U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

BETTY FREELS,

COMPLAINANT,

v.

LOCKHEED MARTIN ENERGY SYSTEMS, INC., ET AL.,[1/]

RESPONDENTS.

ARB CASE NO. 95-110

ALJ CASE NOS. 94-ERA-6
95-CAA-2

DATE: December 4, 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[2/]

FINAL DECISION AND ORDER

Case No. 94-ERA-6 arises under the employee protection provisions of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988 and Supp. V 1993), the Clean Air Act, 42 U.S.C. § 7622, the Toxic Substances Control Act, 15 U.S.C. § 2622, the Safe Drinking Water Act, 42 U.S.C. § 300-j(9)(I), the Water Pollution Control Act, 33 U.S.C. § 1367, and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610

[1/] Lockheed Martin Energy Systems, Inc. (Energy Systems) was formerly known as Martin Marietta Energy Systems, Inc. The other respondents in Case No. 94-ERA-6 are Oak Ridge National Laboratory (ORNL) and Martin Marietta Corporation. The complaint was dismissed as to four individual employees of Energy Systems who initially were named Respondents.

In Case No. 95-CAA-2, the named Respondents are: Energy Systems; ORNL; Martin Marietta Corporation; Martin Marietta Technologies, Inc.; ORNL and Energy Systems' Medical, Health, Health Physics, Occurrence Reporting, Environmental Monitoring and Industrial Hygiene Departments; and the Oak Ridge Operations Office of the United States Department of Energy (DOE).

[2/] On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under these statutes to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations (61 Fed. Reg. 19982) implementing this reorganization were also promulgated on this date.

(all 1988).[3/] Consolidated Case No. 95-CAA-2 arises under the employee protection provisions of the environmental acts.

The Administrative Law Judge (ALJ) issued a Recommended Order (R. O.) in which he dismissed the complaint in No. 95-CAA-2 as to the Department of Energy (DOE) because it was not the employer of Complainant Betty Freels (Freels). The ALJ also granted summary judgment to all of the Lockheed Martin entities in both cases on the ground that the company had not taken any adverse action against Freels.

We grant summary decision to the Respondents in No. 94-ERA-6. We dismiss the complaint in No. 95-CAA-2 for lack of jurisdiction over certain Respondents and for failure to state a claim upon which relief may be granted as to the remaining Respondent.
Accordingly, we affirm the ALJ's dismissal recommendation.

BACKGROUND[4/]

Freels was a senior environmental technician at ORNL, which is operated by Energy Systems under a contract with DOE. Her duties, which included taking samples of chemical and industrial waste, sometimes required her to come in contact with radioactive and toxic substances. Because her health had deteriorated, in June 1992 Freels asked Energy Systems physicians to give her a restriction against working with chemical, radioactive, and toxic substances. Within a few days, Freels' supervisors agreed not to assign her to sample hazardous substances while her request for a restriction was pending. Until she notified her supervisor in August 1992, Freels mistakenly continued to be assigned to such sampling duties.

Freels testified in July 1992 on behalf of complainant C. D. Varnadore in his whistleblower complaint against Energy Systems. Freels was on a medical leave of absence and consequently was not at work from November 24, 1992 through May 4, 1993. She performed other duties at work from May 5, 1993 through late July 1993 that did not require her to come into contact with chemical, radioactive, and toxic substances. Freels took a second medical leave of absence from July 25, 1993 through February 1, 1994. Since that date, Freels has been on long-term disability and has not worked.

Freels filed her first complaint in August 1993 naming as Respondents Energy Systems, ORNL, Martin Marietta Corporation, and four individual employees of Energy Systems. After the four individuals were dismissed as Respondents, the remaining Respondents moved for summary decision and Freels opposed the motion. In a second complaint filed in August 1994, Freels named as Respondents Energy Systems, several ORNL departments, and the Oak Ridge Operations Office of DOE. DOE moved to be dismissed for lack of jurisdiction. The other Respondents moved to

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[3/] With the exception of the ERA, we will refer to these statutes as "the environmental acts."

[4/] Because the recommendation to dismiss the case was made on summary grounds and determination of factual issues is not necessary to render this decision, we do not make any factual findings.

dismiss the second complaint for lack of jurisdiction and for failure to state a claim upon which relief may be granted. Freels opposed the motions.

MOTIONS AND REQUESTS

Freels moved for summary reversal of the R.O. in her opening brief. In light of our decision, which affirms the recommended dismissal of the complaints, we deny the motion for summary reversal.

Freels has moved to supplement the record with the February 9, 1996 Declaration of Max Harris that was filed in a different whistleblower case. Harris' declaration concerns instructions that a DOE attorney gave to Pragmatics, Inc., a company which is not related to the Respondents in this action, concerning a search of e-mail records. Freels also seeks admission of two additional, similar declarations of Harris. The declarations allegedly relate to Freels' outstanding request for discovery of additional e-mail and related back-up computer tapes.

In denying Freels' request for production of e-mail and related back-up tapes, the ALJ cited the extensive discovery already completed (depositions of eight Energy Systems' employees and Energy Systems' production of more than 8,000 pages of documents), the non-specificity of the e-mail requests, and the time required for searching e-mail for such a broad period of time. R. O. at 8. In her initial interrogatories/document request, Freels sought e-mail concerning the identity of employees who were aware of her assignment to sample certain hazardous wastes in 1992. *See* Interrogatories 12D, 16D, 17D, 18D, 19D, 20D, and 21D of Freels' First Interrogatories and Associated Request for Production of Documents, dated Apr. 23, 1994. Freels also requested all e-mail messages sent by, to, or about seven Energy Systems employees during the years 1992 to 1994. *Id*., Interrogatory 8B3.

Energy Systems objected to the requests because an average of 1.24 million e-mail messages are received each month, it does not have the ability to search the e-mail system automatically for documents that pertain to a particular subject, and e-mail messages are retained or deleted at the discretion of the recipient. Resp. Answers and Objections to Freels First Interrogatories, *etc.,* dated June 1, 1994 at 9-11. Energy Systems explained that to comply with the request it would have to do a manual search of all 1992 e-mail messages. *Id.* The company did provide all previously printed e-mail messages that were responsive to the interrogatories in question. *Id.* at 10. Freels then sought to compel responses to her e-mail requests. Freels Second Motion for Protective Order and Motion to Compel, dated July 11, 1994.

We agree with the ALJ's denial of the motion to compel production of e-mail. Most of the e-mail requests were designed to help determine the identity of Energy Systems employees who knew about the substances and materials Freels' was assigned to sample in 1992. There is no material issue of fact concerning the nature of Freels' work or the fact that she was exposed to chemical, radioactive, and hazardous substances. Moreover, events that occurred in 1992 are well outside the 180-day limitation period.

For the one request that covered events within the limitation period, Freels sought e-mail by, to, or about seven employees without regard to whether the e-mail messages had anything to do with her case. We agree with the ALJ that this request was overbroad. In addition, since Freels obviously was aware of the alleged retaliatory actions and hostility directed toward her, the discovery of e-mail and related items would, at most, produce evidence to support her allegations. Therefore, we need not grant the requested additional discovery prior to examining the sufficiency of Freels' opposition to the motions for summary judgment and judgment on the pleadings.

The Harris affidavits, which concern the searching of e-mail records, will be placed with the record, but they were not considered for purposes of reaching this decision.

In her motion to supplement the record, Freels also made a "suggestion of hearing on remand regarding disqualification of Donald Thress as DOE counsel." Since we dismiss DOE as a Respondent, we deny this request.

Freels moved to strike the response of the Lockheed Martin Respondents to her motion to supplement the record, on the ground that the response was filed late. The motion is granted and the response is stricken, since the Lockheed Martin Respondents did not seek leave to file the response late.

Freels' request for leave to file a rebuttal brief that exceeds the page limitation is granted and the rebuttal brief is accepted as filed. Freels' unopposed request that we take official notice of two items posted on the World Wide Web is also granted.

DISCUSSION

I. Summary Decision on the First Complaint

Initially we note that the ERA's employee protection provision provides that a complainant shall file a complaint within 180 days of a discriminatory action, 42 U.S.C. § 5851(b)(1) (1988 and Supp. V 1993). All of the environmental acts at issue have a 30-day limitation period. *E.g.*, 42 U.S.C. 7622(b)(1) (1988) (Clean Air Act). At the outset we will focus on whether there is a genuine issue of material fact concerning the alleged discriminatory actions that occurred within the 180-day period prior to the filing of the first complaint, *i.e.,* on or after February 10, 1993.[5/]

The standard for granting summary decision in whistleblower cases, 29 C.F.R. § 18.40 and 18.41, is the same as summary judgment under the analogous Fed. R. Civ. P. 56(e): moving parties must show that there is no material issue of fact and that they are entitled to prevail as a matter of law. *Flor v. U.S. Dept. of Energy,* Case No. 93-TSC-0001, Sec. Dec. and Rem. Ord., Dec. 9, 1994, slip op. at 10, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). An opposing party "may not rest upon mere allegations or denials [in the] pleading[s], but must set forth specific facts

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[5/] Freels did not distinguish between those acts that allegedly violated the ERA and those that allegedly violated the environmental acts. We will apply the longer 180-day limitation to the allegations in the first complaint.

showing that there is a genuine issue for trial" and "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson*, 477 U.S. at 256-257. We will examine the evidence presented in support of and in opposition to the motion to determine if there is a genuine issue of material fact.

Energy Systems argued in its motion that certain alleged retaliatory incidents occurred outside the limitation period, and that the alleged events that occurred within that period were not hostile toward Freels and could not constitute a violation of the employee protection provisions. The parties conducted extensive discovery, including nine depositions and two sets of interrogatories and responses, prior to the filing of the motion for summary judgment. Energy Systems relied on extensive excerpts from the depositions as well as numerous declarations to support its motion.

In opposition to the motion, Freels relied upon certain depositions, the declarations of three persons, and various documents previously submitted in support of her second motion for a protective order.[6/] We find it significant that in opposing a motion based upon the absence of any hostile or adverse actions toward her, Freels did not rely upon her own deposition to demonstrate a genuine issue of material fact. Freels alleges only three acts of discrimination within the relevant time period.[7/] Each of those allegations is discussed separately below.

A. Office Assignment

Freels alleged that when she returned to work on May 5, 1993 after a six month disability leave, she "no longer had an office. . . phone, computer or desk" and was occupying the office

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[6/] Although Freels also purported to rely upon her "sworn complaint," Opposition to Summary Judgment Motion at 1, Freels' signature on the complaint was not under oath and the opposing party cannot rest upon the allegations in the pleadings. *Anderson*, 477 U.S. at 256-257.

[7/] Freels stated that in April 1993 (within the 180-day limitation period), "a meeting was held regarding Ms. Freels' absences, wrongfully harassing her for missing work due to illness, threatening her with termination." Opposition to Summary Judgment Motion at 5 ¶K. Freels cited the deposition of Frank Kornegay as the basis for that statement. When asked at her deposition to list the adverse actions that occurred within the limitation period, however, Freels did not cite any meeting concerning absences or threatening her with discharge. See Freels Dep., Resp. App. at 190-191.

In his deposition, Kornegay did not refer to any meeting about Ms. Freels' absences in April 1993, and he denied that the company ever considered terminating Freels' employment. See Kornegay Dep., Ex. E to Freels' Second Motion to Compel, at 42, 89, 177-178. Rather, Kornegay explained that in April 1992, the company counseled Freels about her high number of absences. Id. at 182-183. Murphy confirmed that such a meeting occurred and that he showed Ms. Freels the employee handbook, which stated that employees can be terminated based on a excessive absences, whether excused or unexcused. Murphy Dep., App. 236-239.

We therefore do not consider such a meeting or "threat" to be a timely alleged discriminatory action.

assigned to a woman who was on pregnancy leave. Her own desk and its contents had been placed in storage. August 6, 1993 Complaint (Comp. I) at 15. According to John Murphy, the division had a critical shortage of office space and consequently assigned Freels' office space to someone else when Freels was on disability leave for nearly six months. Murphy Aff. ¶4, Resp. App. 55. When Freels returned on two days' notice, there were no offices available immediately and Murphy assigned her temporarily to the office of a worker who was on an extended pregnancy leave. *Id.* In her deposition, Freels admitted that the temporary office space "was small, but it was adequate." Freels Dep. 266, Resp. App. 172.

Freels cited no evidence to dispute Energy Systems' assertions that office space was at a premium, that the office provided to Freels was the only one available, and that it was adequate. We find that there was no disputed material issue of fact and that the temporary office assignment was not discriminatory as a matter of law. *See Lassin v. Michigan State Univ.*, Case No. 93-ERA-31, Sec. Final Dec. and Ord., June 29, 1995, slip op. at 9 (temporary assignment of employee to admittedly inadequate office space found not to be retaliatory).

B. Assigning Freels to work Directly for Murphy

Freels also complained that her assignment in May 1993 to work directly for Murphy was part of a "hostile work environment" since he was "the very manager whose false testimony the ALJ found unbelievable due to [Freels] truthful testimony" in the Varnadore case. Comp. I at 15. Freels further complained that Murphy told her he had no long range plans for her and frustrated her efforts to transfer out of his office. *Id*. at 15-16.

Murphy's affidavit states that in May 1993 he gave Freels an assignment that met her medical restriction to work half days in a sedentary position that required no field work: reviewing and updating various documents. Murphy Aff. at ¶3, Resp. App. 54.[8/] Murphy explained that the assignment was not a long-term position and that "it was very important that we find a long-term niche and a specific task that [Freels] would be responsible for." *Id.* Murphy did not immediately discuss any specific permanent job because "none were identified at the time." *Id*. Freels indicated that Murphy was civil and even complimentary toward her in their initial meeting concerning her new position. Freels Dep. 283, Resp. App. 169. Freels also admitted in her deposition that the temporary assignment was "meaningful work" and "the only thing [she] could do at the time" within her medical restrictions. Freels Dep. p. 289, Resp. App. 175.

One week after her return, Murphy suggested that Freels speak with Paul Baxter, the groundwater coordinator for the division, who was looking for additional workers.. Freels Dep. 290, Resp. App. 176. At that time, Murphy said he had no long-range plans for Freels. *Id*. After speaking with Baxter later that same month, Freels indicated interest in the work and Murphy said it was a good idea to transfer to work with Baxter. Freels Dep. 295, Resp. App. 181. Freels transferred into the new position in July 1993. Freels Dep. 298, Resp. App. 184.

[8/] Freels requested and received the medical restriction because of recent ankle and knee surgery. Freels Dep. 274, Resp. App. 164.

Freels countered this evidence only with a hearsay statement in the declaration of her co-worker, Wayne Parsons, that in June 1993:

> Ms. Freels told me about a meeting in which . . . Mr. Murphy said he no longer had a job for her in the group and that she had no future in the division. Ms. Freels was crying for thirty minutes to an hour. * * * In the summer of 1993, I heard Mr. Murphy say that Mr. Freels was no longer going to be in our group.

Parsons Dec. ¶¶15, 16, attached to Freels Response to Summary Judgment Motion.

Murphy's statement in the summer of 1993 that Freels no longer was going to be in the group with Parsons merely reflected reality, since Freels transferred to work in a different group under Paul Baxter that summer. Even if Freels was upset by, and cried over, Murphy's statement that he had no long range plans for her, she has provided no evidence to support her belief that the statement was part of a hostile work environment. Nor did Freels produce any evidence to refute the affidavit of Murphy and the deposition testimony cited by Energy Systems in support of its nondiscriminatory reasons for assigning her to work for Murphy. Assuming the truth of Parsons' statement, as we must, we find that it does not raise a genuine issue of material fact on this issue and that Energy Systems is entitled to judgment as a matter of law.

C. Lack of Medical Department Response to Freels' Work Restriction Request Concerning Hazardous Substances

Freels alleged that the absence of a response from the medical department to her request to be restricted from working with chemical, radioactive, and hazardous substances was "redolent with retaliation" for her testimony in the Varnadore case. Comp. I at 16.[9/] She further contended that Energy Systems "deliberately and intentionally put [her] in harm's way to chill [her] rights to free speech about environmental matters and for telling the truth under oath" about Murphy. *Id.*

Energy Systems relied upon the deposition of Murphy's superior, Frank Kornegay, who stated that by December 1992, the division had decided that upon Freels' return from disability leave, she would not be given any kind of work with a potential for exposing her to toxic materials or unsafe levels of radiation. Kornegay Dep. 185-187, Resp. App. 281-283.

[9/] It is undisputed that in response to her June 1, 1992 request for a medical restriction, Freels' managers promptly decided not to assign her to hazardous waste sampling. See June 11, 1992 Memorandum initialed by Murphy, Hamilton, and Freels, stating that Freels was removed from hazardous waste sampling in the interim. Resp. App. 413-414. Freels inadvertently was continued on the weekly work schedule for hazardous waste sampling that was prepared by a supervisor other than Hamilton, as she acknowledged. Resp. App. 396. When Hamilton learned of the error in August 1992, she told Freels not to perform hazardous waste sampling even if her name was mistakenly placed on the work schedule. Freels Dep., Resp. App. 131-136.

It is also undisputed that Freels was removed from all environmental sampling in October 1992, while her work restriction request was still pending with the medical department.

When Freels sought the transfer to work with Paul Baxter in July 1993, Kornegay took pains to assure her that the new job would not involve any such exposures. *Id.*

Freels did not cite any occasion on which she was exposed to hazardous substances on or after February 10, 1993, however. The sole evidence on which Freels relied in opposing summary judgment on this issue was Wayne Parsons' declaration that after sustaining a broken jaw in a 1985 traffic accident, he promptly received a medical department restriction that prohibited him from lifting heavy weights and directed him not to work outdoors for several weeks. Parsons Dec. ¶74.

Assuming the truth of Parsons' declaration, we find that there is no genuine issue of material fact concerning the absence of a medical department-issued work restriction for Freels. That Parsons' broken jaw, and Freels' later ankle and knee surgery, led the medical department to issue work restrictions of a temporary nature does not raise a genuine issue of material fact about Freels' dissimilar request to be restricted permanently from exposure to radioactive, chemical, and hazardous substances. Freels' job at Energy Systems was, after all, to perform environmental sampling work, including sampling hazardous waste.

Energy Systems is entitled to judgment as a matter of law on this issue because the company had acted to remove Freels from exposure to chemical, hazardous, and radioactive substances even in the absence of a restriction issued by the medical department. Freels submitted no record evidence to refute this conclusion.

D. Energy Systems is Entitled to Judgment on the Continuing Violation Claim

Freels alleged that numerous actions by Energy Systems or its managers constituted a continuing violation of the employee protection provisions. Comp. I at 3. In order for an ERA complaint to be timely filed under a continuing violation theory, the complainant must show a course of related discriminatory conduct and the charge must be filed within 180 days of the last discriminatory act. *Thomas v. Arizona Public Svc. Co.,* Case No. 89-ERA-19, Sec. Final Dec. and Ord., Sept. 17, 1993, slip op. at 13; *Garn v. Benchmark Technologies,* Case No. 88-ERA-21, Sec. Remand Ord., Sept. 25, 1990, slip op. at 6; *see also Varnadore v. Oak Ridge National Laboratory,* Case Nos. 92-CAA-2, *et al.,* Sec. Dec. and Ord., Jan. 16, 1996 (*Varnadore I*), slip op. at 61 (under environmental acts), *petition for review filed*, No. 96-3888 (6th Cir. Aug. 13, 1996). *See also Gallagher v. Croghan Colonial Bank,* 89 F.3d 175 (6th Cir. 1996) (under Age Discrimination in Employment Act). At least one of the alleged retaliatory acts within the limitation period has to be adverse to the complainant. *See Moody v. Tennessee Valley Authority*, Case Nos. 91-ERA-40 and 91-ERA-49, Sec. Dec. and Ord., Apr. 16, 1995, slip op. at 4-5 and case there cited. Since Energy System is entitled to judgment as a matter of law on all of the timely alleged "retaliatory" actions, we find that it also is entitled to judgment on the continuing violation claim.

II. Dismissal of the Second Complaint

A. Dismissal of DOE and Certain Other Entities

On the ground that it is not Freels' employer, DOE moved to be dismissed as a Respondent in the second complaint. DOE supported its motion with the affidavit of Patricia Howse-Smith, the Director of the Personnel Division of DOE's Oak Ridge operations, who stated that DOE does not supervise, manage, evaluate, or control the manner or means by which Freels performs her work. Howse-Smith also stated that Lockheed Martin pays Freels, provides her employee benefits, and withholds payments for her taxes.

Since DOE relied upon Howse-Smith's affidavit in its motion, it will be treated as requesting summary decision pursuant to 29 C.F.R. § 18.40, 18.41 (1995). *See Flor,* slip op. at 9 (motion to dismiss supported by affidavit treated as motion for summary decision).
Freels did not introduce affidavits or other evidence to counter DOE's affidavit. Instead, citing *Flor*, Freels argues that summary decision is not permitted when the opposing party has not had full opportunity for discovery. Freels still seeks answers to certain discovery requests, including production of back-up computer tapes of e-mail.

In *Flor*, the Secretary found that summary decision was not appropriate because the respondent had not answered certain interrogatories and document requests that could possibly establish essential elements of the complainant's case. Slip op. at 12. In this case, however, Freels would have personal knowledge of evidence concerning the identity of her employer and could have provided it in a sworn affidavit. Freels has not argued that the outstanding discovery requests would produce any evidence that DOE is her employer. Therefore, we do not find *Flor* controlling.

We acknowledge that in *Hill and Ottney v. Tennessee Valley Authority*, Case Nos. 87-ERA-23 and 87-ERA-24, Sec. Dec. and Remand Ord., May 24, 1989, slip op. at 2-4, the Secretary held that the ERA prohibits employers from discriminating against any employee, not only their own employees. In that case, the complainants alleged that because of their disclosure of safety problems, the TVA restricted the scope of its contract with the complainants' employer, thereby causing the termination of the complainants' employment. We do not find *Hill and Ottney* applicable here because Freels did not allege that DOE interfered in Energy Systems' contract or that DOE caused Energy Systems to take any adverse action against her.

We find that no genuine issue of material fact has been presented and that DOE is entitled to judgment as a matter of law since it is not Freels' employer and Freels did not allege that DOE interfered in her employment at Energy Systems. *See Varnadore v. Oak Ridge National Laboratory, et al. (Varnadore II),* Case Nos. 92-CAA-2, et al., Final Consolidated dec. and Ord., June 14, 1996, slip op. at 59 and cases there cited, *petition for review filed,* No. 96-3888 (6th Cir., Aug. 13, 1996).

Martin Marietta Corporation (now Lockheed Martin Corporation) and Martin Marietta Technologies, Inc. (now Lockheed Martin Technologies) properly were dismissed as Respondents since Freels did not allege that these corporations employed her and they are merely parent companies of Energy Systems. *Varnadore II*, slip op. at 62.

Energy Systems sought dismissal of ORNL because it is an unincorporated division of Energy Systems and is not a legal entity subject to this action. For the same reason, it sought dismissal of various named departments operated by Energy Systems for DOE at Oak Ridge. The

following entities are dismissed as Respondents because they are not legal entities subject to this action: ORNL; ORNL and Energy Systems Medical, Health, Health Physics, Occurrence Reporting, and Environmental Monitoring and Industrial Hygiene Departments. *See Varnadore II*, slip op. at 61. Consequently, the only remaining Respondent is Energy Systems.

B. Dismissal of Allegations Against Energy Systems For Failure to State A Claim Upon Which Relief May Be Granted

Freels alleged in the second complaint that Energy Systems acted pursuant to retaliatory animus when it: hired the former Director of the Office of Administrative Appeals of the Department of Labor, M. Elizabeth Culbreth, as a legal consultant in whistleblower cases; violated Freels' right to confidentiality of her medical records; failed to post adequate notices of employee rights concerning protected activities; and failed to respond to her work restriction request.

Energy Systems moved for dismissal of the second complaint on the ground that the allegations either were untimely or failed to state a claim upon which relief may be granted. Neither the ERA, the environmental acts, nor the implementing regulations specifically provide for dismissal of a complaint for failure to state a claim upon which relief may be granted.[10/] Consequently, the applicable provision for dismissal is the analogous Fed. R. Civ. P. 12(b)(6). *Tyndall v. U.S. Environmental Protection Agency*, Case Nos. 93-CAA-6 and 95-CAA-5, Dec. and Rem. Ord., June 14, 1996, slip op. at 3; 18 C.F.R. § 18.1(a) (1995). In considering dismissal for failure to state claim, "all reasonable inferences are made in favor of the non-moving party." *Estelle v. Gamble*, 429 U.S. 97 (1976); *Tyndall*, slip op. at 3; *Studer v. Flowers Baking Co. of Tennessee*, Inc., Case No. 93-CAA-00011, Dec. and Remand Ord., June 19, 1995, slip op. at 2. Dismissal should be denied "unless it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim[s] which would entitle [them] to relief." *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980); *accord, Helmstetter v. Pacific Gas & Elec. Co.*, Case No. 91-TSC-1, Dec. and Rem. Ord., Jan. 13, 1993, slip op. at 4.

1. Hiring Culbreth as Legal Consultant

Freels complains that Energy Systems violated the whistleblower protection provisions when it hired Ms. Culbreth, within one year of her leaving the position of Director of the Office of Administrative Appeals, to act as a legal consultant on this and other cases. Aug. 3, 1994 Complaint (Comp. II) at 3 ¶11. Freels seeks an order that Energy Systems have "Ms. Culbreth do no further work on Ms. Freels' case or on any other case involving clients who had cases pending before DOL (including its Office of Administrative Law Judges and the Wage-Hour Division) on January 20, 1993." Comp. II at 4 ¶14.

The gist of Freels' claim is that Culbreth allegedly acted in an unethical manner by advising Energy Systems on whistleblower cases that were pending in the Department of Labor at the time she was Director of the Office of Administrative Appeals. Even assuming that hiring Culbreth as

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[10/] We do not treat the dismissal request as a motion for summary judgment because Energy Systems did not rely upon affidavits, depositions, answers to interrogatories, or admissions.

an adviser to Energy Systems (as opposed to hiring her to appear as an attorney before the Department in a case which had been pending during her employment) was an ethical violation, *see* 29 C.F.R. § 2.2 (1995), such a claim would not be actionable under the whistleblower provisions. *Varnadore II* at 61. Moreover, Freels' complaints, which were filed in August 1993 and August 1994, were not pending before the Department while Culbreth was the Director. This claim is completely frivolous. Accordingly, we find that Freels could prove no set of facts that would entitle her to relief, and the allegation concerning Culbreth is dismissed for failure to state a claim upon which relief may be granted.

2. Use of Freels' Medical Records

Freels alleges a violation of the employee protection provisions when Energy Systems' medical department doctors, acting without a court order, "freely dispensed" information contained in her medical files to Energy Systems managers and the company's attorneys. Comp. II at 6 ¶26-27. Energy Systems contends that this allegation is both frivolous and time barred. Resp. Br. at 25.

Based upon this record, we do not agree that the allegation is time barred because Freels alleged that she learned about the misuse of medical information when she took the depositions of medical department physicians concerning her first complaint. Comp. II at 6 ¶26, 27. Since the depositions were taken in mid to late July 1994, *see* Resp. App. 304 (Dr. Avera), 321 (Dr. Garrett) and 323 (Dr. Sisk), the complaint filed on August 3, 1994 is timely as to this allegation even under the 30-day limitation of the environmental acts.

Turning to the substance of this allegation, we note that in Tennessee, where Freels worked, patients do not have a privilege that communications with their physicians not be disclosed to third persons. *Quarles v. Sutherland,* 215 Tenn. 651, 389 S.W.2d 249 (1965); *accord*, *State v. Fears,* 659 S.W.2d 370, 376 (Tenn. Crim. App. 1983). There is a Tennessee statute, however, that entitles an employer to obtain the medical records of a workers' compensation claimant. *See* Tenn. Code Ann. Sec. 50-6-2049(a)(1) (1996), providing that upon the employer's or the employer's insurer's request, a physician shall furnish "a complete medical report. . . as to the claimed injury, its effect upon the employee, the medical treatment prescribed, an estimate of the duration of required hospitalization, if any, and an itemized statement of charges for medical services to date." We find, to the extent that a physician/patient privilege exists in this case, that a worker restriction request based on an employee's health is analogous to a workers' compensation claim and that the employer, through appropriate personnel, is entitled to examine the requesting employee's medical records. Freels alleged only that Energy Systems dispensed her medical information to company managers and attorneys, *i.e.*, those who needed to review the medical information in order to respond appropriately to Freels' work restriction request. We therefore find that she has not stated a claim upon which relief may be granted and this allegation is dismissed.

3. Postings Required by the Environmental Acts

Freels admits that there are postings at Energy Systems' Oak Ridge operations advising employees about their rights under the employee protection provisions of the environmental acts. Comp. II at 9. She contends that the postings are inadequate because they (1) contain only the text

of the statutory provisions and not explanatory material, (2) are behind glass, and (3) often are covered by other materials. *Id.* at ¶41-43. Freels complains that the inadequate postings are adverse to her because they might chill other employees from giving truthful testimony in Freels' case. *Id.* at 9 ¶44.

Posting the text of the employee protection provisions fully comported with Energy Systems' obligations under the environmental acts. Accordingly, we find that Freels has not stated a claim upon which relief may be granted and this allegation is dismissed.

4. Non-Response to Work Restriction Request

Freels again alleged in the second complaint that the continued lack of a medical department response to her request for a work restriction was a violation of the employee protection provisions. Comp. II at 6 ¶25. First, as discussed above, Energy Systems did respond affirmatively to Freels' request. Freels is splitting hairs of no legal consequence when she claims that a response from the medical department was necessary to free Energy Systems from liability for this allegation. Second, due to a disability, Freels was not at work during any of the 30 days preceding the filing of her second complaint.[11/] Therefore Energy Systems could not have required her to work with the feared substances at any time during that period. Accordingly, we find that Freels could not prove any set of facts establishing that the absence of a medical department response to her work restriction request violated the employee protection provisions of the environmental acts. This allegation is dismissed.

5. Hostile Work Environment

Freels alleged that the purportedly discriminatory actions discussed above caused her to suffer a hostile work environment. Comp. II at 11 ¶53. Since Freels did not state a claim upon which relief must be granted as to any of the allegedly discriminatory actions, we find that she did not state a valid hostile work environment claim either.

The necessary elements of proof in a hostile work environment case are:

(1) the plaintiff suffered intentional discrimination because of his or her membership in the protected class;

(2) the discrimination was pervasive and regular;

(3) the discrimination detrimentally affected the plaintiff;

(4) the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and

(5) the existence of *respondeat superior* liability.

West v. Philadelphia Elec. Co., 45 F.3d 744 (3d Cir. 1995), cited in *Varnadore I*, slip op. at 79-80. In the absence of alleging any valid claim of intentional discriminatory acts, Freels has failed to allege that the discrimination was pervasive and regular. Therefore the hostile work environment claim is dismissed.

[11/] In the second complaint, only the 30-day limitation of the environmental acts is at issue.

CONCLUSION

Respondents are entitled to summary judgment on the first complaint. Freels has not stated a claim upon which relief may be granted in the second complaint. Accordingly, both complaints are dismissed in their entirety.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member