



In the Matter of:

**VIRGINIA JOHNSON,
KENNETH W. WARDEN,
DENNIS McQUADE,**

COMPLAINANTS

v.

ARB CASE NO. 97-057

**(ALJ Case Nos. 95-CAA-20;
95-CAA-21;
95-CAA-22)**

DATE: September 30, 1999

**OAK RIDGE OPERATIONS OFFICE,
UNITED STATES DEPARTMENT OF
ENERGY; DOE INSPECTOR GENERAL;
PATRICIA HOWSE-SMITH,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:

Edward A. Slavin, Jr., Esq., *Deerfield Beach, Florida*
Lori A. Tetreault, Esq., *Lawrence, Mutch & Tetreault, P.A.*
Gainesville, Florida
Jacqueline O. Kittrell, Esq.,
American Environmental Health Studies Project, Knoxville, Tennessee

For the Respondents:

Ivan A. Boatner, Esq., Donald Thress, Esq., Office of Chief Counsel
U.S. Dept. of Energy, Oak Ridge Operations Office, Oak Ridge, Tennessee

For Non-Party Witness Joe La Grone:

J. Ford Little, Esq., Woolf, McClane, Bright, Allen & Carpenter, PLLC
Knoxville, Tennessee

FINAL DECISION AND ORDER

In April 1995, three U.S. Department of Energy (DOE) employees – Virginia Johnson, Kenneth W. Warden, and Dennis McQuade – filed complaints under the employee protection

(“whistleblower”) provisions of various statutes,^{1/} and their implementing regulations (29 C.F.R. Part 24^{2/}), alleging that the Respondents, DOE’s Oak Ridge, Tennessee, Operations Office (ORO), the DOE Inspector General, and DOE employee Patricia Howse-Smith had retaliated against them for engaging in activity protected by the whistleblower provisions.^{3/} The Department of Labor’s Wage and Hour Division dismissed the complaints on the grounds that DOE was not a covered employer under the ERA, and that the complaints were untimely under the remaining statutes. Complainants requested a hearing before an Administrative Law Judge (ALJ). Following extensive pre-hearing litigation, the ALJ issued a decision recommending that the complaints be dismissed.

Based upon our review of the record, we concur with the ALJ’s recommendations and dismiss the complaints.

^{1/} The complaints alleged violations of the employee protection provisions of the Energy Reorganization Act (ERA), as amended, 42 U.S.C. §5851 (1994); the Clean Air Act (CAA), 42 U.S.C. §7622 (1994); the Safe Drinking Water Act (SDWA), 42 U.S.C. §300j-9(i) (1994); the Solid Waste Disposal Act (SWDA), as amended, 42 U.S.C. §6971 (1994); the Toxic Substances Control Act (TSCA), 15 U.S.C. §2601 (1994); and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9610 (1994).

^{2/} These regulations were amended in February 1998 to provide, *inter alia*, for review of ERA and environmental “whistleblower” complaints upon the filing of an appeal by a party aggrieved by an Administrative Law Judge’s decision. *See* 63 Fed. Reg. 6614 (Feb. 9, 1998). In this case, the Administrative Law Judge issued a recommended decision and order on February 4, 1997; accordingly, this matter is before the Board pursuant to the pre-1998 automatic review provision of the regulation at 29 C.F.R. §24.6(a) (1997).

^{3/} In a July 22, 1997 letter to the Board Complainants for the first time raised the applicability of the employee protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. §31105 (1994), to this proceeding “inasmuch as the unreliable individuals about whom Complainants expressed concerns include persons who operate trucks . . . [including] nuclear weapons truck drivers and material handlers carrying nuclear weapons materials and components” Since the applicability of the STAA was not raised in the individual complaints or before the ALJ, it will not be considered in this decision. 49 U.S.C. §31105(b); 29 C.F.R. §§18.54, 18.57-18.59, 24.7-24.8 (1998).

BACKGROUND

I. The DOE Oak Ridge Facility and the Parties

The Oak Ridge Operations Office is engaged in various DOE nuclear activities, including uranium storage and assembling and disassembling thermonuclear weapons, weapons components and assemblies. ORO's personnel security system is an important component in protecting and maintaining these materials free from harm.

Complainants are former Oak Ridge personnel security analysts who worked in the Personnel Clearance and Assurance Branch then headed by Patricia Howse-Smith, Branch Chief for Personnel Security. In essence, they alleged that they suffered reprisal by Howse-Smith and others for disagreeing with Howse-Smith's security clearance determinations. They charged the DOE Inspector General with failure to properly address their security concerns and to protect them from retaliation.

II. The Complaints

Complainants alleged that they were retaliated against because they expressed concerns to the DOE Inspector General and to congressional and FBI investigators about ORO's administration of its personnel security clearance operation. Complainants had expressed concerns that, under the auspices of Howse-Smith, various questionable individuals had their national security clearances granted or renewed in contravention of DOE personnel security regulations. Complainants asserted that these individuals included convicted felons, drug dealers and abusers, and persons with psychological problems. Complainants also asserted that they raised concerns regarding organized criminal activity, including gambling, drugs and prostitution, and government contract fraud. Johnson Compl. at 3-9; Warden Compl. at 3-8; McQuade Compl. at 3-8.

Complainants alleged that a nexus existed between their security clearance concerns and the environmental laws. "Howse-Smith's apparent knowing and intentional security violations, suffered and permitted by DOE Oak Ridge Operations officials, have created a substantial risk of harm through the potential for explosions and pollution, representing a reckless or willful violation of the . . . environmental laws at the K-25, Y-12 Nuclear Weapons Plants and the Oak Ridge National Laboratory." Johnson Compl. at 6; Warden Compl. at 5; McQuade Compl. at 5 (para. num. deleted). Complainants asserted:

Vesting security clearances in drug users, drug dealers and convicted criminals creates a substantial risk of accidental or deliberate releases for various foreseeable reasons. Vesting security clearances in unreliable personnel could result in release of pollutants at DOE facilities.

On behalf of the United States, the American people entrust some 20,000 chemicals and radio nuclides to 17,000 DOE and contractor employees in Oak Ridge. The American people have a right to expect that accidental or deliberate releases of such materials will not occur because of negligent entrustment of such materials in the hands of persons liable to hand such materials over to terrorists, or to negligently, recklessly or intentionally spill or emit such substances into the air, land or waters of the State of Tennessee and the United States.

Warden Compl. at 16; McQuade Compl. at 14-15; Johnson Compl. at 16 (para. num. deleted).

Complainants alleged that DOE officials retaliated against them for expressing their criticisms of ORO's administration of its security clearance program. Warden Compl. at 9; McQuade Compl. at 8-9; Johnson Compl. at 9-10. Johnson asserted that beginning in 1987, Howse-Smith abused and isolated her, and created a hostile working environment. Johnson stated that she was demoted from her team leader position at Howse-Smith's behest and was forced to accept a job offer at DOE's Germantown, Maryland facility in 1991. She also alleged that in continuing retaliation for her protected activity she was prevented from performing any inspection assignments at Oak Ridge as part of her current position. Johnson Decl. at 1-4; Oct. 30, 1995 ALJ Ord. at 3-4.

Similarly, Warden asserted that starting in 1987 Howse-Smith (and branch chief Nettie Hudson) had retaliated against him by treating him in a hostile manner in staff meetings and private conversations; by attempting to bring criminal charges against him between 1990-92; by rescinding his designation as acting branch chief for the week of September 4, 1995; and by failing to provide him with his 1994-95 employee performance appraisal when it was due. Warden Decl. at 1-3; Oct. 30, 1995 ALJ Ord. at 4.

McQuade alleged that Howse-Smith had retaliated against him starting in 1987 for initiating a lengthy DOE Inspector General's investigation of Oak Ridge security clearance operations and similar investigations by the FBI and the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce. McQuade alleged that Howse-Smith retaliated against him by giving him a 1989 employee performance appraisal falsely accusing him, as team leader, of instructing subordinates to commit improprieties, including illegal acts; by giving him an unsatisfactory rating and mandatory performance improvement plan in his 1991 performance appraisal; and by accusing him of initiating investigations against her. McQuade charged that in March 1992, he was subjected to a retaliatory security clearance interview in which he was questioned about raising security concerns and was pressured into requesting a transfer from Howse-Smith's supervision or risk

termination.^{4/} Howse-Smith also allegedly persuaded management to bar McQuade from visiting his former unit except for official business. McQuade also alleged that he was instructed not to meet with the unit's managers during his performance of an annual security survey of the Oak Ridge Federal Building in January 1993. McQuade Decl. at 1-4.

McQuade also asserted that in April 1994 he asked ORO Manager Joe La Grone to return him to his former position. Howse-Smith and Wilken allegedly rejected that request. Nevertheless, in June 1994 McQuade applied for a branch chief position in his former unit and was interviewed by Howse-Smith as selecting official. McQuade charged that his application was not treated seriously because DOE and Howse-Smith had entered into a confidential EEO settlement agreement, which specifically provided that DOE would not transfer McQuade to Howse-Smith's supervision and would minimize official contact between them. He asserted that the settlement precluded him from working in his field of expertise despite over seventeen years' experience in personnel security work.^{5/}

In August 1995 McQuade placed a telephone call to Assistant Manager Wilken, in which McQuade said that he would "kick [Wilken's] ass." After this incident ORO required McQuade to undergo a psychiatric evaluation and a security clearance interview. McQuade alleged that this action by ORO also was in retaliation for his raising security concerns.^{6/}

McQuade asserted that he has received psychotherapy since 1994 (including counseling and medication) relating to symptoms which he alleged arose from his employment situation and was forced to take time off from his employment at Oak Ridge because of his condition.

III. Proceedings Below

The ALJ issued two recommended orders which are of particular significance on review before us.^{7/} First, in response to ORO's motion to dismiss, the ALJ ruled that sovereign immunity barred the ERA and TSCA causes of action against DOE, citing the Secretary's

^{4/} In June 1992, McQuade was transferred to the Safeguards and Security Division.

^{5/} Retired Oak Ridge Operations Manager Joe La Grone, signatory to the January 15, 1993 Howse-Smith EEO settlement agreement, testified in his October 30, 1995 deposition that the settlement was predicated on Oak Ridge management's failure to provide Howse-Smith with proper support during the DOE Inspector General's investigation of McQuade's charges involving Howse-Smith's management of her security clearance responsibilities. La Grone Dep., Vol. I at 75-78, Vol. II at 53-56. The Howse-Smith EEO settlement is a basis of McQuade's separate EEO complaint against DOE.

^{6/} On June 12, 1997, McQuade's counsel informed the Board that McQuade had been fired that day, allegedly in retaliation for his protected activities.

^{7/} The lengthy procedural history of this case is described in the ALJ's Recommended Decision and Order (R. D. and O.) at 2-11.

decisions in *Teles v. DOE*, Case No. 94-ERA-22, Sec. Fin. Dec. and Ord., Aug. 7, 1995, and *Stephenson v. NASA*, Case No. 94-TSC-5, Sec. Dec. and Ord. of Rem., July 3, 1995. ALJ Ord. at 7, 10. Thus, the ALJ ruled that although complaints about security clearance operations at a facility subject to the ERA might otherwise fall within the scope of the ERA whistleblower provision, sovereign immunity barred such an application in this case. An action under TSCA was similarly barred.

Accordingly, the ALJ dismissed Complainants' causes of action under the ERA and TSCA and ordered Complainants to file supplemental submissions containing specific allegations of protected activities under the CAA, SDWA, SWDA and CERCLA:

[Complainants'] allegations, taken as true, are that criminals and drug dealers were hired at ORO, that DOE violated applicable security clearance regulations for nuclear power plant employees in hiring such people, and that, because such people are irresponsible, violations of environmental and pollution control statutes may occur as a result because of such problems as possible releases from small-power nuclear devices. There are no indications who these people are or whether they in fact committed or were in fact about to commit violations of the [CAA, SDWA, SWDA, and CERCLA]. The concerns about the environmental harms such people might commit flow from the alleged violations of the security clearance regulations which are, as DOE points out, exclusively in its purview. Based on the holding in the *Teles* case, the Department of Labor does not have jurisdiction [under the ERA] to remedy retaliatory actions for whistleblowing against DOE because of security clearance violations. Because such whistleblowing is the essence of the complaints here, the complainant will be required to file supplemental submissions which state specific allegations of protected activity under CAA, SDWA, SWDA, and/or CERCLA.

Oct. 30, 1995 ALJ Ord. at 9-10.

In response to the ALJ's order, Complainants filed a submission which stated in regard to each Complainant that the "protected activity under environmental whistleblower statutes includes but is not limited to the following employees with the characteristics described, whose work assignments pose dangers of environmental releases, spills, accidents and radiation exposures," and that "Complainants raised protected environmental concerns about numerous other persons whom Respondents have allowed to work in close proximity with bomb-grade uranium, radiation and toxic materials, repeatedly referring to the possibility of spills or criticality accidents." Complainants' First Environmental Protected Activity Summary at 1, 2, 9, 13. This submission then listed allegations regarding several current and former ORO employees.

Following further submissions and argument by the parties, the ALJ issued a Recommended Decision and Order dismissing the three complaints. The ALJ held that: (1) Complainants' allegations of specific protected activities filed pursuant to the ALJ's October 30, 1995 Order merely illustrated Complainants' concerns about the improper retention or granting of security clearances and therefore were not protected activities under the CAA, SDWA, SWDA, or CERCLA; (2) Johnson's complaint was untimely, but Warden's and McQuade's complaints were timely; and (3) claims could not be brought against Howse-Smith and the DOE Inspector General as individuals because they were not Complainants' employers. R. D. and O. at 12-18.^{8/}

The ALJ summarized in detail the contents of Complainants' December 18, 1995 First Environmental Protected Activity Summary. R. D. and O. at 4-8. With regard to the first issue, the ALJ held that Complainants' expressions of concern regarding Oak Ridge's implementation of its federal security clearance system obligations were too removed from environmental matters to be considered protected activities under the CAA, SDWA, SWDA or CERCLA:

[T]he complainants were given the opportunity to plead facts alleging violations of CAA, SDWA, SWDA and/or CERCLA, the only remaining causes of action. These facts . . . indicate that some DOE employees have had problems with seizure disorders, credit problems, alcohol abuse, drug abuse, drug dealing, psychiatric disorders, stealing, prostitution, violent behavior, illicit sex, and other anti-social behavior, that some of these employees have been granted security clearances, and that some have quit, been fired, or suspended and had their security clearances revoked while others have been retained on the job with their security clearances intact. The protected activity alleged is that the complainants raised concerns that the work assignments of such employees "pose[d] dangers of environmental releases, spills, accidents and radiation exposures"

* * * *

I find that the complainants' allegations, even if taken as true, merely constitute the assertion of a belief "that the environment may be negatively impacted by the employer's conduct" and are thus too speculative to state a claim of protected activities under the Acts. These allegations rest solely

^{8/} On July 17, 1996, the ALJ issued an order which, among other things, denied the motion of DOE employee Connie Byrum to intervene. On February 4, 1997, the ALJ also issued a separate Order Barring [Complainants'] Attorney Edward A. Slavin from future appearances before her. See R. D. and O. at 10, n.2.

on the questionable assumption that employees with bad records will cause environmental releases, spills, accidents and radiation exposures in the future. . . . The complainants have failed even to allege that the employees referred to caused, or threatened to cause, environmental releases, spills, accidents and radiation exposures in the past. *Thus, these allegations do not constitute the assertion of a reasonable belief that the employees referred to were about to commit violations of the CAA, SDWA, SWDA, and/or CERCLA, and are not grounded in conditions constituting reasonably perceived violations of the Acts.*

* * * *

The only cases where whistleblowing on security clearance violations has been found to be a protected activity were brought under the ERA. Once the TSCA and ERA claims were dismissed [on sovereign immunity grounds], complainants were given the opportunity to come forward with specific claims of protected activities under CAA, SDWA, SWDA, and/or CERCLA, but they have failed to do so. Since the complainant’s allegations, even if taken as true, fail to articulate a connection with a protected activity under these Acts, and the complainants have failed to raise a material issue of fact that a protected activity was involved in these events, the complainants cannot, as a matter of law, establish a prima facie case of a violation of the Acts.

R. D. and O. at 13-15 (emphasis added).

With regard to the claims against Howse-Smith and the DOE Inspector General, the ALJ ruled that Complainants had “failed to allege that the IG is or was their employer” and that they “failed to raise any material issues of fact for hearing that” Howse-Smith was “an employer or employment agency” *Id.* at 12.

In summary, the ALJ concluded “that the claims must be dismissed for multiple reasons, including untimeliness, improper parties, failure to state a claim on which relief can be granted, and/or failure to raise a genuine issue of material fact for a hearing under the cited statutes.” *Id.*

DISCUSSION

We conclude that Complainants’ claims under the ERA and TSCA are barred by sovereign immunity, and that Complainants failed to state a claim upon which relief can be

granted with regard to whether they engaged in activity protected by the CAA, SDWA, SWDA, or CERCLA whistleblower provisions.^{9/}

^{9/} Because we rule that this case should be dismissed because Complainants' activity, as a matter of law, was not protected by the CAA, SDWA, SWDA, and/or CERCLA whistleblower provisions, we do not address the issues of timeliness or whether Howse-Smith and the DOE Inspector General were proper parties.

I. Sovereign Immunity

The ALJ correctly dismissed Complainants' causes of action under the ERA and TSCA on sovereign immunity grounds, relying on the Secretary's decisions in *Teles v. DOE*, Case No. 94-ERA-22, Sec. Fin. Dec. and Ord., Aug. 7, 1995, and *Stephenson v. NASA*, Case No. 94-TSC-5, Sec. Dec. and Ord. of Rem., July 3, 1995.

Any waiver of the government's sovereign immunity must be "unequivocal." *U.S. Dept. of Energy v. Ohio*, 112 S. Ct. 1627, 1633 (1992). Waivers of immunity must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires. *Id.* Thus, in *Teles*, the Secretary dismissed an ERA whistleblower complaint against DOE because the legislative history of the 1992 amendments to the ERA demonstrated an intent to exclude DOE from the definition of "employer" in the whistleblower provision, and the references to the United States as a "person" for purposes of legislation in other chapters of Title 42 of the U.S. Code dealing with energy matters were insufficient to constitute an unequivocal waiver of sovereign immunity under the whistleblower provision. Similarly, in *Stephenson*, the Secretary dismissed a TSCA complaint against NASA because sovereign immunity had not been unequivocally waived except for whistleblower complaints involving lead-based paint.

We see no reason to depart from the Secretary's sovereign immunity holdings in *Teles* and *Stephenson*, and therefore concur with the ALJ's dismissal of the ERA and TSCA claims.^{10/}

II. The Merits

To prevail in a case brought under the environmental whistleblower provisions, the complainants must prove by a preponderance of the evidence that they engaged in activity protected by one or more of those provisions, and that the employer retaliated against them based, at least in part, on their protected activity. *See White v. Osage Tribal Council*, ARB Case No. 96-137, ALJ Case No. 95-SDW-1, ARB Dec. and Ord. of Rem., Aug. 8, 1997, slip op. at 4 and cases cited therein. The ALJ concluded that "[s]ince the complainants' allegations, even if taken as true, fail to articulate a connection with a protected activity under these Acts . . . , the complainants cannot, as a matter of law establish a prima facie case of a violation of the Acts." R. D. and O. at 15. We concur and dismiss for Complainants' failure to state a claim under the CAA, SDWA, SWDA, and/or CERCLA.

It is well settled that protected activities under the environmental whistleblower provisions are limited to those which are grounded in conditions constituting reasonably

^{10/} It is not even certain that Complainants challenge this aspect of the ALJ's decision. Complainants' briefs to the Board do not address sovereign immunity, and their July 15, 1997 letter to the Board simply refers to "this unjust DOE [ERA] exemption from a remedial statute" and urges that "DOE should stipulate [ERA] coverage" because it "should live under the same laws as its contractors." *Id.* at 1-2.

perceived violations of the environmental statutes. *Jones v. EG & G Defense Materials, Inc.*, ARB Case No. 97-129, ALJ Case No. 95-CAA-3, ARB Fin. Dec. and Ord., Sept. 29, 1998, slip op. at 10-12, *appeal pending sub nom. EG & G Defense Materials, Inc. v. U.S. Dept. of Labor*, No. 99-9501 (10th Cir.); *Tyndall v. U.S. Environmental Protection Agency*, Case Nos. 93-CAA-6, 95-CAA-5, ARB Dec. and Rem. Ord., Jun. 14, 1996, slip op. at 5-6; *Crosby v. Hughes Aircraft Co.*, Case No. 85-TSC-2, Sec. Dec. and Ord., Aug. 17, 1993, slip op. at 26, *aff'd sub nom. Crosby v. U.S. Dept. of Labor*, 53 F.3d 338 (9th Cir. 1995) (table); *Johnson v. Old Dominion Security*, Case No. 86-CAA-3, Sec. Fin. Dec. and Ord., May 29, 1991, slip op. at 15; R. D. and O. at 13. An employee's belief that the environment may be negatively impacted by the employer's conduct is not *by itself* sufficient to establish protected activity; the issues raised by the employee must be within the scope of the environmental statutes and regulations. *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Jan. 25, 1995, Sec. Dec. and Rem. Ord., slip op. at 4, 8; *Crosby v. Hughes Aircraft*, Sec. Dec. and Ord., Aug. 17, 1993, slip op. at 26; R. D. and O. at 13. Thus, in order to have stated a valid claim under the environmental whistleblower provisions at issue here, Complainants were required to demonstrate that the concerns they expressed regarding the security clearance operation were "grounded in conditions" that reasonably could be concluded to relate to the CAA, SDWA, SWDA, or CERCLA.

Complainants argue that the federal security clearance requirements and procedures for DOE employees and applicants set forth at 10 C.F.R. Part 710 (1998) were improperly implemented and enforced, and that such improper enforcement could result in environmental damage in violation of the CAA, SDWA, SWDA, or CERCLA.

Part 710 of Title 10 of the Code of Federal Regulations, captioned "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material," is issued pursuant to the Atomic Energy Act of 1954. *See* 10 C.F.R. §§710.1(a), 710.3 and 710.52(a). Employee concerns about alleged violations of the Atomic Energy Act are specifically protected by the ERA at 42 U.S.C. §5851(a)(1).^{11/} In contrast to the ERA^{12/} and the Atomic Energy Act and their implementing regulations, however, nothing in the CAA, SDWA, SWDA, or CERCLA relates to security clearance operations at places of employment. Since Complainants' security concerns are unrelated to potential violations of the CAA, SDWA, SWDA, or CERCLA, their expressed concerns cannot be grounded in reasonably perceived violations of those statutes.

In an effort to avoid this fatal weakness in their argument, Complainants theorize that people who have something questionable in their personal background are, *for that reason*, likely

^{11/} "[I]n 1978, Congress amended both the Atomic Energy Act and the Energy Reorganization Act. Pub. L. 95-601, 92 Stat. 2947. Among those amendments is §210, 42 U.S.C. §5851 (1982 ed.), which . . . encourages employees to report safety violations and provides a mechanism for protecting them against retaliation for doing so." *English v. General Electric Co.*, 496 U.S. 72, 82 (1990).

^{12/} As we have held above, Complainants' cause of action under the ERA must be dismissed on sovereign immunity grounds.

to engage in behavior at work which will endanger the environment. Therefore, Complainants posit, their expressed concern that ORO's security clearance operations allowed such people to work at ORO was protected activity under the CAA, SDWA, SWDA and CERCLA. This is rank speculation of the sort that cannot support a claim of protected activity. As the ALJ noted, Complainants have not asserted that any of the persons allegedly improperly granted security clearances had ever harmed or threatened to harm the environment. *See* R. D. and O. at 14. A claim of retaliation under the environmental whistleblower provisions must rest upon a firmer foundation than was presented here. *See Crosby, Minard, supra.*

For these reasons we conclude that Complainants' expressed concerns about security clearance operations did not constitute activity protected by the CAA, SDWA, SWDA, or CERCLA. *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB Case No. 96-173, ALJ Case No. 95-CAA-0012, Fin. Dec. and Ord., Apr. 8, 1997, slip op. at 4-5, *appeal dismissed sub nom. Kesterson v. Secretary of Labor*, No. 97-3579 (6th Cir. May 6, 1998); *Tucker v. Morrison & Knudson*, ARB Case No. 96-043, ALJ Case No. 94-CER-1, Fin. Dec. and Ord., Feb. 28, 1997, slip op. at 4-6. *Cf. Frederick v. Department of Justice*, 73 F.3d 349, 352-53 (Fed. Cir. 1996) (Whistleblower Protection Act, 5 U.S.C. §2302(b), specifically requires that federal employee have a reasonable belief that he is disclosing a violation of law, rule or regulation; statute enacted to protect employees who report genuine infractions of law, not to encourage employees to report arguably minor and inadvertent miscues occurring in the conscientious carrying out of assigned duties).

III. Additional Issues on Appeal

A. Discovery

In ruling that Complainants' security concerns were not protected activities under the CAA, SDWA, SWDA or CERCLA, we have considered their argument that the ALJ should not have limited discovery to the timeliness issue (*see* R. D. and O. at 3-4, 8, 10) but should have allowed discovery of protected activities through disclosure of the Case Review and Analysis Sheets which Complainants had previously prepared (in the course of their work), and which were in the possession of DOE. Complainants' Rebuttal Brief at 12-13; Complainants' Motion for Summary Reversal and Opening Brief at 2, 9, 13-15.

We agree with the ALJ that "[d]iscovery is unnecessary for complainants to counter the respondents' assertion that they have failed to state a claim with respect to protected activity because necessary facts to do so are within the complainants' own personal knowledge." R. D. and O. at 14. *See also* R. D. and O. at 3-4, 8, 10. Complainants' alleged protected activities involved their criticisms of Oak Ridge's implementation and enforcement of federal personnel security clearance requirements and procedures. As Complainants' First Environmental Protected Activity Summary -- submitted to the ALJ in response to DOE's motion for summary judgment -- makes clear, discovery of the Case Review and Analysis Sheets which Complainants themselves had previously prepared would not have changed the nature of their protected activities claim. Complainants asserted that:

Environmental releases of enormous consequences could result from putting such criminal and questionable employees as those more than 40 persons recounted above to work in nuclear weapons plant positions where they have access to and hegemony over radioactive and toxic materials. This brings this case within the ambit of each of the environmental whistleblower laws.

* * * *

If the Court needs further facts, Complainants require access to their signed case analysis and review sheets . . . to give the Court *further details* on these and other cases. In one year, Ms. Johnson was involved in 700 cases. It is astounding for DOE to expect Complainants to recall all such details without access to their notes in the DOE files.

Complainants' First Environmental Protected Activity Summary at 13, 15 (emphasis added).

Discovery of the Case Review and Analysis Sheets would merely have provided "further details" regarding the employees described in the Summary as well as additional examples of such employees. Discovery would not have changed the speculative basis of Complainants' assertion that they engaged in activity protected by the CAA, SWDA, SDWA, or CERCLA. Accordingly, Complainants were not prejudiced in the presentation of their argument regarding the scope of those environmental statutes. *See Reid v. Secretary of Labor*, 1996 WL 742221, at *2 (6th Cir. 1996) (allegations that Secretary and ALJ committed reversible error in ALJ's refusal to order discovery prior to ruling on jurisdictional underpinnings of case is meritless; facts necessary to determine whether complainant was an employee under whistleblower statutes were in his control at all times); *Freel v. Lockheed Martin Energy Systems*, ARB Case No. 95-110, ALJ Case Nos. 94-ERA-6, 95-CAA-2, Fin. Dec. and Ord., Dec. 4, 1996, slip op. at 9-10 (discovery unnecessary because complainant had personal knowledge of evidence concerning identity of her employer). In sum, the ALJ's limitation on discovery was neither arbitrary nor an abuse of discretion. *Robinson v. Martin Marietta Services, Inc.*, ARB Case No. 96-075, ALJ Case No. 94-TSC-7, ARB Fin. Dec. and Ord., Sept. 23, 1996, slip op. at 4.

B. Request for Protective Order

Joe La Grone, retired Manager of Oak Ridge Operations, requests that the Board issue a protective order continuing the protection afforded by the ALJ's May 18, 1996 Order Granting Non-Party Motion for Protective Order, which limited the use of La Grone's October 30, 1995 videotape deposition (also taken by stenographic means) to the instant proceeding unless the ALJ ruled otherwise. The ALJ's protective order expired by its terms upon our assumption of

jurisdiction. *Id.* at 2. The ALJ's order was predicated on an agreement between counsel for La Grone and Complainants so that the videotaping could proceed although La Grone had not received proper notice of the taping or its purpose prior to his arrival at the deposition. La Grone Dep., Vol. I, at 4-8.

Complainants' counsel opposes a new protective order. He argues that La Grone's motion is a *sub rosa* attempt by DOE to preclude use of the videotapes in proceedings before the Equal Employment Opportunity Commission involving complainant McQuade and to interfere with Complainants' First Amendment rights. La Grone denies that DOE influenced his motion to the Board. He states that the only reason he agreed to the videotape deposition was because he was going to be unavailable on the expected ALJ hearing date and Complainants' counsel agreed to limits on its use. (We do not know whether McQuade's EEOC matter remains pending at this time.)

We decline to issue a new protective order limiting the use of the videotape deposition to the instant proceeding and barring its disclosure "to any other person or entity unless the Court and/or Administrative Review Board rules otherwise" (La Grone's proposed order). La Grone has not shown that issuance of such an order is required by justice under 29 C.F.R. §18.15(a), particularly since he does not oppose dissemination of the transcribed version of the identical deposition and is not subject to further burden or embarrassment because the videotape deposition has already been taken. We believe that the interests of justice are best served by not restricting use of the videotapes. *Holden v. Gulf States Utilities*, Case No. 92-ERA-44, Sec. Dec. and Rem. Ord., Apr. 14, 1995, slip op. at 7-9.

C. Requests to Supplement Record

Complainants' counsel submitted several documents to the Board during the briefing period and subsequent thereto, seeking to have them considered. These materials include a March, 1997 report of the U.S. General Accounting Office entitled "Nuclear Employee Safety Concerns--Allegation System Offers Better Protection, but Important Issues Remain"; a February 21, 1990 DOE memorandum captioned "Visit of the House Energy and Commerce Committee/Oversight and Investigations Subcommittee staff to Oak Ridge, February 14-16, 1990," involving ORO Personnel Security Branch employee complaints that a number of their security clearance recommendations were overturned; a July 31, 1991 letter to the Secretary of Energy from John D. Dingell, Chairman of the House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, involving McQuade; an April, 1996 Energy Department report entitled "Independent Oversight Baseline Assessment of the Effectiveness of Safety and Security Management Programs within the Department of Energy"; July 2, 1997 *Knoxville News-Sentinel* and October 22, 1997 *Associated Press* and *USA Today* articles concerning security problems at DOE facilities; a May 18, 1998 *Knoxville News-Sentinel* article reporting a deposition by former DOE Secretary Hazel O'Leary involving a lawsuit brought by an Oak Ridge employee (not one of the complainants in this case); April 1 and May

13, 1998 *Knoxville News-Sentinel* articles involving purported harassment against Oak Ridge nuclear couriers; an article by Nahum Litt, "Doing It with Mirrors: The Illusion of Independence of Federal Administrative Law Judges" *ABA Judges' Journal* 27 (Spring 1997); and an article by Leonard W. Shroeter, "Human Experimentation, the Hanford Nuclear Site, and Judgement at Nuremberg," 31 *Gonzaga L. Rev.* 147 (1997). None of these materials is relevant to the issue before us on appeal, *i.e.*, whether Complainants have stated a claim under the CAA, SDWA, SWDA or CERCLA. We therefore decline to reopen the record to admit these post-hearing documentary submissions.

In addition, on May 22, 1998, Complainants' lead counsel submitted to this Board the autopsy report on the presiding ALJ, who died several months after issuing the R. D. and O. The autopsy report ostensibly was submitted to demonstrate that the ALJ was in some way unbalanced, and that her rulings therefore were tainted.

An administrative law judge's decisions stand or fall on their merits. We have reviewed the record in this case, and find nothing improper in any of the rulings of the presiding ALJ. Indeed, it is clear that the ALJ went to extraordinary lengths to be fair and objective to Complainants, notwithstanding the difficult behavior of their counsel.

Attorneys have a professional obligation to demonstrate respect for the courts. *See ABA Model Rules of Professional Conduct* Rules 3.5 and 8.2 (1999); 29 C.F.R. §18.36. It is clear to us - as it no doubt was clear to counsel - that the autopsy report is completely irrelevant to the merits of Complainants' challenge to the ALJ's rulings. To the extent that the report is offered by counsel in an effort to sully the reputation of the ALJ posthumously, such a personal attack is contemptible. The May 22, 1998 letter and autopsy report are excluded from the record in this case.

CONCLUSION

Sovereign immunity protects DOE from suit under the whistleblower provisions of the ERA and TSCA. Complainants Virginia Johnson, Kenneth W. Warden, and Dennis McQuade

have failed to establish, as a matter of law, that their alleged activities were protected under the CAA, SDWA, SWDA, or CERCLA. Therefore, Complainants failed to state a claim upon which relief can be granted, and the complaints are **DISMISSED**.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member