 808 (7th Cir. 1998). And there is certainly nothing inherently discriminatory about an employer's decision to use criteria other than past performance evaluations to determine whether its employees can meet the increased workplace expectations that often coincide with a corporate reorganization. *Gorence v. Eagle Food Centers, Inc.*, 242 F.3d 759, 765 (7th Cir. 2001) (noting that "[w]hat the qualifications for a position are, even if those qualifications change, is a business decision, one courts should not interfere with"). Indeed, we have repeatedly held that "'prior job performance evaluations, standing alone, [do not] create a genuine issue of triable fact when . . . *there have been substantial alterations in the employee's responsibilities . . . in the intervening period.*'" *Peele*, 288 F.3d at 329 (citation omitted) (emphasis in original); *see also Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1113 (7th Cir. 1998); *Grohs v. Gold Bond Bldg. Products*, 859 F.2d 1283, 1287 (7th Cir. 1988). Nor is there anything discriminatory about BASF's decision to allow selection panels comprised of management and supervisors to make the final decision as to whether its employees were competent in a given category (rather than leaving that to consultant DDI).[9]

[9] Plaintiffs Allen, Cerutti, Clinton, Davis, and Real also claim that they satisfy the "legitimate expectations" prong of *McDonnell Douglas* because the DDI assessors concluded that they had no developmental needs. The DDI assessment, however, was but one component of the restructuring process implemented by BASF, and the DDI evaluators were only asked by the company to evaluate some of the 14 competencies at issue. More importantly, the selection panels, and not DDI, were charged with making the ultimate determination of whether an employee possessed the necessary skills and attitude to work in the restructured organization. Therefore, the initial scores given to employees by DDI have

(continued...)

The plaintiffs also imply that BASF applied its legitimate workplace expectations in a disparate manner because the company fired the plaintiffs yet retained two individuals with six or more developmental needs—Andrew Partilla and Helynne Smith. What plaintiffs' counsel neglects to mention, however, is that both Partilla (51) and Smith (42) are not outside the protected class. Furthermore, it does not appear that Partilla or Smith are substantially younger than any of the plaintiffs (as plaintiffs make no such argument). It is also worth noting that BASF terminated every employee under the age of 40 with six or more developmental needs.

Moreover, because BASF did not rely on prior performance evaluations in the restructuring process to ascertain whether its current employees were qualified to be retained, the plaintiffs may not use those evaluations as a basis for arguing that the company applied its legitimate workplace expectations in a discriminatory manner (by comparing their evaluations with those of younger employees who were retained). Finally, the plaintiffs were not qualified to be rehired by the company for the same reason that they were not retained—they lacked the necessary competencies.[10]

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[9] (...continued)
no bearing on the question of whether the plaintiffs were qualified to be retained in the absence of any evidence that the selection panels lowered their scores for discriminatory reasons. This is evidence the plaintiffs do not have, and therefore the only scores that matter were those assigned to the plaintiffs by the selection panels.

[10] Plaintiffs do not identify anyone under the age of 40 or substantially younger who was terminated for having six or more developmental needs and was then subsequently reemployed.

For all of the preceding reasons, we conclude that the plaintiffs have not demonstrated that they were qualified to be retained or rehired by BASF, and thus they cannot make out prima facie cases of age discrimination under the indirect method. *Peele*, 288 F.3d at 328; *Coco*, 128 F.3d at 1179. We, therefore, need not address the plaintiffs' remaining arguments as to whether substantially younger employees were treated more favorably by BASF, or engage in any type of pretext inquiry. *Coco*, 128 F.3d at 1179-80.[11]

B. Race and National Origin Claims

Plaintiffs Pearl Adams, Daniel Allen, Michael Severado (all of whom are black), and Steve Real (who is Hispanic) also contend that the district court erred in granting the defendants summary judgment for their race and national origin discrimination claims under Title VII and § 1981. In support of these claims, these plaintiffs assert that they worked in an environment replete with racist comments and where minority workers were treated as second-class citizens. Several of the racist comments referenced by the plaintiffs, however, are either extremely dated or were made by individuals who had no involvement or influence over the decisionmaking process that led to their terminations. Therefore, these comments cannot be used by the plaintiffs to support claims of race or national origin discrimination

[11] Plaintiffs also attempt to support their age discrimination claims using a disparate impact theory, but we have held that such claims are not permissible under the ADEA. *Miller v. City of Indianapolis*, 281 F.3d 648, 651 (7th Cir. 2002)

under the direct method.[12] *Swanson v. Leggett & Platt, Inc.*, 154 F.3d 730, 733 (7th Cir. 1998) (noting that "[o]nly evidence on the attitudes of the employees involved in the decision to fire the plaintiffs is relevant"). The only "racist" acts attributed to anyone involved in the decisionmaking process concern Thad Zdunich (a member of the Operators selection panel) and Kevin Biehle (a member of both selection panels). According to the plaintiffs, Zdunich "made hundreds of racial statements to Plaintiff Daniel Allen between 1998 and 2000," such as "it's got to be a black thing"; "for brothers only"; "brothers' meeting today?"; and "what you mean, brothers' meeting?" As for Biehle, the plaintiffs claim that he "treated [Steve] Real with less cordiality than he treated Caucasian workers," told Pearl Adams "the reason you're here is because you don't fit into our new family and you have been deselected," and informed Lori Washington, the other black Individual Contributor at the Joliet facility Job Family, "that a white employee would be taking over her duties on the same day that he [told Adams that she had been deselected]."

However, as we have already explained, the selection panels are the relevant decisionmakers in this case, and therefore Zdunich and Biehle's alleged animus toward blacks and Hispanics is, without more, not enough to establish the convincing mosaic of circumstantial evidence needed for the plaintiffs to prevail under the direct method of proof. To do so, the plaintiffs needed to present evidence

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[12] For example, plaintiff Pearl Adams alleges that a co-worker told her to "get her black ass in the corner where you belong," that sometime back in the "1990s" she was called a "coon" by a supervisor, and that on another occasion a contractor not employed by BASF used the term "nigger-rigged" in her presence.

from which a reasonable jury could infer that Zdunich and Biehle's prejudicial views influenced their fellow panel members to such a degree that it resulted in their being terminated.[13] *Swanson*, 154 F.3d at 733; *Shager*, 913 F.2d at 405. This is evidence the plaintiffs simply do not have.

Moreover, as with the age discrimination claims, it is clear the incidents referenced by the plaintiffs in support of their racial or national origin discrimination claims would not permit a reasonable juror to infer racial or national origin discrimination under the direct method of proof. *See Adams*, 324 F.3d at 939; *Traylor v. Brown*, 295 F.3d 783, 788 (7th Cir. 2002); *Pafford v. Herman*, 148 F.3d 658, 666 (7th Cir. 1998). The plaintiffs also cannot prevail on their race and national origin claims under the indirect method because, as with their age discrimination claims, the evidence shows that they were not qualified to be retained or rehired by BASF, and that the company did not apply its qualifications in a disparate manner.[14]

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[13] In this respect, the plaintiffs' arguments regarding Richard Harris, a black supervisor who they claim "occupies a position on the organization chart where no one reports to him," and Lori Washington, a black Individual Contributor who allegedly had her duties reduced as part of the restructuring process, are likewise insufficient to establish claims of race or national origin discrimination under the direct method.

[14] Here, the only evidence these plaintiffs offer to support their allegation that BASF applied its expectations/qualifications in a discriminatory manner is that the company retained one white operator, Andrew Partilla, who was found by the selection panel to have six developmental needs. This is true, but as the defendants point out, Adams, Allen, Real, and Severado all had more than six developmental needs. Moreover, the Operators Selection panel changed a number of DDI's assessment scores to improve

(continued...)

Finally, the remaining arguments offered by the plaintiffs in support of their race and national origin discrimination claims appear to be premised on a disparate impact theory. A disparate impact claim exists "when an employer has adopted a particular employment practice that, although neutral on its face, disproportionally and negatively impacts members of one of Title VII's protected classes." *Bennett v. Roberts*, 295 F.3d 687, 698 (7th Cir. 2002). To establish a prima facie case of disparate impact, a plaintiff must isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities. *Id.* Although the plaintiffs imply that BASF's restructuring process had such an effect, the numbers tell otherwise. Black employees in the company's NCR Unit were not disproportionally and negatively impacted by the restructuring process, and at the Joliet facility every Hispanic but Real was retained. Indeed, even the plaintiffs' own statistical expert witness conceded that the company's terminations did not have a statistically significant disparate impact on *any* protected group.

C. Defendants' Cross-Appeal for Sanctions

In their cross-appeal, the defendants argue that the district court abused its discretion when it denied their motion for sanctions against the plaintiffs' counsel. Our review of the

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[14] (...continued)
the ratings of several black employees and lower those of white employees. Therefore, it would seem that if BASF applied its qualifications in a disparate manner, it did so in favor of employees inside rather than outside the protected classes in question. Finally, there is no evidence that any white employee terminated by BASF for having six or more developmental needs was subsequently rehired by the company.

district court's denial of the defendants' motion for sanctions is deferential, and we will disturb the denial only if we conclude the court abused its discretion. *Smith v. Chicago Sch. Reform Bd. of Trustees*, 165 F.3d 1142, 1144 (7th Cir. 1999).

In denying the defendants' motion, the district court reasoned that plaintiffs' counsel had already been sanctioned when the court precluded her from deposing two witnesses, and noted that "[while the [plaintiffs'] other motions to strike may be meritless, they do not warrant sanctions under 28 U.S.C. § 1927." The defendants contend, however, that the plaintiffs' attorney should have been sanctioned by the court for "unreasonably and vexatiously multiplying the proceedings by filing two utterly frivolous motions to strike." Although we find many of plaintiffs' counsel's actions in this case to be less than professional, the defendants have not presented us with sufficient evidence from which we can conclude that the district court abused its discretion in declining to impose sanctions on her, and we therefore decline to disturb its ruling.

III.

For the reasons noted herein, we AFFIRM the district court's judgment in all respects.

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Crosby v. Hughes Aircraft Co., 85-TSC-2 (Sec'y Aug. 17, 1993)

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DATE: August 17, 1993
CASE NO. 85-TSC-2

IN THE MATTER OF

PATRICK CROSBY,

COMPLAINANT,

v.

HUGHES AIRCRAFT COMPANY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER

Before me for review is the Recommended Decision and Order (R.D. and O.) issued by the Administrative Law Judge (ALJ) in this case which arises under the employee protection provision of the Clean Air Act, 42 U.S.C. § 7622 (1988), and the Toxic Substances Control Act, 15 U.S.C. § 2622 (1988) (collectively, "the environmental acts"). [1] The ALJ found that the Department of Labor lacked jurisdiction because any connection between Complainant's complaints and the environmental acts was so remote that his activities were not protected under the acts. In the alternative, assuming that jurisdiction existed, the ALJ recommended dismissing the complaint because he found that Respondent discharged Complainant for legitimate, job related reasons.

The record in this case is enormous; the 16-day hearing included the admission of numerous documents and resulted in a transcript of over 3,000 pages. The ALJ's thorough but concise findings of fact, at R. D. and O. at 6-17, are supported by record evidence and I adopt them. In order to focus the

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discussion, I will briefly restate the relevant facts.

I. *Facts*

A. Crosby's Tenure in Image Processing Laboratory

Complainant Crosby was a member of the technical staff at the Image Processing Laboratory (IPL), a part of the Electro-optical and Data Systems Group at Respondent Hughes Aircraft Company's (Hughes) facility at El Segundo, California. T. 270-271. During the course of his work in IPL, Crosby became suspicious that IPL was engaging in "mischarging," or using government contract money to support work on Hughes' proprietary projects. T. 502-503. According to Crosby, he raised the issue of mischarging "indirectly" in comments he made to his supervisor, Larry Rubin. T. 504-505.

After a falling out with Rubin, Crosby was assigned to work under other supervisors in IPL. T. 1966-1969. Each of the subsequent supervisors was disappointed with Crosby's attitude and the amount and quality of his work, and declined to work with him again. T. 1969, 1971. During this time, Crosby was not doing much work, interfered with the work of others, and complained to coworkers about employment conditions at Hughes. T. 1978-1979, 2075. IPL managers began to keep written statements or journals about Crosby's work. T. 2011-15; RX 9; RX 44.

While employed in IPL, Crosby engaged in activities that can be summarized as whistleblowing about mischarging. In January 1984, Crosby anonymously telephoned an investigator of the Defense Logistics Agency to discuss mischarging. T. 362, 364, 374. In the following months, Crosby spoke with a well-known Pentagon whistleblower, with the Project on Military Procurement, and with members of the press about his belief that Hughes had engaged in mischarging. T. 375, 383, 385-386, 1140-1152. Crosby also raised the mischarging allegation with Hughes' security office, T. 358, and with staff of relevant Congressional committees. T. 411-412, 1190.

At the hearing, Crosby's counsel stated that the whistleblowing activities in which Crosby engaged while working in IPL were not protected under the environmental statutes, but were relevant in this case as background information demonstrating Crosby's general reputation as a "whistleblower." T. 1494-96.

B. Transfer to Division 72 [2]

In August 1984, an IPL Assistant Division Manager discussed Crosby's work situation with Albert Wasney, the Assistant Division Manager of Hughes' Division 72, the Tactical Engineering Division. T. 2226-2227. Knowing that Crosby had not performed well in IPL, Wasney agreed to take Crosby into Division 72 with

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the intention that Crosby could start anew and be a productive worker. T. 2230. At the time, Wasney had not read Crosby's personnel file and did not know that Crosby was considered a whistleblower. T. 2227-2229, 2279.

Crosby reacted angrily when an IPL manager gave Crosby a memorandum announcing his involuntary transfer. T. 1995; RX 8. Crosby was still very emotional about the transfer when he met with Wasney three days later to discuss his new position in Division 72. T. 2233-2235. Crosby told Wasney that IPL managers were committing "horrible" crimes, and that he was being transferred in order to set him up to be fired. T. 2233, 2307. Wasney told Crosby that there was no set up and that he could start over with a "clean slate" in Division 72. T. 2307. In a

later meeting with the Manager of Human Resources, Crosby said that he considered the transfer a constructive discharge [3] and that he was "at war" with Hughes. T. 1360-1362, 3024-3025 (Battle offer of proof).

Wasney assigned Crosby to the department headed by Elvil Vachal because it best fit Crosby's background and talents. T. 2231. Crosby and Vachal agreed that of the two sections that reported to Vachal, the one supervised by Bill Taylor was the best fit, and Crosby was assigned to Taylor. T. 2474. Neither Vachal nor Taylor knew of Crosby's reputation as a whistleblower. T. 2468, 2471-2473, 2720-2724. Taylor believed that Crosby had a personality conflict with prior supervisors and was being given a fresh chance in Division 72. T. 2720-2722.

Crosby told Taylor and Vachal that he did not fit in with, or want to work in, Division 72. T. 1365, 2474-2475, 2725-2726. Crosby asked for and received permission to try to transfer to a different unit. T. 2475-2476, 2726. Crosby frequently complained to workers in Division 72 about purported mismanagement and improprieties in IPL, which was part of a different division. T. 2477, 2500 (Vachal), 2727, 2850 (Taylor), 2447, 2580 (Branyan).

Crosby was assigned to work on the CNITE program [4] and satisfactorily completed his first minor assignment on it. T. 2488 (Vachal), T. 2735 (Taylor), RX 14, p.1. Crosby did not perform well on his next CNITE assignment, which involved compiling a signal description list. On the day before the signal description was due, Crosby told his first line supervisor, Taylor, that he was having difficulty with it and would not complete it on time. RX 14, p.1.

Concerned about Crosby's missed deadline, Vachal began to provide to his superiors weekly status reports on Crosby's performance. T. 2244, 2484. Taylor and Vachal asked Crosby to prepare a memorandum detailing the difficulties he was

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experiencing on the signal description assignment. T. 2495; RX 15. Crosby did so and in response Taylor advised him to complete as much as possible of the signal list description and indicate "TBD" ("to be determined") where Crosby was unable to obtain the needed information. T. 2745; RX 16. Crosby turned in a listing of signals that had been compiled by a different engineer and did not provide any new information or any description. T. 2750, 2507; RX 17; *see* CX 31. Taylor and Vachal informed Crosby that his performance on the signal list description was unsatisfactory. T. 1385, 2509; CX 128.

Crosby worked under Norman Branyan on his next assignment, a pre-contract determination of the maximum power which certain circuits would dissipate from a tracker in the A-6 fighter plane. T. 2755, 2449; CX 128. Branyan had to redo parts of the work Crosby turned in. T. 2449-2450.

Crosby informed Branyan that it would take approximately ten working days to do the next assigned task, design of the one-half megahertz bus simulator used in testing A-6 equipment. T. 2456, 2511, 2757; CX 130. Crosby received an extension on the due date for the assignment, but did not meet the extended deadline. T. 2757. When the department learned that it did not receive the contract on the A-6 program, Taylor and Branyan told Crosby to finish up as much of the work on the bus simulator as possible

and turn in the documentation by February 1, 1985. T. 2460, 2762-2763; CX 134. Crosby did not turn in any documentation on the project, T. 1390, 2461, and conceded that he never completed much of the work on it. T. 2394-2397.

C. James Rosoff and the CNN Broadcast

Crosby testified that at the time he was working in Division 72, he met a person named James Rosoff, and explained to Rosoff his whistleblowing activities concerning alleged mischarging at Hughes. T. 331-347. It is undisputed that Rosoff informed Hughes security officers of Crosby's activities. [5] Through Rosoff, Crosby agreed to provide information to Sheila Hershow, a reporter for the Cable Network News (CNN), about the quality of workmanship at Hughes and a specific project that IPL was doing for the Air Force. T. 339 (Crosby); 1521-22 (Hershow stipulation). In January 1985, CNN broadcast a news feature that was critical of Hughes and the Air Force project. T. 1158-1159 (Crosby); 1520-1526 (Hershow). Much of the information that Rosoff gave to Hughes security centered on the CNN broadcast and Crosby's purported role in it. *See* CX 116, 117, 119, 120.

D. Short-lived Assignment to Fullerton

While assigned to work on the bus simulator, Crosby arranged a potential transfer to Hughes' Ground Systems Group in Fullerton, California. T. 271; *see* CX 131 and CX 134. Crosby sought a "yellow card" transfer, whereby one division loans an

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employee to another division to allow an evaluation of the employee before completing a formal transfer. T. 2313; CX 134. Vachal and Taylor agreed that Crosby could pursue the Fullerton job, CX 131, but neither of them checked with the Human Resources Department about the validity of such a loan. T. 1395, 2518.

On Crosby's fourth day at Fullerton, he was ordered to return to Division 72 at El Segundo. T. 1396; CX 135. According to Taylor and Vachal, T. 2518 and 2764, the Human Resources Department objected to the Ground Systems Group's using a yellow card loan to obtain a new employee when there was a hiring freeze. *See* CX 135.

E. Crosby's Last Assignments in Division 72.

Upon Crosby's return to Division 72, Taylor reminded him to produce the documentation he had prepared on the bus simulator task prior to the brief transfer to Fullerton. T. 2461, 2764-65; CX 135. Despite another reminder, however, Crosby did not provide the documentation. T. 2463, 2765.

Crosby next worked for two days on the Remote Active Spectrometer (RAS), a military chemical gas detection system. T. 1403-1405, 2768. Crosby was told to stop work when the bid for the RAS project was given to a different organization within Hughes. T. 2768. Crosby testified that he told Rosoff that he was considering using the environmental laws to enforce quality in the RAS program. T. 294. [6]

Taylor and Vachal reviewed Crosby's performance within Division 72. Because of Crosby's failure to provide a satisfactory signal description list and the documentation on the A-6 bus simulator, Taylor and Vachal decided to place Crosby on probation and required him to improve his work significantly within 30 days or else be subject to discharge. T. 2520, 2770;

X 23. The two managers reviewed the probation memorandum with rosby. T. 302, 2521, 2774.

Crosby's final assignment was the PROM Programmer Utility rogram (PPUP), an internally funded computer program for the use f the Division and designed to transfer data into PROMS Programmable Read Only Memory chips). T. 719-720, 2616-2617, :655-2656, 2775-2776; CX 136. In Taylor's opinion, the available ›rograms did not contain enough features. T. 2776; CX 136. 'aylor considered Crosby quite capable of doing the PPUP task. :. 2784.

Crosby received detailed instructions about the assignment. r. 330-331, 718; CX 136. After Crosby said that he was ınfamiliar with the programming language and the computer ɔperating system to be used in the task, T. 718, engineer Van Oler met with Crosby and showed him the manuals for both the programming language and the operating system. T. 1428-1429,

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2797. When Crosby asked about whether he would have to complete the assignment within his 30-day probationary period, which began on the day Crosby was assigned to the PPUP task, Taylor assured him that he would only have to make a good faith effort toward completion within the probationary period. T. 2800-2801; CX 136.

On February 28, 1985, Oler and Crosby met to go over a requirements document that Oler had prepared for the PPUP task. T. 764, 1431; CX 37. Oler asked Crosby to be prepared to discuss the document and potential milestones for completion of the assignment at a meeting the next day. T. 785; CX 136.

The next day, Crosby stated that he understood the assignment, but had not prepared any milestones for its completion. T. 1445, 2813, 2817. Oler explained the milestones he had prepared, which provided two months to complete the task. T. 789, 2816; RX 37.

Crosby believed that the requirements document did not reflect a "quality" engineering approach, T. 827, and that the task should be done in accord with military specifications (requirements for documentation at various phases of an engineering task). T. 1448, RX 27, p.4. Taylor and Oler responded that the PPUP task was not a miliary contract, but rather was funded by Hughes money for internal Hughes use, that compliance with military specifications was not required, and that voluntarily complying with the specifications would be too expensive and time consuming. T. 2819-2820. Taylor also opined that the requirements document reflected a quality approach. T. 2818-2819.

Crosby claimed that during the March 1 meeting, when Taylor stated that he could set the quality standards without regard to military specifications, Crosby responded "What if a bug gets into the gas detector through the [PUPP] program?" T. 1456. According to Crosby, Taylor and Oler did not respond to his mention of the gas detector. *Id.* Taylor testified, however, that Crosby did not mention either a gas detector or the Remote Active Spectrometer (RAS) in connection with the PPUP assignment. T. 2828. [7]

Crosby conceded that he neither asked, nor was told, whether the PPUP was going to be used in a gas detection system, T. 1458, and did not attempt to explain to Taylor and Oler in any detail the connection he made in his own mind between the PPUP

task and a gas detection system. T. 1456. Nor did Crosby tell Taylor and Oler that his disagreement with their approach was based on a concern for the environment. T. 1456-1457.

When Taylor asked if Crosby was willing to do the PPUP task, Crosby said he would rather not do it. T. 2821; RX 27. After Crosby said that he lacked the correct background for the task, Taylor and Oler offered help and reassured Crosby that they

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believed he could do it. T. 2822; RX 27. At the end of the meeting, Taylor again asked if Crosby was willing to do the task and Crosby again said no. T. 2822; *see* T. 2832.

Taylor had never had any other subordinate refuse an assignment, T. 2833, and promptly reported Crosby's refusal to Vachal. T. 2834, 2524-2527. Taylor and Vachal decided to discharge Crosby and a member of the Human Resources Department concurred. T. 2530, 2629, 2870-2872, 3028 (Battle offer of proof). Crosby was given the option to resign voluntarily and receive two weeks' severance pay, or be suspended immediately pending the processing of an involuntary discharge. T. 2530, 2629, 2836; CX 136. Crosby declined to resign, and consequently Hughes discharged him. T. 848, 2530-2531.

II. *Pending motions*

A. Motion to Strike Appendices to Complainant's Supplemental Reply Brief

Respondent moved to strike two appendices to Complainant's Supplemental Reply Brief on the ground that they are newspaper articles concerning disciplinary actions against four employees in Hughes divisions in which Crosby did not work, and therefore are not relevant to this case. Resp. Opposition to Comp.'s Motion to Accept Affidavit and Request to Strike Comp.'s References to Appendices A and B, dated May 14, 1987. [8] The ALJ liberally accepted into the record other newspaper accounts concerning Hughes organizations in which Crosby did not work. *E.g.*, CX 81, 82, 96, 97, 98 (concerning Hughes' Missile Systems Group in Arizona). In order to provide the fullest record possible, I deny the motion and accept into the record all the appendices attached to Complainant's Supplemental Reply Brief, dated April 24, 1987.

B. Motion to Accept Hershow Affidavit into Record

Crosby moved to admit into the record the April 1987 affidavit of reporter Sheila Hershow. Hershow initially voluntarily agreed to appear as a witness on behalf of Crosby. After Hershow received a subpoena, however, Ms. Hershow's counsel stated that, if called to testify, Hershow would invoke the First Amendment privilege accorded to news reporters and would not answer any substantive questions. T. 1507-A. Crosby's counsel then made an offer of proof concerning Hershow's testimony, T. 1520-1526, and Hughes stipulated that the offer of proof could be used as evidence in this case. T. 1527. *See* R. D. and O. at 20-21.

Hughes opposed the motion on the ground that the offer of proof and arguments of counsel at the hearing made the affidavit superfluous. The April 1987 affidavit contained new evidence

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iat Hershow received orders from her superiors not to speak with ɔunsel for Crosby, however. I grant Crosby's motion in light of ıe new evidence contained in the affidavit. The April 24, 1987 ffidavit of Sheila Hershow is accepted and made part of the ɛcord in this case.

C. Motion to Strike Respondent's Reply Brief

In his Supplemental Reply Brief, dated April 24, 1987, rosby renewed his motion to strike Respondent's Reply Brief on ıe ground that the signature of counsel is not genuine. The ɛecretary earlier denied the same motion but gave the parties the ɔpportunity to submit supplemental reply briefs, Order for ɔupplemental Briefing, March 10, 1987, and both parties did so. \ccordingly, I deny the renewed motion to strike Respondent's ɛply brief.

D. Hughes' Request for Attorney's Fee as Sanction

Hughes requested a reasonable attorney's fee as a sanction ɜgainst Crosby and his counsel for their purported bad faith ɔonduct in this case, and to compensate Hughes for the time and ɛffort spent in responding to such conduct. Respondent's Reply Memoranda, dated January 9, 1987, at Part 5. The environmental acts under which the complaint was brought authorize the payment of an attorney's fee only to a successful complainant, however. *See* 15 U.S.C. 2622(b)(2)(B) (Toxic Substances Control Act), 42 U.S.C. 7622(b)(2)(B) (Clean Air Act), and 42 U.S.C. 9610(c) (CERCLA). There is no provision for recovery of costs and attorney's fees by a respondent. Therefore, I deny the request for an attorney's fee. *See Rogers v. Multi-Amp Corp.*, Case No. 85-ERA-16, Final Dec. and Order, Dec. 18, 1992, slip op. at 2 (under analogous provision of Energy Reorganization Act). [9]

E. Crosby's Motion to Disqualify Counsel, for Default Judgment, and for Sanctions

Alleging that Hughes' counsel engaged in a number of questionable tactics ranging from interference with witnesses to perjury, Crosby moved to disqualify Hughes' counsel, for default judgment, and for sanctions against Hughes. Comp. Memorandum in Support of Disqualification, Default Judgment, and Sanctions ("Disqualification Memo"), dated November 20, 1986. [10] I note that the ALJ denied a series of similar motions by Crosby. *See* Order of August 8, 1986 and R. D. and O. at 20-21. Although I have considered all the many arguments made, I will address only the major ones here. [11] After reading all of the record, I agree with the ALJ that any purported improprieties by Hughes' counsel did not justify disqualification, sanctions, or default judgment. I find that the ALJ did not abuse his discretion in denying the motions and I adopt the ALJ's discussion of the issues at R.D. and O. 20-21.

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Hughes security officers interviewed Crosby about a legitimate management inquiry, whether Crosby provided confidential Hughes documents to CNN for use in its broadcast. Crosby argues that Hughes' in-house counsel, J.T. Kuelbs, who was in charge of the investigation of the leak of documents to CNN, violated ethical standards when he allowed the interview to go forward despite knowing that Crosby had retained counsel and without consulting Crosby's counsel. Disqualification Memo at

126-128. Crosby testified, however, that he told Hughes only that he had *spoken with* counsel, not that he had retained counsel. T. 353 (emphasis added). And Crosby admitted that his attorney advised him he could not refuse to cooperate with Hughes security. T. 353. Moreover, since Crosby admitted that the CNN broadcast had nothing to do with any environmental concerns, T. 1398, the security officers interviewed Crosby only about non-environmental matters. In light of the legitimacy of the questions concerning leak of confidential documents that did not concern the environment, and the fact that Crosby did not state that he had retained counsel, it was permissible for Kuelbs to authorize or condone the security officers' questioning of Crosby. Kuelbs' activities clearly did not merit granting default judgment to Crosby.

Crosby accused Hughes' outside counsel either of engaging in perjury or suborning perjury by Hughes' witnesses. Crosby contends that he is entitled to a directed verdict because of the supposed perjury. Disqualification Memo at 129-131. I disagree.

In his opening statement, counsel for Hughes stated that during the March 1, 1985 meeting, when Crosby mentioned concern about the PPUP software program being used in a chemical gas detection system, Taylor and Oler ignored Crosby's comments because they did not know what Crosby was talking about. T. 58-59 (February 20, 1986). Taylor later testified, however, that Crosby did not mention a chemical gas detection system during the March 1 meeting. T. 2828 (April 17, 1986). Hughes made an offer of proof that Oler also would testify that Crosby did not mention a chemical gas detection system at the meeting. T. 2930 (April 18, 1986).

Whereas I find a contradiction between counsel's statement and Taylor's testimony given two months later, I also find that Crosby did not demonstrate that any perjury was committed. Counsel's statement, not given under oath, was not evidence and could not be the basis for a perjury finding. Crosby did not show that any witness contradicted earlier sworn testimony or gave testimony that the witness knew to be false. Crosby's request for a directed verdict on the basis of perjury (or subornation of perjury) is not well taken and is denied.

Crosby argued that he is entitled either to default judgment

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or to a new trial because the ALJ did not call four of Crosby's witnesses who were high level executives at Hughes. Disqualification Memo at 96-110. As the ALJ explained, R.D. and O. at 21, he initially ordered that Hughes make at least two of the four executives available at the hearing. When Hughes did not comply, Crosby sought enforcement of the ALJ's order in the United States District Court, which denied enforcement. Even if the ALJ could impose sanctions for the failure to produce the executives after the court declined to compel their appearance, the ALJ cogently explained that he would not do so because he deemed their testimony not to be material. [12] The ALJ did not abuse his discretion in declining to impose a sanction.

Finally, I will address the allegation that Hughes' counsel interfered with a witness for Crosby, CNN reporter Sheila Hershow. I agree with the ALJ that CNN is responsible for any pressure brought to bear on Hershow not to cooperate with or testify for Crosby. R.D. and O. at 21. Since Hughes stipulated

that Crosby could use the offer of proof concerning Hershow's testimony as evidence, and since I have admitted into the record the April 1987 Hershow affidavit, Hershow's full testimony is a matter of record. Therefore, even if Hughes' counsel interfered in some way with Ms. Hershow's appearance, the evidence she would have provided is before me.

F. Motion to Amend Complaint

Crosby moved to amend the complaint to include a cause of action under CERCLA. Comp. Br. in Opp. to R.D. and O. at 96-98. In Crosby's *pro se* Answer to Respondent's Motion to Dismiss, etc., dated December 5, 1985, at p. 4, he argued that he "has an excellent prima facie case under a minimum of four or more of the statutory employee protection provisions administered by the Department of Labor," including the CERCLA, among other statutes. The ALJ treated the argument as a motion to amend and "declined to consider the other Acts referred to in Complainant's answer" because he did not believe that amendment would alter the analysis or the outcome in the case. January 3, 1986 Order Denying Motion to Dismiss, etc., at 4. Crosby contends that the ALJ erred in disallowing the amendment.

In view of the fact that Crosby filed the pleadings at issue *pro se*, I will permit amendment of the complaint to include a cause under CERCLA. *See Doyle v. Bartlett Nuclear Services*, Case No. 89-ERA-18, Dec. and Order of Dis., May 22, 1990, slip op. at 5 n.3 (*pro se* litigants not held to same standard for pleadings as those represented by counsel), *aff'd*, 949 F.2d 1161 (11th Cir. 1991). The employee protection provision of CERCLA is similar enough to those of the CAA and TSCA that allowing amendment at this time will not prejudice Hughes.

III. *Analysis*

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A. Jurisdiction

Although Hughes initially moved to dismiss the complaint for lack of jurisdiction in the Department of Labor, it has conceded that the Department has jurisdiction over the complaint. Respondent's Opening Memorandum in Support of R.D. and O. at 6. Indeed, the parties stipulated that Hughes is an employer and Crosby was an employee under the environmental acts. T. 88-89. No one disputes that Hughes discharged Crosby, and Crosby contends that Hughes did so because he engaged in activities protected by the environmental acts. I find that Crosby stated a cause of action under the employee protection provisions of the environmental acts. Therefore I find that the ALJ erred when he concluded that he did not have jurisdiction over the complaint. R.D. and O. at 2.

I disagree with Crosby's suggestion that the ALJ's use of the term "jurisdiction" prejudiced Crosby and requires remand for a new trial before a different ALJ. Comp. Br. in Opp. to R.D. and O. at 11-12. The ALJ extensively considered the merits of the issue that he mislabeled as jurisdictional: whether Crosby established required elements of a prima facie case, especially whether he engaged in activities protected under the environmental acts, and whether the managers who discharged him were aware of his protected activities. I will not remand for a purely semantic correction.

B. Prima Facie Case

To make a prima facie case, the complainant in a whistleblower case must show that he engaged in protected activity, that he was subjected to adverse action, and that the respondent was aware of the protected activity when it took the adverse action against him. Complainant also must present sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action. *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Ord., Apr. 25, 1983, slip op. at 8.

The three environmental acts at issue contain similar statements of the activities that are protected. For example, the employee protection provision of the TSCA provides:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has--
>
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter;
>
> (2) testified or is about to testify in any such

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> proceeding; or
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

15 U.S.C. § 2622(a). [13]

At the hearing, Crosby limited the scope of activities that he contends are protected under the environmental acts to his actions while working on his last assignment, the PPUP program, in late February and early March, 1985. [14] T. 1494-1496; *see* R.D. and O. at 4. He eliminated from consideration as protected activities in this case his whistleblowing concerning alleged mischarging by IPL. T. 1488, 1494. I will examine the relevant alleged protected activities to determine whether they are protected under the environmental acts and, if so, whether the Hughes managers who were responsible for firing Crosby were aware of the protected activities.

The first alleged protected activity was Crosby's statement to James Rosoff that he was considering filing an environmental citizen suit. [15] Reply Brief at 33-34. Assuming that Crosby stated such an intention to Rosoff, [16] I find that the statement is a protected activity, since the environmental acts protect from discrimination employees who threaten to enforce the acts. *See, e.g., Helmstetter v. Pacific Gas & Elec. Co.*, Case No. 91-TSC-1, Dec. and Order, Jan. 13, 1993, slip op. at 7 (under TSCA); *see also, Couty v. Arkansas Power and Light Co.*, Case No. 87-ERA-10, Final Dec. and Order, June 20, 1988, adopting ALJ Recommended Dec. and Order of November 16, 1987, slip op. at 9 (under Energy Reorganization Act (ERA), threat to go to the Nuclear Regulatory Commission is protected), *rev'd on other grounds sub nom., Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Ashcraft v. Univ. of Cincinnati*, Case No. 83-ERA-7, Dec. and Final Order, Nov. 1, 1984, slip op. at 10 (under ERA, protection extends from the

earliest stage in which complainant engaged in protected activity).

Concerning his threatened lawsuit, I find that Crosby did not establish the next required element of a prima facie case, that the persons who participated in the decision to fire him knew that he had threatened an environmental suit. *See Bartlik v. Tennessee Valley Authority*, Case No. 88-ERA-15, Final Dec. and Order, Apr. 7, 1993, slip op. at 4, n.1 ("the evidence must show that an employee of Respondent with authority to take the complained of action, or an employee with substantial input in that decision, had knowledge of the protected activity"), *pet. for review* filed, No. 93-3616 (6th Cir. June 7, 1993).

Although members of Hughes' security department were aware

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that Crosby threatened to file a law suit, there is no indication that they knew it was to be an environmental or citizens suit, as Crosby claims. *See* CX 121. Further, no evidence indicated that the security officers shared their information with any of the managers who were involved in the discharge. Rather, the persons involved in the termination decision convincingly testified that they were not aware either that Crosby had environmental concerns or that he intended to sue Hughes. T. 2732 (Taylor), 2480 (Vachal), 2250-2251 (Wasney), 3026 (Battle offer of proof).

Crosby's second alleged protected activity consisted of his questioning the quality of the outlined PPUP task with internal managers. Most courts that have ruled on the subject have held or stated that internal complaints to managers are protected under analogous employee protection provisions. *Jones v. Tennessee Valley Authority*, 948 F.2d 258, 264 (6th Cir. 1991) (explicit statement); *Couty v. Dole*, 886 F.2d 147 (implicit); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1513 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986) (explicit); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (explicit); *Consolidated Edison Co. v. Donovan*, 673 F.2d 61 (2d Cir. 1982) (implicit). *Compare, Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1036 (5th Cir. 1984) (internal complaints not protected activity). In this case, which arises in the Ninth Circuit, an employee's internal complaints clearly are protected activity under *Mackowiak*.

It is undisputed that Crosby orally questioned the validity of the approach his supervisors provided in the requirements document for the PPUP assignment. *See* T. 2817-1819 (Taylor), 2927 (Oler offer of proof). Employees' internal quality complaints have been found to be protected under analogous employee protection provisions. *Dysert v. Westinghouse Electric Corp.*, Case No. 86-ERA-39, Final Dec. and Order, Oct. 30, 1991, slip op. at 1, 3 (employee's complaints to team leader about testing procedures protected under ERA); *Guttman v. Passaic Valley Sewerage Comm'rs*, Case No. 85-WPC-2, Final Dec. and Order, Mar. 13, 1992, slip op. at 12-13, *aff'd*, 992 F.2d 474 (3d Cir. 1993) (complaint to superiors about validity of sampling system protected under Water Pollution Control Act).

Crosby argues that to establish protected activity "it is sufficient that [he] believed that the Q[uality] C[ontrol] and

other problems at [Hughes] were a threat to the environment and he took action or was 'about to' take action to curtail the threat." Comp. Reply Brief at 39. He contends that a complainant need not prove that an actual violation of law occurred. Comp. Reply Br. at 39, 40. I agree that proof of an actual violation is not required. *See Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (protection

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under Surface Transportation Assistance Act not dependent upon whether complainant proves a safety violation).

I do not agree, however, that "the employee merely has to think that the environment may be negatively impacted by the employer conduct." Comp. Reply Br. at 40. Rather, an employee's complaints must be "grounded in conditions constituting reasonably perceived violations" of the environmental acts. *Johnson v. Old Dominion Security*, Case Nos. 86-CAA-3, 86-CAA-4, and 86-CAA 5, Final Dec. and Order, May 29, 1991, slip op. at 15; *see also, Aurich v. Consolidated Edison Co.*, Case No. 86-ERA-2, Sec. Rem. Order, Apr. 23, 1987, slip op. at 4. In this case, therefore, Crosby had to have a reasonable perception that Hughes was violating or about to violate the environmental acts.

The Secretary's decisions finding protected activity often illustrate an experiential basis for the employee's belief that an employer is violating an environmental act. For example, in both the *Dysert* and *Guttman* cases, the employee's protected activities consisted of complaints that certain systems already in use violated environmental statutes. As a condition of federal funding, the Water Pollution Control Act (WPC) requires a fair allocation of user fees to assure that each recipient of waste treatment services pays its proportionate share of the costs of operation of a waste treatment plant. *Guttman*, slip op. at 2. Based on experience with the sampling technique his employer used to calculate user charges, Guttman complained that the system did not comport with the WPC's explicit fairness requirement. *Id.* at 3-4. In *Dysert*, the internal complaint of an engineer engaged in testing certain instruments installed at a nuclear power plant constituted protected activity under the ERA. *Dysert*, slip op. at 1. *See also, Nichols v. Bechtel Construction, Inc.*, Case No. 87-ERA-0044, Dec. and Order of Rem., Oct. 26, 1992, slip op. at 10 (ERA protects employee's questioning of foreman about safety procedures being used to examine tools), *appeal dismissed*, No. 92-5176 (11th Cir. Apr. 15, 1993).

Here, however, Crosby did not base his fear of a potential "bug" in the PPUP on either an existing computer program or on its use in any specific gas detection device. Crosby questioned quality before he (or anyone else) had begun to create the program. Rather, Crosby assumed that a bug would occur in the as yet undeveloped software, and he further assumed that the bug would not be found when the software was tested. Crosby also assumed that the PPUP program could be used in a gas detection device. [17] I do not dispute the ALJ's finding that Crosby made that assumption in good faith. [18] R.D. and O. at 5. In addition, Crosby assumed that a gas detection device that employed the PPUP would fail in operation because of an

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undetected software bug.

I find, however, that Crosby's assumptions are both too numerous and too speculative for him reasonably to have perceived that Hughes was about to violate one of the environmental acts. No one has alleged that a bug in the PPUP program could cause the emission of a harmful element into the environment. Rather, a gas detector is a passive device. [19] The ultimate risk at issue is that if some damaging chemical gas were emitted into the atmosphere, a bug in the PPUP software used in a deployed gas detection device might fail to analyze the emitted gas, with the resultant failure to warn the human population to take precautions against the gas, such as wearing gas masks or avoiding the area. This scenario assumes first, the emission of a harmful gas, second, the use of the PPUP program in a detection device deployed at the vicinity of the emitted gas, third, a bug in the PUPP program, fourth, a nearby human populace, fifth, a means to warn the populace, and sixth, a potential means to counteract the effects of the emitted chemical gas agent. Many or most of these assumptions might not occur.

As further support for finding protected activity in this case, Crosby argues that an Executive Order reposes in the Administrator of the Environmental Protection Agency (EPA) the responsibility to:

> Provide guidance on acceptable emergency levels for hazardous agents, and support plans of other Federal agencies that are responsible for developing plans for the detection, reporting, assessment, protection against, and reduction of effects of hazardous agents introduced into the environment.

E.O. 11490, Assignment of Emergency Preparedness Functions to Federal Agencies and Departments, reprinted in 50 U.S.C.A. app., at Part 15A, Sec. 1551. *See* Comp. Br. in Opp. to R.D. and O. at 54-55 and Comp. Supp. Reply Br. at 3. The TSCA provides that the EPA Administrator "shall coordinate actions taken under [TSCA] with actions taken under other Federal laws administered in whole or in part by the Administrator." 15 U.S.C. § 2608(b).

The EPA Administrator's duty to guide, support, and coordinate the actions of other Federal agencies involved in detection of hazardous agents does not come into play here, however, because there is no record evidence that the PPUP program would be used in any device or system for any Federal agency. Rather, the PPUP task was intended for internal Hughes use, to improve the functioning of the already existing PPUP in the department and make it more efficient. T. 2778 (Taylor), 2655-2656 (Vachal), 2919-2920 (Oler offer of proof), 2936-2937 (Marotta offer of proof).

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In view of my finding that Crosby did not have a reasonable perception of a violation or potential violation of the environmental acts, I find that Crosby's quality complaints about the requirements document and proposed PPUP programming task were not protected activities under CAA, TSCA, or CERCLA. To summarize, I find that Crosby did not establish a prima facie

case of discrimination regarding his purported threat to file a "citizens" or "environmental" suit because he did not show that the managers who were involved in the decision to fire him were aware of the threat. I further find that Crosby did not establish a prima facie case regarding his quality complaints about the PPUP programming task because the complaints were not protected activities under the environmental acts. In view of the fact that Crosby did not establish a prima facie case, the ALJ correctly recommended dismissal.

2. The Motivation for the Discharge

Assuming for the sake of argument that Crosby established a prima facie case, Respondent Hughes had the burden to come forth with legitimate, nondiscriminatory reasons for placing him on probation and discharging him. *See Dartey*, slip op. at 8. Hughes articulated Crosby's performance deficiencies and work refusal as legitimate reasons. Crosby had the ultimate burden of persuading that the articulated reasons were a pretext, and that the real reason for the adverse action was discriminatory. *St. Mary's Honor Center v. Hicks*, No. 92-602, 1993 U.S. LEXIS 4401, at 15-16 (U.S. June 25, 1993). [20]

Among the reasons Crosby's managers cited for discharging him, the most telling was Crosby's declination to work on the PPUP task. Crosby argued that no one actually ordered him to work on the PPUP and thus he did not disobey any direct order to perform the work. Comp. Opening Statement, T. 42. [21] The evidence convincingly establishes, however, that Crosby indicated to Oler and Taylor that he would not perform the work. T. 2821-2822; RX 27.

The Secretary has found that under the analogous employee protection provision of the ERA, a worker has the right to refuse work when "he has a good faith, reasonable belief that working conditions are unsafe or unhealthful. Whether the belief is reasonable depends on the knowledge available to a reasonable man in the circumstances with the employee's training and experience. . . ." *Pennsyl v. Catalytic, Inc.*, Case No. 83-ERA-2, Sec. Dec., Jan. 13, 1984, slip op. at 6-7; *accord Sartain v. Bechtel */nstructors*, Case No. 87-ERA-37, Final Dec. and Order, Feb. 22, 1991, slip op. at 8. In this case, there is no allegation that conditions were unsafe or unhealthful, and therefore Crosby's work refusal was not protected. Under established precedent,

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Crosby's objection to the design approach for the PPUP assignment clearly did not render his work refusal protected. *Pennsyl*, slip op. at 8 ("Employees have no protection under [the employee protection provision of the ERA] for refusing to work simply because they believe another method, technique, or procedure or equipment would be better or more effective").

Where, as here, an employee's work refusal does not meet the *Pennsyl* test, an employer legitimately may discharge the employee for refusing a work assignment. *Wilson v. Bechtel Construction, Inc.*, Case No. 86-ERA-34, Final Dec. and Order, Feb. 9, 1988, slip op. at 12; *see also Sartain*, slip op. at 17 (discharge permissible because of unprotected work refusal and abusive manner).

Concerning probation, several witnesses convincingly demonstrated that Crosby's work product was inadequate during his

tenure in Division 72. As the ALJ found, R.D. and O. at 12, even Crosby admitted that his work deteriorated in the last few months he worked in Division 72. T. 1026. Indeed, the record is replete with managers' documentation of their dissatisfaction with the quality and quantity of Crosby's work. T. 2750-2751, 2506-2509, RX 17 (CNITE signal description list); T. 2450, 2573-2574 (A-6 circuits power dissipation from tracker); T. 2460, 2463 (A-6 bus simulator); T. 2764-2765, 2461-2462, CX 135 (failure to turn in documentation on A-6 bus simulator).

When an employee has recurring work deficiencies, the employer legitimately may respond with low performance ratings, suspension, and discharge. *Jain v. Sacramento Municipal Utility District*, Case No. 89-ERA-39, Final Dec. and Order, Nov. 21, 1991, slip op. at 9 (recurring deficiencies in performance justified adverse performance appraisal); *Sellers v. Tennessee Valley Authority*, Case No. 90-ERA-14, Final Dec. and Order, Apr. 18, 1991, slip op. at 5-6 (inability or lack of desire to perform work in a timely manner justified adverse performance rating and discharge), *aff'd mem.*, No. 91-7474 (11th Cir. Apr. 30, 1992). I find that Crosby did not demonstrate that work performance inadequacies and refusal of an assignment were a pretext for discrimination or that the real reason for his probation and discharge was his engaging in protected activities. Rather, the overwhelming weight of the evidence is that Hughes disciplined and fired Crosby for legitimate, work related reasons. Accordingly, the complaint is DISMISSED.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The ALJ denied Complainant's motion to amend the complaint to include a cause of action under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610 (1988) (CERCLA). As discussed below, I will grant Crosby's renewed motion and amend the complaint to include a cause under CERCLA, which is also included in the collective term, "the environmental acts."

[2] Crosby's counsel stated that the lawfulness of, and motivation for, the transfer to Division 72 are the subject of a state court claim for wrongful discharge and are not at issue in this case. T. 1494. The ALJ opined that Crosby's "[e]xposing cost irregularities would be the kind of background protected activity that should be considered if a later incident brings the environmental laws into play." R.D. and O. at 10. Nevertheless, the ALJ found that Crosby was transferred "for reasons that have

nothing to do with whistleblowing." R. D. and O. at 11. Facts concerning the transfer are included here as background to the alleged protected activity in which Crosby engaged while employed in Division 72.

[3] Crosby admitted, however, that his pay and benefits did not change when he was transferred. T. 1361.

[4] CNITE was a Hughes military contract to design a night vision capability for the already existing TOW missile and Cobra helicopter. T. 662, 2262, 2487.

[5] Crosby argued that Rosoff was an informant or spy and that Hughes was responsible for his actions. Comp. Br. Regarding Illegal Surveillance, etc. at 15-29. In view of the length of the hearing, the ALJ did not permit Hughes to call many of the witnesses it had listed on pre-trial documents. Instead, the ALJ permitted Hughes to make offers of proof concerning those witnesses. Hughes proffered that its security personnel would testify that Hughes did not pay Rosoff or engage him to provide information. T. 2981-2983 (Van Houten); 2984-2985 (Costigan).

[6] Crosby worked in Fullerton for four days in early February, 1985. T. 280-281. Crosby testified that he first mentioned to Rosoff "using the environmental laws to enforce quality on [the RAS] program" when Crosby was assigned to the RAS program, which was after his return from his short-lived transfer to Fullerton. T. 294, 1403, 1408. A Hughes security memorandum indicates that on January 30, 1985, Rosoff told Hughes security officers that Crosby was "setting [Hughes] up for a law suit" but did not mention the type of suit contemplated. CX 121.

[7] If allowed to testify, Oler would have corroborated that Crosby made no comment connecting the PPUP task to a gas detector or the RAS. T. 2930.

[8] The newspaper accounts to which Hughes objected were attached in Appendices B and C. Hughes did not object to the inclusion of Appendix A, the text of a presidential Executive Order.

[9] Hughes did not cite any authority as the basis for awarding it an attorney fee. I note that Fed. R. Civ. P. 11 does not apply in this case as a basis to impose a sanction. *See Rogers*, slip op. at 2-3; *Cable v. Arizona Public Service Co.*, Case No. 90-ERA-15, Final Dec. and Order, Nov. 13, 1992, slip op. at 5-6 (Rule 11 does not provide a basis for sanction against a party accused of acting in bad faith in case under analogous employee protection provision of Energy Reorganization Act).

[10] Complainant's motion to replace pages 112 through 132 of the Disqualification Memo is granted. The replacement pages are accepted in lieu of pages 112-132 in the original.

[11] In particular, I will not address the allegations that Hughes failed to comply with various discovery requests and orders. The ALJ carefully and extensively considered the arguments regarding discovery, and in several instances fashioned

adverse inferences that he would make if Hughes did not comply. *See, e.g.*, January 3, 1986 Order. I adopt the ALJ's analysis on discovery matters. *See also* R.D. and O. at 21.

[12] Hughes submitted affidavits of the four executives, each of whom stated under oath that he did not have any role in Crosby's discharge.

[13] The provision in the Clean Air Act, 42 U.S.C. § 7622(a), is nearly identical. The provision in the CERCLA, 42 U.S.C. § 9610(a), is set forth below:

> No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

[14] Despite the limitation, Crosby argued in post hearing submissions and in pleadings before the Secretary that a wider range of his activities were protected in this case, and the ALJ examined the broader range of activities. *See* R.D. and O. at 12-15. I will limit my examination to the protected activities as stated at the hearing.

[15] I disagree that the protected activities in this case included contacting the government and the news media, Comp. Reply Brief at 36-37, since the evidence shows that the issue Crosby raised with the government and the media was mischarging. Crosby has not argued or shown that he raised environmental concerns with those entities. Pursuant to Crosby's express wishes, for purposes of this case, whistleblowing about mischarging may not be considered protected activity under the environmental acts.

[16] Rosoff could not be found and did not testify at the trial.

[17] Witnesses for Hughes would have testified that the company did not intend to use the PPUP in any gas detector, but their offers of proof did not indicate that the PPUP could not possibly be used in such a device. T. 2918-2919 (Oler), 2939-2940 (Marotta).

[18] The ALJ found both that Crosby did mention the PPUP in connection with a gas detector, and that neither Taylor nor Oler heard Crosby say it. R.D. and O. at 18. Whether Crosby actually mentioned "RAS" or "gas detector" to Taylor and Oler is not dispositive since Crosby clearly otherwise questioned the validity of the approach outlined for the PPUP task, and such questioning may be protected if it is based in conditions constituting a reasonable perception of a violation of the underlying statute.

[19] A Hughes witness would have testified that the purpose of the RAS that Hughes was developing under a military contract was to "identify the content of chemical gas clouds so that ground troops will know what protective gear to utilize to go through the cloud or whether they can't go through it and whether they should simply go around it or under it." T. 2950 (Elser offer of proof). Elser would have testified further that "whether RAS correctly or incorrectly identifies the content of the gas cloud, the gas cloud will still be there." *Id.*

[20] *Dartey* relied upon the framework for cases brought under Title VII of the Civil Rights Act of 1964. *See Dartey*, slip op. at 7-8, citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The Supreme Court's recent decision in *St. Mary's Honor Center* clarifies that the plaintiff in a Title VII case has the burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff on an impermissible basis.

[21] Crosby admitted that Taylor and Oler indicated they were open to adjusting the design of the PPUP task if Crosby could provide "some specifics as to why it was important." T. 1560. Taylor testified, however, that Crosby "gave no indication that if given more time he could come up with anything better on the design." T. 2819; *see also* RX 27.

PATRICK CROSBY, Petitioner, v. UNITED STATES DEPARTMENT OF LABOR; HUGHES AIRCRAFT COMPANY, Respondents

No. 93-70834

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1995 U.S. App. LEXIS 9164

April 7, 1995, Argued and Submitted, Pasadena, California
April 20, 1995, FILED

NOTICE: [*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *53 F.3d 338, 1995 U.S. App. LEXIS 22757.*

PRIOR HISTORY: Petition to Review Decision of the Secretary of Labor. DOL No. 0973-2.

DISPOSITION: PETITION DENIED.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner employee sought review of the decision of respondent, the United States Secretary of Labor, which affirmed the decision of the administrative law judge that petitioner was not discriminated against by respondent former employer, in violation of the whistleblower provisions of various federal environmental statutes.

OVERVIEW: Respondent, the United States Secretary of Labor (secretary), affirmed the decision of the administrative law judge that petitioner employee was not discriminated against by respondent former employer in violation of the whistleblower provisions of the Clean Air Act, *42 U.S.C.S. § 7622,* the Toxic Substances Control Act, *15 U.S.C.S. § 2622,* and the Comprehensive Environmental Response, Compensation and Liability Act, *42 U.S.C.S. § 9610.* Respondent secretary determined that the reasons for petitioner's termination were that his work was not good and that he was often insubordinate. Moreover, the final straw was petitioner's absolute refusal to work on a project because he did not like the protocol for the performance of that task. The court affirmed the denial of petitioner's claim because petitioner failed to meet his ultimate burden of proving to the trier of fact that he was the victim of intentional discrimination. The court found that the record was filled with evidence of incidents of petitioner's supervisors' dissatisfaction with his work, which began long before petitioner engaged in any of the protected activities at issue.

OUTCOME: The court affirmed the denial of petitioner employee's complaint that he was discriminated against by respondent former employer in violation of the whistleblower statutes of various federal environmental statutes. Petitioner failed to meet his ultimate burden of proving to the trier of fact that he was the victim of intentional discrimination. The record was filled with evidence of incidents of his supervisors' dissatisfaction with his work.

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law > Discrimination > Retaliation

[HN1] If an employee makes out a prima facie case of retaliatory discharge, the burden of production shifts to the employer to show that it has legitimate, nondiscriminatory reasons for its actions. If it does so, the production burden shifts back to the plaintiff to show that those reasons were pretextual. Once an employment discrimination case is tried, the only truly relevant question is whether the plaintiff has met his ultimate burden of proving to the trier of fact that he is the victim of intentional discrimination.

Administrative Law > Judicial Review > Standards of Review > Abuse of DiscretionAdministrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious ReviewAdministrative Law > Judicial

Review > Standards of Review > Substantial Evidence Review

[HN2] The United States Secretary of Labor's decision is upheld unless it is unsupported by substantial evidence or is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

COUNSEL:

For PATRICK CROSBY, Petitioner: Thomas M. Devine, Esq., Government Accountability Project, Washington, DC. Thomas Michael Devine, Government Accountability Project, Washington, DC.

For UNITED STATES DEPARTMENT OF LABOR, Respondent: Secretary-DOL, UNITED STATES DEPARTMENT OF LABOR, Washington, DC. Civil Division, Appellate Section, U.S. Department of Justice, Washington, DC. Solicitor-DOL, Esq., UNITED STATES DEPARTMENT OF LABOR, Washington, DC. Mary J. Rieser, Attorney, U.S. Department of Labor, Washington, DC.

For HUGHES AIRCRAFT COMPANY, Respondent: Russell F. Sauer, Jr., Esq., LATHAM & WATKINS, Los Angeles, CA.

JUDGES: Before: McKAY, ** REINHARDT, and FERNANDEZ, Circuit Judges

** Hon. Monroe G. McKay, Senior United States Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

OPINION:

MEMORANDUM *

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Patrick Crosby appeals the Secretary of Labor's adoption of an administrative law judge's recommended decision and order to the effect that Crosby was not discriminated against by his former employer, Hughes Aircraft Company, in violation of the whistleblower provisions of various federal environmental statutes. n1 The Secretary ruled that Crosby had not shown that Hughes had [*2] terminated him for protected rather than nondiscriminatory business reasons. We deny the petition.

n1 Originally, Crosby brought his action under the provisions of the Clean Air Act, *42 U.S.C. § 7622*, and the Toxic Substances Control Act, *15 U.S.C. § 2622*. The Secretary granted his post-trial motion to amend his complaint to include a cause of action under the Comprehensive Environmental Response, Compensation and Liability Act, *42 U.S.C. § 9610*.

[HN1] If an employee has made out a prima facie case of retaliatory discharge, the burden of production shifts to the employer to show that it had legitimate, nondiscriminatory reasons for its actions. See St. Mary's Honor Ctr. v. Hicks, U.S. , , *113 S. Ct. 2742, 2747, 125 L. Ed. 2d 407 (1993)*. If it does so, the production burden shifts back to the plaintiff to show that those reasons were pretextual. Id. More to the point for purposes of this appeal, once an employment discrimination case has been tried, as this one has been, the [*3] only truly relevant question is whether the plaintiff has met his ultimate burden of proving to the trier of fact that he was the victim of intentional discrimination. See id. at , 113 S. Ct. at 2747-48.

[HN2] The Secretary's decision should be upheld unless it is unsupported by substantial evidence or is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. *5 U.S.C. § 706*(2)(A), (E) (Administrative Procedure Act); *Lockert v. United States Dep't of Labor, 867 F.2d 513, 516-17, 520 (9th Cir. 1989)*.

Here the Secretary determined that the reasons for Crosby's termination were that his work was not good and he was often insubordinate. Moreover, the final straw was his absolute refusal to work on the PPUP project because he did not like the protocol for the performance of that task. We understand that he sought to retract the refusal; alas, the decision had already been made.

Crosby does not contend that the actual working conditions related to the PPUP project were unsafe or unhealthy. "Employees have no protection . . . for refusing to work simply because they believe another method, technique, procedure or equipment would be better [*4] or more effective." Pensyl v. Catalytic, Inc., Case No. 83-ERA-2, at 8 (Sec. Dec. Jan. 13, 1984). When an employee's refusal to work does not meet the Pensyl test, an employer may legitimately terminate the employee. Wilson v. Bechtel Constr., Inc., Case No. 86-ERA-34, at 12 (Sec. Dec. Jan. 9, 1988). The record is filled with evidence of incidents of Crosby's supervisors' dissatisfaction with his work, which began long before he engaged in any protected activities at issue here. From

the very beginning of his work for Hughes he resisted completing assignments given to him, refused to work on certain projects and even refused to pass on information to those who were brought in to complete the projects. Finally, he was asked to perform work on PUP. His reaction was characteristic. He objected to the whole thing and finally said he would not work on the project at all. In short, there is evidence that Crosby fairly bristled with antagonism, complaints, foot dragging, insubordination, and fractiousness. The ALJ and the Secretary decided that his termination was based upon that. There is substantial evidence to support the decision.

It is noteworthy that the individuals who [*5] terminated Crosby did not even know of most of his alleged protected activity. While they did hear him complain about PPUP, they did not understand that he was complaining about a possible environmental problem related to a gas detector system if PPUP were used with that system. What they did understand was that Crosby was, once again, refusing to do work that he was directed to do. The Secretary did not err when he found that Crosby was discharged for proper reasons. n2

n2 The parties spill much ink over whether Crosby spelled out a prima facie case. We, of course, recognize that a prima facie case is the first step in a trial of this kind. However, given the ultimate determination, there is no need for us to delve into the intricacies of prima facie case building.

Crosby, however, complains of the procedures used to reach a decision in this case. He says that he was entitled to a continuance because certain discovery was delivered late. But though that continuance was denied him, after two days of hearings [*6] the proceeding was adjourned for five weeks. Thus, he effectively got his continuance anyway. He also asked that adverse inferences be drawn against Hughes because of the lateness of the discovery and because Hughes asserted a privilege as to some discovery which was sought. But the issue of sanctions is left to the discretion of the ALJ, and we see no abuse of that discretion here. See *29 C.F.R. § 18.6(d)(2)(i)*. Moreover, it is not appropriate to draw adverse inferences from the failure to produce documents protected by the attorney-client and work product privileges. See Wigmore on Evidence § 291 (rev. 1979).

Crosby further complains that he did not get to examine certain subpoenaed witnesses after the district court refused to enforce a subpoena for them. He said that adverse inferences should have been drawn, but the ALJ determined that their testimony would have been immaterial. Moreover, Crosby did have an opportunity to examine the officials who actually fired him. We see no reversible error.

Finally, Crosby complains that certain offers of proof were improperly relied upon. Those were made when the ALJ refused to hear testimony from certain Hughes witnesses and [*7] allowed Hughes to protect the record by stating what the witnesses' testimony would have been. The ALJ did not rely upon the offers at all. While the Secretary did refer to them, those occasional references were not necessary to the final decision and were accompanied by references to proper evidentiary matter. We are unable to say that Crosby's substantial rights were affected by those stray, though improper, references. See *29 C.F.R. § 18.103*.

PETITION DENIED.

Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902-1401

December 17, 2003

OVERNIGHT MESSENGER

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Re: In the Matter of Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, & 3) - ASLBP No. 01-791-01-CivP - EA 99-234

Dear Office of the Secretary:

We are enclosing for filing the original and two copies of the following document which has been served on all appropriate parties as evidenced by the certificate of service:

TENNESSEE VALLEY AUTHORITY'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITIES

Please complete the receipt form below on the enclosed copy of this letter and return the completed receipt form to us in the enclosed preaddressed envelope.

Thank you for your assistance.

Sincerely yours,

Brent R. Marquand

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