



In the Matter of:

HARRY L. WILLIAMS,

ARB CASE NO. 98-059

COMPLAINANT,

(ALJ CASE NO. 95-CAA-10)

v.

DATE: January 31, 2001

**LOCKHEED MARTIN ENERGY SYSTEMS, INC.,
MARTIN MARIETTA CORPORATION, and
MARTIN MARIETTA TECHNOLOGIES, INC.,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Edward A. Slavin, Jr., Esq., *Deerfield Beach, Florida*

Lori A. Tetreault, Esq., *Lawrence, Mutch & Tetreault, P.A., Gainesville, Florida*

For the Respondent:

Charles W. Van Beke, Esq., *Wagner, Myers & Sanger, Knoxville, Tennessee*

Patricia L. McNutt, Esq., *Lockheed Martin Energy Systems, Oak Ridge, Tennessee*

FINAL DECISION AND ORDER

This case arises under the employee protection (“whistleblower”) provisions of the Clean Air Act (CAA), 42 U.S.C. §7622 (1994), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9610 (1994), the Toxic Substances Control Act (TSCA), 15 U.S.C. §2622 (1994), the Solid Waste Disposal Act (SWDA), 42 U.S.C. §6971 (1994) (collectively referred to as the “Environmental Acts”), and the Energy Reorganization Act (ERA), as amended, 42 U.S.C. §5851 (1994).

On August 2, 1994, Complainant Harry L. Williams (Williams) filed a complaint with the Employment Standards Administration, Wage and Hour Division, alleging that Martin Marietta Energy Systems, Inc.; Martin Marietta Corporation; Martin Marietta Technologies, Inc.; Union Carbide Corporation - Nuclear Division (Union Carbide); the Y-12 Nuclear Weapons Plant and the K-25 Plant (“the Oak Ridge facilities”); Sam Thompson; Lorry Ruth; Oak Ridge

Operations Office; and the United States Department of Energy (DOE) retaliated against him for engaging in activity protected by the Environmental Acts and the ERA.^{1/} Williams, who had been employed at the Oak Ridge facilities since 1976, alleged that since 1982 Respondents had subjected him to “retaliation, [a] hostile working environment and constructive discharge” for engaging in protected activity involving “his expression of good faith concerns” regarding safety and environmental issues.^{2/} Williams alleged that Respondents:

- subjected him to false charges of sexual harassment, copyright violations and gun alterations;
- gave him materially false information about toxic materials and radiation hazards, failed to provide adequate health and information services, and made the false assertion that there was nothing harmful to his health at the K-25 Plant;
- intimidated him during a 1992 DOE-sponsored audit;
- threatened to remove his security clearance;
- eavesdropped on Williams’ personal conversation with a fellow employee;
- failed to place a letter from Williams’ doctor in Williams’ medical file;
- separated him from working with his “mentee,” Joey Roop;
- refused to transfer him to a safe working environment;
- removed him from training responsibilities and demoted him;
- subjected him to a hostile working environment;

^{1/} There are three U. S. government-owned nuclear facilities in Oak Ridge, Tennessee: the K-25 Plant; the Y-12 Nuclear Weapons Plant; and the Oak Ridge National Laboratory. Union Carbide operated the Oak Ridge facilities under contract with DOE until 1984. On April 1, 1984, Martin Marietta Energy Systems (MMES), a division of Martin Marietta Corporation, replaced Union Carbide as the government contractor at the three facilities. In 1996, MMES became a wholly owned subsidiary of Lockheed Martin Corporation, now known as Lockheed Martin Energy Systems (LMES).

^{2/} As Williams was employed by LMES at the time the complaint was filed, it is unclear what the constructive discharge allegation refers to.

- refused to reasonably accommodate his heart and diabetes conditions;
- removed him from supervising the K-25 training program;
- refused to let him see his 1991 performance evaluation for 18 months; and
- spread disinformation, including blacklisting in the form of defamatory and coercive negative references.

Interspersed throughout the complaint were myriad other alleged adverse actions, including “possible fraud and plagiarism”; “false imputation of protected activity”; “Life, Safety Risks to Security Personnel from Live Ammunition in Rounds Used for Training Exercises”; and “theft of weapons.”

The Wage and Hour Division conducted an investigation and on February 24, 1995, issued a letter dismissing the complaint. Williams appealed the dismissal to an Administrative Law Judge (ALJ) pursuant to 29 C.F.R. §24.4(d)(3) (1994). Respondents filed various motions to dismiss. DOE sought dismissal on jurisdictional grounds because: 1) sovereign immunity had not been waived by the federal government under either the ERA or TSCA; 2) DOE was not a covered employer under the remaining environmental whistleblower laws because there was no employment relationship between DOE and Williams; and 3) the complaint had failed to allege any activity by DOE that constituted unlawful discriminatory conduct against Williams. DOE attached to its motion the contract between DOE and LMES and an affidavit of the Director of the Personnel Division of DOE’s Oak Ridge Operations. Williams opposed DOE’s motion, arguing that DOE and LMES were “joint employers.” However, Williams did not support this assertion with affidavits or documentary evidence. LMES, on behalf of itself, Martin Marietta Corporation, Martin Marietta Technologies, the Y-12 Plant, the K-25 Plant, and LMES employees Sam Thompson and Lorry Ruth, filed a motion to dismiss on the grounds that the complaint failed to allege sufficient facts to establish a *prima facie* case, and was barred by the applicable statutes of limitations.^{3/}

The ALJ granted DOE’s motion to dismiss the ERA and TSCA claims on sovereign immunity grounds, and dismissed the other claims against DOE because Williams failed to allege “any facts in his complaint which would support a finding that [LMES] and DOE are joint employers or that complainant is an employee of DOE.” August 2, 1995 Order at 9.

^{3/} In addition, Union Carbide sought dismissal as a respondent on the grounds that Williams had failed to state any cognizable claims against it because its contract with DOE for the operation of the Oak Ridge facility ceased March 31, 1984, before any of the violations alleged by Williams took place. The ALJ granted Union Carbide’s motion. Williams does not challenge the ALJ’s dismissal of Union Carbide on appeal.

In another order, the ALJ granted in part and denied in part LMES' motion to dismiss. August 8, 1995 Order. The ALJ dismissed Williams' claims against LMES employees Thompson and Ruth on the grounds that they were not employers of Williams, and thus not subject to suit under the whistleblower protection laws.^{4/} *Id.* at 3-4. The ALJ further held that Williams failed to state a cognizable claim against either the Y-12 Plant or the K-25 Plant because neither constituted a legal entity subject to suit under the Environmental Acts.^{5/} *Id.* at 5. The ALJ denied LMES' motion to dismiss with respect to the claims against all other Respondents, concluding that the complaint sufficiently alleged a *prima facie* case against them, and that the claims, at least as alleged, were not time-barred. *Id.* at 7-8.

On February 16, 1996, LMES filed a Motion for Summary Decision, arguing that there were no genuine issues of material fact, and that Respondents were entitled to judgment as a matter of law. LMES supported its motion with numerous affidavits and Williams' deposition.

From February through September 1996, Williams requested and was granted several extensions of time in which to reply to LMES' Motion for Summary Decision. On September 23, 1996, the ALJ ordered Williams to respond by December 1, 1996. No response was filed by the December deadline; nor did Williams file a response during the ensuing ten-month period. Finally, on September 30, 1997, the ALJ issued an order allowing Williams twenty-five additional days to respond. Williams failed to file a response to Respondents' motion within the time allotted. Williams' only response to the motion to dismiss came on December 22, 1997, in the form of a letter in which Williams cited the allegations in his sworn complaint in support of his contention that there were material facts in dispute.

On January 6, 1998, the ALJ issued a Recommended Decision and Order granting LMES' Motion for Summary Decision. The ALJ held that all but four of the adverse actions alleged by Williams to have been taken by Respondents were barred by the applicable statutes of limitations of the Environmental Acts and the ERA, rejecting Williams' argument that the limitations periods were equitably tolled. The ALJ found that the following alleged adverse actions occurred within the limitations periods:

- LMES managers allegedly eavesdropped on a phone conversation between Williams and a fellow employee;
- LMES management notified Williams that his security clearance was being changed from a "Q" to an "L" level;

^{4/} On appeal, Williams does not challenge the dismissal of the claims against Thompson and Ruth.

^{5/} Williams does not challenge this holding on appeal.

- LMES failed properly to file a letter from Williams’ physician indicating that his relationship with his supervisor was causing him stress; and
- LMES separated Williams from his “mentee” by transferring Williams (thereby allegedly undermining a “successful team”).

RD&O at 5-7. The ALJ determined that there were no material facts in dispute with regard to these four alleged actions and that Respondents were entitled to a decision as a matter of law. The ALJ held:

- Based upon uncontested affidavits the alleged eavesdropping did not occur (*Id.* at 6-7);
- Uncontested affidavits demonstrated that LMES managers erroneously proposed to change Williams’ security clearance; when their mistake was pointed out by Williams, LMES immediately reversed course and never changed the clearance level (*Id.* at 7-9);
- LMES’ failure to place the letter in Williams’ medical file did not constitute adverse action (*Id.* at 9-10);
- Williams’ “separation from his friend was not an adverse action . . . but was made to accommodate Complainant’s request for transfer and for legitimate business reasons” *Id.* at 10.

The ALJ also rejected Williams’ arguments that the alleged adverse actions constituted a continuing violation of the ERA and Environmental Acts, as well as Williams’ claim that Respondents had subjected him to a hostile work environment. *Id.* at 10-11. The ALJ therefore recommended that the case be dismissed. *Id.* at 11.

Williams filed a timely appeal to this Board pursuant to 29 C.F.R. §24.8 (1998). We have jurisdiction pursuant to the ERA, the Environmental Acts, and 29 C.F.R. §24.8 (2000). We review the ALJ’s recommended summary decision order *de novo*, and our review is governed by the same standard used by the ALJ. *See Harris v. General Motors Corp.*, 201 F.3d 800, 802 (6th Cir. 2000).

DISCUSSION

Williams claims on appeal that the ALJ improperly dismissed DOE as a party; failed to allow Williams to conduct what Williams characterizes as “full discovery”; erroneously refused to equitably toll the limitations periods; and erroneously granted summary decision with regard

to the four actions which allegedly occurred within the limitations periods, and with regard to Williams' hostile work environment and continuing violation allegations.^{6/} Williams also urges the Board to reverse the RD&O based upon additional information submitted by Williams to the Board.

We affirm the ALJ's orders and the RD&O and attach the RD&O to this decision. We address briefly four issues Williams raises before us.

First, Williams argues that although the "ALJ correctly held that Mr. Williams was entitled to discovery of every document bearing [Williams'] name and coverage of all issues, even those that might appear 'technical' . . .," ultimately the ALJ did not require production of all documents bearing Williams' name. Complainant's Opening Brief at 4-5. Williams mischaracterizes the ALJ's discovery order. Although the ALJ noted that Williams' request for all electronic mail mentioning his name was "not overly broad," he found that discovery of such scope would be burdensome and limited production of documents from certain electronic mail systems to those which related to Williams' complaint. Order, July 10, 1996, at 2, 3, and 9-10. Especially in light of Williams' lengthy employment with LMES and its predecessors it was appropriate for the ALJ to limit discovery in this fashion; the ALJ's order was neither arbitrary nor an abuse of discretion. *See Freels v. Lockheed Martin Energy Systems, Inc.*, ARB Case No. 95-110, ALJ Case No. 95-CAA-2 (Dec. 4, 1996). Williams also argues that it was error for the ALJ to refuse to order DOE to comply with his Freedom of Information Act (FOIA) request. Opening Brief at 4. However, as the ALJ correctly ruled, the Department of Labor does not have jurisdiction to rule on DOE FOIA matters.

Second, in an effort to supplement the evidentiary record on appeal, Williams attached to his Opening Brief a personal "Declaration." Subsequently, Williams submitted to the Board a neuropsychological evaluation of himself, and four documents (including a newspaper article) which he claims relate to the existence of material facts precluding summary judgment.^{7/} When considering a motion to reopen the record to admit new evidence, the Board ordinarily relies upon the same standard found in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18, which provides:

Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.

^{6/} Williams also contends that the ALJ accorded him insufficient time to respond to LMES' Motion for Summary Decision.

^{7/} Among the documents provided with Williams' submissions is what Williams characterizes as "the May 31, 1994 proposed Staff reorganization, which showed me as a Senior Training Analyst, *e.g.*, a demotion from Training Commander. This was a proposed demotion publicly distributed, and is another adverse action not discussed by the ALJ." Declaration of Harry L Williams, ¶6.

29 C.F.R. §18.54(c). See e.g., *Duncan v. Sacramento Metro. Air Qual. Mgt. Dist.*, ARB Case No. 99-011, ALJ Case No. 97-CAA-12, Order, June 13, 2000. William has failed to meet this standard. Accordingly, we deny Williams' request to supplement the record.

Third, Williams' argument that he was not given sufficient time to respond to the Motion for Summary Decision is ludicrous. LMES filed its supported motion in February 1996. After having failed to comply with numerous extensions of time, Williams finally submitted a two-page letter labeled a "Partial Response" on December 22, 1997, which the ALJ admitted into the record. Williams has advanced no plausible explanation why a period of almost two years was not sufficient to respond to LMES' motion.

Fourth, Williams asserts that the ALJ erred in dismissing Williams' claims against DOE. As Member Brown in his Concurring and Dissenting Opinion, *infra*, agrees with Williams on this issue, we discuss it in some detail.^{8/}

Before the ALJ, DOE filed a motion to dismiss the complaint on the grounds that DOE and Williams did not have an employer-employee relationship as required under the Environmental Acts, and Williams did not allege any activity by DOE which constituted discriminatory conduct under the relevant statutes.^{9/} DOE supported that motion with an affidavit of Patricia Howse-Smith, Director of the DOE Personnel Division for Oak Ridge Operations, and with a copy of the DOE-LMES contract for the operation of the Oak Ridge facilities. Williams filed a brief in response. However, Williams did not support his argument with affidavits or documentary evidence. August 2, 1995 Order at 8.

The ALJ treated DOE's motion as a "factual" 12(b)(1) motion. *Id.* at 6. See Rule 12(b)(1), Fed.R.Civ.P., 29 C.F.R. §18.1(a)(1994). The ALJ noted that:

^{8/} Our colleague also criticizes the ALJ's order dismissing the individual Respondents, LMES employees Thompson and Ruth. However, as LMES pointed out in n.2 of its brief, and as we note at n.3, *supra*, Williams has not challenged that ruling on appeal. It is a basic tenet of appellate practice and procedure that the reviewing court will not address rulings of the trial judge that the parties do not challenge on appeal. The Supreme Court has made the point repeatedly. See *United Parcel v. Mitchell*, 451 U.S. 56, 61 n.2, 101 S.Ct. 1559, 1563 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 532, n.13, 99 S.Ct. 1861, 1870 n.13 (1979); *Knetch v. United States*, 364 U.S. 361, 370, 81 S.Ct. 132 (1960). To some extent this reflects the fact that Article III courts have jurisdiction only over cases and controversies, a limitation that does not apply to non-Article III administrative adjudicators. To that extent, the rule of appellate restraint does not apply to us, as we may issue advisory opinions.

However, this rule of appellate restraint also serves important fairness considerations. The reviewing court should not, out of its interest in an issue, deprive the parties of the ability to control what or how much they place at risk of reversal. Exceptions to the rule should be made only for extraordinarily important issues, such as jurisdiction or the validity of the law on which the appeal depends. Cf. e.g., *United States Nat'l Bank of Oregon v. Independent Insurance ts of America, Inc.* 508 U.S. 439, 444-447, 113 S.Ct. 2173, 2177-2179 (1993) ("After giving the parties ample opportunity to address the issue, the Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation as to a question of law" - the question being whether the law had been repealed).

^{9/} DOE also moved to dismiss the ERA and TSCA claims on sovereign immunity grounds. The ALJ granted that aspect of DOE's motions, and Williams does not challenge that ruling on appeal.

Where the party seeking dismissal on grounds of lack of subject matter jurisdiction makes a factual attack and presents the trier of fact with affidavits or documents, the burden placed upon the party defending jurisdiction is not an onerous one as the complainant is required only to “demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss.” . . . Moreover, the trier of fact must consider facts in [the] light most favorable to the plaintiff The Secretary has held that a party defending a motion to dismiss that is supported with documents or affidavits cannot “rest upon the mere allegations or denials” of the pleadings.

August 2, 1995 Order at 7. The ALJ dismissed the complaint against DOE, relying upon the Howes-Smith affidavit, the DOE-LMES contract,^{10/} and the fact that Williams did not support his argument:

DOE has introduced the declaration of Ms. Patricia Howse-Smith Howse-Smith stated that DOE does not manage, supervise, or control complainant while he works at the Oak Ridge facilities. Howse-Smith declared that DOE does not provide complainant with compensation or employee benefits. She also stated that DOE does not have the authority to terminate complainant’s employment. Howse-Smith emphasized that complainant is employed by [LMES].

* * * *

Complainant filed an extensive brief arguing that the DOL has jurisdiction over this case because the DOE and [LMES] are “joint employers.” Complainant however does not support his argument with any affidavits or documentary evidence. Moreover, complainant does not allege any facts in his complaint which would support a finding that [LMES] and DOE are joint employers

^{10/} The ALJ excerpted the following paragraph from the contract, which Member Brown fails to cite in his lengthy footnote (Concurring and Dissenting Opinion at n.4) quoting provisions of the contract:

Persons employed by the Contractor shall be and remain employees of the Contractor, and shall not be deemed employees of DOE or the Government; provided, that nothing herein shall require the establishment of an employer employee relationship between the Contractor and consultants and others whose services are utilized by the contractor for the work hereunder.

August 2, 1995 Order at 7-8, *quoting* DOE-LMES contract at Paragraph (b)(3)(iii).

or that complainant is an employee of DOE. DOE has clearly shown that it does not employ complainant; DOE only executed a contract with [LMES] to operate the Oak Ridge facilities site, and this alone does not establish an employee-employer relationship between the DOE and an employee of [LMES].

Id. at 8.

We affirm the ALJ's holding that Williams failed to support his claim that DOE was his "joint employer," and expressly disavow the opinion of Member Brown. As an initial matter, we note that our colleague has misapprehended the ALJ's Order as well as our decision when he states that the Majority is affirming the "ALJ's ruling that the Department of Energy is not a covered employer subject to liability under the Environmental Acts herein at issue" Neither the ALJ nor the majority of this Board have done any such thing. Any such holding would be directly contrary to our recent decision in *Stephenson v. NASA*, ARB Case No. 98-025, ALJ Case No. 94-TSC-5 (July 18, 2000). In *Stephenson* we cited with approval^{11/} previous *Stephenson* decisions of the Board which had discussed the issue whether an employer may be held liable for actions it has taken against a person who is not its common law employee:

[T]he relevant question . . . is "whether [Stephenson] is protected under the CAA against retaliation by an entity which, *albeit not her direct or immediate employer, is nonetheless a covered employer.*" . . .

Without deciding the exact breadth appropriately accorded [the statutory terms "employer" and "employee"], we do conclude that, in a hierarchical employment context, an employer that *acts* in the capacity of employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that that employer does not directly compensate or immediately supervise the employee The issue of employment relationship necessarily depends on "the specific facts and circumstances" of the particular case, however.

* * * *

^{11/} Because we ultimately determined that Stephenson had not engaged in protected activity, we were not required to reach the question whether, under the facts and circumstances of that case, NASA sufficiently controlled or interfered with her employment with Martin Marietta Corp. to be held liable under the CAA. *Stephenson, supra*, slip op. at 13.

In response to NASA's subsequent petition for reconsideration, we reemphasized our holding. Noting that an "employment relationship" is essential to the complaint, we stressed that such a relationship usually exists "between the complainant and the immediate employer. *In appropriate circumstances, however, protection may extend beyond the immediate employer. . . .* The underlying question . . . is . . . : did NASA *act* as an employer with regard to the Complainant[], whether by exercising control over production of the work product or by establishing, modifying or interfering with the terms, conditions or privileges of employment?"

Stephenson, supra, slip op. at 11, citations omitted.^{12/}

In reaching his conclusion that Williams' claims against DOE should not have been dismissed, Member Brown relies entirely upon the terms of the DOE-LMES contract.^{13/} He concludes that:

While LMES is charged under the contract with management, operation and maintenance of the Oak Ridge facilities and operations, LMES' authority is throughout the contract subject to DOE's overriding authority and control. This contract language

^{12/} Our colleague apparently misapprehends this discussion in *Stephenson* when he offers this characterization:

While declining in *Stephenson* to decide the exact breadth of the CAA's employee protection provision, the Board nevertheless did hold that in a hierarchical employment context, such as that involving a parent company or a contracting agency, the company or agency will be considered to act in the capacity of a covered employer with regard to the complainant if it is established that the company/agency either "exercis[ed] control over production of the work product" or that it established modified or interfered with the terms, conditions or privileges of employment. . . ."

Concurrence and Dissenting Opinion at 16-17 (underlining added). The fact that a federal agency such as DOE retains some authority to exercise control over a contractor's work product, and reserves other rights to regulate the conduct of workers at government-owned facilities, does not mean *per se* that the federal agency becomes a joint employer with its contractors. The question whether a federal agency actually has "acted" in the capacity of an "employer" with regard to a contractor's employees must be an individualized, fact-specific inquiry addressed on a case-by-case basis; liability (or even potential liability) cannot be imputed merely from the language of procurement contracts.

^{13/} Indeed, there is nothing else one could rely upon, as the ALJ made abundantly clear. August 2, 1995 Order, slip op. at 7-8.

clearly brings DOE within the scope of employer coverage under the CAA in the instant case. Indeed, to rule otherwise would permit DOE to exploit without challenge circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer.

Concurring and Dissenting Opinion at 18-19 (footnote omitted). Although he does not explicitly say so, Member Brown appears to believe that the contract in and of itself is sufficient to establish that there exists a "joint employer" relationship between DOE and LMES. This is preposterous.

As Lindemann and Grossman explain, the "joint employer" theory --

is used to obtain jurisdiction over a company that is unrelated to the employer-in-fact but which exercises sufficient day-to-day control over a [complainant's] work to be treated as a co-employer of the [complainant]. Factors that may result in joint employer status include control over the hiring, discipline, or discharge of employees; control over the work schedules and work assignments of such employees; and the obligation to train or to pay such employees.

* * * *

Allegations that a company is a joint employer most often arise in situations where the [complainant] works for an independent contractor commissioned to perform certain work for the alleged joint employer, and the [complainant] claims that the alleged joint employer caused the discrimination.

B. Lindemann & P. Grossman, *Employment Discrimination Law*, Ch. 30 at 1312 (3d ed. 1996) (Lindemann & Grossman) (footnotes omitted).^{14/} See, e.g., *Lambertsen v. Utah Dep't of Corrections*, 922 F. Supp. 533 (D. Utah 1995) (Department of Corrections not joint employer of school teacher in prison school where school district alone hired and could fire her, paid her salary and benefits, and established work hours), *aff'd*, 79 F.3d 1024 (10th Cir. 1996); *Astrowsky*

^{14/} In their 1998 Supplement, Lindemann & Grossman state:

In general, courts look to three factors in assessing whether a joint employer relationship exists; authority to hire and fire the employee, promulgate work rules and assignments, and set conditions of employment; day-to-day supervision, including discipline; and control of employee records, including payroll and taxes.

Lindemann & Grossman, 1998 Supplement, Ch. 30 at 432.

v. First Portland Mortgage Corp., 881 F.Supp 332 (D. Me. 1995) (employee leasing agency that managed commissions and tax withholding of leased employee but exercised no other control over employee not joint employer). Application of the law on the “joint employer” issue must lead to the conclusion that a contract such as that between DOE and LMES cannot, **without more**, establish a joint employer relationship. In this case there is nothing more to support the existence of such a relationship, and as the ALJ held, there are quite a few uncontradicted facts which support the opposite conclusion. DOE does not:

- employ Williams, or have a contract with him;
- manage or supervise Williams, or his work;
- have any right to assign work to Williams;
- pay Williams or pay his benefits;
- withhold taxes on Williams’ behalf;
- evaluate Williams performance; or
- have the authority to terminate Williams.

In sum, the uncontested facts show that DOE did not “act as an employer with regard to complainant[].” *Stephenson, supra*. Under these circumstances the ALJ correctly dismissed Williams’ claims against DOE.

CONCLUSION

For the foregoing reasons we **AFFIRM** the ALJ’s orders of August 2 and 8, 1995, and the RD&O and **DISMISS** this case.

SO ORDERED.

CYNTHIA L. ATTWOOD
Member

Paul Greenberg, Chair, concurring:

I agree fully with the opinion of Member Attwood and its conclusion that this complaint must be dismissed because Williams did not meet the basic threshold evidentiary requirements of a whistleblower case. I also agree with Member Attwood's comments regarding the separate concurrence/dissent of our colleague, Member Brown. I write separately to add an additional note regarding Williams' litigation of his case and to emphasize the authority of administrative law judges to regulate the conduct of litigants and their attorneys.

As the ALJ noted in his recommended decision (slip op. at 2), Lockheed Martin Energy Systems filed its Motion for Summary Decision in this case on February 16, 1996. Between February and September 1996, Williams requested and was granted six extensions of time for filing an opposition to the Motion. No response was filed by the final December 1996 deadline. In September 1997 – fully ten months later – the ALJ issued an Order to Williams allowing him 25 additional days to file an opposition. Although Williams had known of the Motion for Summary Decision for more than 18 months, he failed to produce any response even within the extended time frame granted by the ALJ. Belatedly, Williams produced only a partial response. Even then, the partial response was ineffectual.

As a general proposition, an administrative law judge has broad latitude in regulating the conduct of a trial, 29 C.F.R. §18.29 (2000), and will be reversed by this Board only for errors in discretion. *Robinson v. Martin Marietta Servs., Inc.*, ARB No. 96-075, ALJ No. 94-TSC-7 (ARB Sept. 23, 1996). *Cf. Khandelwal v. Southern California Edison*, ARB No. 98-159, ALJ No. 97-ERA-6 (ARB Nov. 30, 2000). In this case, the ALJ was extraordinarily generous to Williams, repeatedly extending the time limit for filing a response to Lockheed Martin's dispositive pleading – even to the point of giving Williams “one last chance” to submit a response almost a year after Williams had missed the December 1996 filing deadline. While such patience by a trial court may be commendable, it is not required. Williams' repeated failure to file pleadings could be viewed as a failure to prosecute his claim. As we have noted previously,

Courts possess the "inherent power" to dismiss a case for lack of prosecution. *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962). This power is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* at 630-31. *Accord Tri-Gem's Builders, Inc.*, ARB Case No. 99-117, Order of Dismissal (Feb. 25, 2000). Like courts, this Board necessarily must manage its docket in an effort to “achieve the orderly and expeditious disposition of cases.” Thus, given [Complainant's] unexplained failure to submit a brief, notwithstanding the Board's every effort to allow him sufficient time to do so, we find that he has failed to prosecute his petition for review . . . [and dismiss it].

Mastrianna v. Northeast Utilities Corp., ARB No. 99-012, ALJ No. 98-ERA-33 (ARB Sept. 13, 2000). *Accord, Curley v. Grand Rapids Iron & Metal Co.*, ARB No. 00-013, ALJ No. 99-STA-39 (ARB Feb. 9, 1999). Just as this Board has the authority and obligation to manage its docket, so too do the Labor Department's administrative law judges. Under the facts before us, the ALJ would have been fully justified to dismiss this case as early as December 1996 for lack of prosecution.

PAUL GREENBERG

Chair

E. Cooper Brown, Member, concurring in part and dissenting in part:

I concur in that part of the Majority's opinion affirming the ALJ's Recommended Decision and Order barring Complainant's complaint pursuant to the applicable statutes of limitations. I dissent from the Majority's affirmation of ALJ's ruling that the Department of Energy (DOE) is not a covered employer subject to liability under the environmental acts herein at issue, and the determination that the individual Respondents are not liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Solid Waste Disposal Act (SWDA). While resolution of the statute of limitations issue in Respondents' favor is determinative of this case, I nevertheless address whether the DOE and the individual Respondents should have been held liable because of the significance of these issues to the cases that come before the Board under the environmental whistleblower protection laws.

The ALJ dismissed Williams' claims against the DOE under the Energy Reorganization Act (ERA) and the Toxic Substances Control Act (TSCA) because under neither of these acts has Congress waived the government's sovereign immunity. Decision & Order Granting Respondent Department of Energy's Motion to Dismiss, slip op. at 4-5 (Aug. 2, 1995). Relying upon *Reid v. Methodist Medical Center of Oak Ridge*, 93-CAA-4 (Sec'y, April 13, 1995), and *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318, 112 S.Ct. 1344 (1992), the ALJ dismissed Williams' claims against DOE under the remaining environmental whistleblower acts (the Clean Air Act (CAA), SWDA and CERCLA) because no employer-employee relationship between DOE and Complainant was found to exist. *Id.* at 5-6.

Relying upon *Stephenson v. NASA*, 94-TSC-5 (Sec'y, July 3, 1995), the ALJ also dismissed Williams' claims against individual Respondents Sam Thompson and Lorry Ruth on the grounds that they were not employers of Complainant and thus not subject to suit under the various whistleblower protection laws cited as the jurisdictional basis for Williams' complaint. Order Granting in Part and Denying in Part Respondent Lockheed Martin Energy Systems' Motion to Dismiss, slip op. at 4 (Aug. 8, 1995).

The ALJ correctly dismissed Complainant's ERA and TSCA causes of action against DOE on sovereign immunity grounds. *See, e.g., Johnson v. Oak Ridge Operations Office*, ALJ Case Nos. 95-CAA-20, 21 & 22, ARB Case No. 97-057 (Sept. 30, 1999); *Teles v. Department*

of Energy, 94-ERA-22 (Sec’y, Aug. 7, 1995). However, with respect to Williams’ CAA, CERCLA and SWDA claims, the ALJ misapplied the test for what constitutes a common law employee, enunciated by the Supreme Court in *Nationwide Mutual Insurance v. Darden*, *supra*, to the question of whether DOE had been properly named as a respondent under these acts. *Coupar v. U. S. Department of Labor*, 105 F.3d 1263, 1266-67 (9th Cir. 1997).^{1/}

The whistleblower protection provision of the CAA prohibits any “employer” from “discharg[ing] any employee or otherwise discriminat[ing] against any employee” who has engaged in protected activity. 42 U.S.C. §7622(a) (1994). As this Board has recently emphasized, this language does not limit liability under the CAA whistleblower provision solely to the direct or immediate employer of a complaining employee. “[T]here need not be a direct employer-employee relationship in order for there to be liability under the CAA employee protection provision” *Stephenson v. NASA*, ALJ Case No. 94-TSC-5, ARB Case No. 98-025, slip op. at 10 (July 18, 2000). Under appropriate circumstances, “an employer who is not an employee's common law employer may nevertheless be held liable for retaliation under the CAA employee protection provision.” *Id.*

While declining in *Stephenson* to decide the exact breadth of the CAA’s employee protection provision, the Board nevertheless did hold that in a hierarchical employment context, such as that involving a parent company or a contracting agency, the company or agency will be considered to *act in the capacity of* a covered employer with regard to the complainant if it is established that the company/agency either “exercis[ed] control over production of the work product” or that it “established, modified or interfered with the terms, conditions or privileges of employment” as occurred in *Hill & Ottney v. Tennessee Valley Authority*.^{2/} *Stephenson*, slip op. at 11 (citing the ARB’s prior Orders of February 13, 1997 and April 7, 1997).

In the instant case, Williams’ complaint collectively charged *all Respondents* (thus necessarily including the DOE) with having engaged in various forms of retaliation and the creation of a hostile working environment. See Majority Opinion *supra*, pp. 2-3; Complaint ¶¶ 6, 11-14, 18, 22, 66, 67, 68 and 78. Such allegations are relevant to resolving the question of whether Complainant properly asserted that DOE took cognizable adverse action against him

^{1/} Whether the ALJ treated DOE’s motion as a “factual” Rule 12(b)(1), Fed. R. Civ. Pro., motion is immaterial to the question of whether the ALJ applied the correct legal standard and reached the proper conclusion with regard to the issue of whether DOE is a covered employer under the environmental acts.

^{2/} In *Hill & Ottney v. T.V.A.*, 87-ERA-23 & 24 (Sec’y, May 24, 1989), the Secretary interpreted the similar language of the ERA, 42 U.S.C. §5851(a) (1994), to include the Tennessee Valley Authority as a covered employer despite the fact that it was not the complainants’ immediate employer. Determinative was the control TVA was alleged to have effected over the complainants’ employment through its contractual relationship with the immediate employer, which TVA allegedly terminated in retaliation against the complainants’ protected activities.

with respect to his compensation, terms, conditions, or privileges of employment.^{3/} However, the question of whether the DOE is an *employer* subject to the CAA's whistleblower protection provisions is a matter separate and apart from whether Complainant has satisfactorily alleged that adverse action was taken against him by DOE. *See e.g., DeFord v. Sec. of Labor*, 700 F.2d 281, 286 (6th Cir. 1983) (setting forth the three principal elements of a valid whistleblower discrimination claim that must be established).

To establish that a named party respondent who is not the complainant's immediate, common-law employer is nevertheless a covered "employer" for purposes of liability under the CAA, a successful complainant must establish the existence of a "relevant nexus" between the respondent in question and the complainant's immediate employer.^{4/} *Varnadore v. Oak Ridge National Laboratory*, 92-CAA-2&5, 93-CAA-1, 94-CAA-2&3 and 95-ERA-1, ARB Fin. Con. Ord., slip op. at 35 (ARB, June 14, 1996). As the Board noted in *Stephenson*, whereas this nexus was established in both *Stephenson* and *Hill & Ottney*, "the *Varnadore III* complainant failed to articulate any association between his immediate employer . . . and DOE . . . which resulted in adverse employment action." *Stephenson v. NASA*, ALJ Case No. 94-TSC-5, ARB Case No. 96-080, slip op. at 2-3 (April 7, 1997).^{5/}

Although Williams' complaint fails to allege that necessary nexus between DOE and Williams' immediate employer, the evidence of record establishes its existence. Attached to Respondent DOE's Motion to Dismiss (May 12, 1995) is that portion of the contract by and between DOE and Respondent Lockheed Martin Energy System (LMES) governing LMES' management and operation of the Oak Ridge facilities where Williams worked. The contract's provisions establish the existence of a hierarchical relationship between DOE and LMES by which DOE retained the *right to control* virtually all of LMES' activities at Oak Ridge. While LMES is charged under the contract with management, operation and maintenance of the Oak Ridge facilities and operations, LMES' authority is throughout the contract subject to DOE's

^{3/} *Cf. Freels v. Lockheed Martin Energy Systems*, ALJ Case Nos. 95-CAA-2, 94-ERA-6, ARB Case No. 95-110 (Dec. 4, 1996) (DOE entitled to summary decision that it was not the complainant's employer where she did not allege that DOE interfered with her employment).

^{4/} This theory of employer liability is separate and distinct from the "joint employer" theory of liability. As the Secretary in *Hill & Ottney* acknowledged, there are several legitimate legal tests in addition to the "joint employer" theory for determining when a party other than the employee's common law employer will be considered a covered employer for purposes of liability under the environmental acts. Slip op. at 2-3. Obviously, as the majority opinion discusses, the "joint employer" theory of liability is inapplicable to the facts before us in this case.

^{5/} As the Board explained in its April 7, 1997 Order, the dismissal of the *Varnadore III* (95-ERA-1) complaint against the named respondents "turned on more than the mere lack of an immediate employment relationship between the complainant and the Federal and individual respondents. Not only did Varnadore fail to show that DOE and Culbreth employed him directly; he also failed to articulate any relevant nexus between either DOE or Culbreth and his immediate employer, respondent Energy Systems." Slip op. at 2-3.

overriding authority and control.^{6/} This contract language clearly

^{6/} Under Clause 1 of the Contract, Statement of Work, at section (a), Engagement of Contractor, it is stated in relevant part: “The Contractor undertakes and promises to manage, operate and maintain said plant and facility, and to perform said work and services, upon the terms and conditions herein provided and in accordance with such directions and instructions not inconsistent with this contract which DOE may deem necessary or give to the Contractor from time to time.”

At section (b), Description of Work and Services, subsection (1), it is stated in relevant part: “With respect to the facilities . . . the Contractor shall manage, operate and maintain them in accordance with programs approved in writing from time to time by DOE.” Including, *inter alia*:

“(i) Fabrication and assembly of nuclear weapons components in accordance with workload guidance established by DOE.”

“(ii) Processing . . . and production reactor operations in accordance with workload guidance established by DOE.”

“(iv) Production and/or distribution of radioisotopes [etc] as DOE may authorize and direct.”

“(vi) Services in support of contract DE-AC05-760R00001, or as directed by DOE.”

At subsection (2) of section (b), the contract provides: “(i) In addition to [the foregoing provisions], the contractor shall perform services as DOE and the Contractor shall agree in writing will be performed from time to time under this contract at Oak Ridge or elsewhere, as follows: . . . (2) services . . . for other Federal agencies and non-federal entities in accordance with policies and procedures established by DOE, (3) services . . . for the Nuclear Regulatory Commission, under interagency agreements between NRC and DOE, and (4) services in support of the program of Oak Ridge Operations when the work involved has been determined by DOE to be within the unique capabilities of the Contractor The work performed by the Contractor for third-party sponsors shall be pursuant to a DOE-approved Work for Others Agreement”

At subsection (3), paragraph (i), the contract provides that the work and services covered under the contract shall be under the “direct charge” of a “competent full-time supervising representative of the Contractor, approved by DOE” Paragraph (ii) thereof states, “In carrying out the work under this contract, the Contractor shall, subject to the general control of DOE, do all things necessary . . . provided that, whenever approval or other action by DOE is required with respect to any expenditure or commitment by the Contractor . . . the Government shall not be responsible unless and until such approval or action is obtained or taken.”

Subsection (3), paragraph (iv) provides, in part: “The Contractor shall, when directed by DOE and may, but only when authorized by DOE, enter into subcontracts for the performance of any part of the work under this clause.”

At subsection (3), paragraph (vi) it is stated, in relevant part: “The Contractor shall provide for necessary repairs, alterations, additions or improvements to the buildings and facilities of the plants, to the extent such work is included in programs approved in writing by DOE. Projects which, under applicable procedures adopted by DOE from time to time, require the issuance of a directive therefor by the Manager of DOE’s Oak Ridge Operations Office . . . shall not be undertaken until such directive has been issued.”

Subsection (3), paragraph (vii) states: “The Contractor shall, to the extent requested by DOE, perform maintenance, protective and service functions in portions of the Oak Ridge area outside the plant areas.”

Paragraph (viii) of subsection (3) dispels any notion of DOE’s lack of control over the Oak Ridge workforce, stating in relevant part: “Upon the prior approval of DOE, the Contractor’s employees normally engaged in the performance of this contract may be retained on the allowable cost payroll and used intermittently by the Contractor on work other than in the performance of this contract” Moreover, at paragraph (xi), concerning Contractor compliance with the Privacy Act, 5 USC §552(a), it is stated, in

(continued...)

brings DOE within the scope of employer coverage under the CAA in the instant case. Indeed, to rule otherwise would permit DOE to exploit without challenge circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer. To permit DOE to do so would be to condone continued use of the very criteria for employment that Congress has under the CAA prohibited.

The ALJ also dismissed Williams' CERCLA and SWDA claims against DOE. However, liability under the whistleblower protection provisions of both CERCLA, 42 U.S.C. §9610(a) (1994), and the SWDA, 42 U.S.C. §6971(a) (1994), is not limited to "employers" but includes any "person" who discriminates against any employee because that employee engaged in activities protected thereunder. "Person," in turn, is expansively defined under both CERCLA and the SWDA to include the federal government or any agency thereof.^{7/}

Thus, on the face of these provisions, and for the additional reasons explained below with regard to coverage of the named individual Respondents, it was error on the part of the ALJ to dismiss DOE as a Respondent under CERCLA and the SWDA.

Additionally, the ALJ dismissed all claims asserted by Williams against the two individual Respondents, Thompson and Ruth. Order Granting in Part and Denying in Part Respondent [LMES'] Motion to Dismiss (Aug. 8, 1995). Both Thompson and Ruth were employees of Respondent LMES, and served as Complainants' supervisors. The ALJ's dismissal of Williams' claims under the ERA, TSCA and the CAA against these two individuals should thus be upheld. However, the ALJ erred in his reliance upon *Stephenson v. N.A.S.A.*, 94-TSC-5, Sec'y D&O of Remand (July 3, 1995), to dismiss Williams' SWDA and CERCLA claims against these two respondents.

The Secretary's July 3, 1995 *Stephenson* decision was limited to the issue of individual liability under TSCA and the CAA. As previously noted, both TSCA and the CAA prohibit "employers" from discriminating against employees because they have engaged in protected activity. Accordingly, the Secretary in *Stephenson* affirmed the ALJ's conclusion that, "only

^{6/}(...continued)

relevant part: "*If DOE requires* the Contractor to design, develop, or maintain additional systems of Government-owned records on individuals to accomplish an agency function, the Contracting Officer . . . shall so notify the Contractor in writing and such Privacy Act system shall be deemed added . . . whether incorporated by formal contract modification or not."

[*All emphasis throughout this footnote is added.*]

^{7/} Under the SWDA the term "person" is defined to mean "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States." 42 U.S.C. §6903(15).

Similarly, under CERCLA the term "person" means "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. §9601(21).

employers, as distinguished from individuals who are not employers, are subject to the employee protection provisions of the [TSCA] and the [CAA].” *Stephenson*, 94-TSC-5, slip op. at 3.

As previously noted, the whistleblower protection provisions of both the SWDA and CERCLA extend liability coverage to any “person.” The SWDA provides that: “No *person* shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee” 42 U.S.C. §6971(a) (emphasis added). Similarly, CERCLA provides: “No *person* shall fire or in any other way discriminate against, or cause to be discriminated against, any employee” 42 U.S.C. §9610(a) (emphasis added). This language has been held, both by the Secretary and by the courts, to impose individual liability.

For example, in *Ass’t Sec. of Labor v. Bolin Associates*, 91-STA-4, Sec’y D&O, slip op. at 5-6 (Dec. 30, 1991), the Secretary interpreted similar language found in section 405 of the Surface Transportation Assistance Act (STAA), 49 U.S.C. §31105 (1994), to hold the principal officer within the company responsible for discharging the complainant personally liable. “Bolin, as the person who discharged Complainant, is liable under the express language of Section [31105] The ALJ properly pointed out that the express language of the STAA permits individual liability. [citation omitted] The statute provides that ‘[n]o *person* shall discharge’ an employee for conduct protected by the STAA, and defines a person as ‘one or more individuals’” *Bolin*, slip op. at 4. The Secretary noted that her interpretation of the STAA provision was not only consistent with that taken under the analogous employee protection provision of the Occupational Safety and Health Act, 29 U.S.C. §660(c) (1988), “but the approach also finds support in other substantive law areas with similar statutory language, *i.e.* Section 107 of [CERCLA], 42 U.S.C. §9607.” *Id.*

Interpreting the analogous provision of OSHA, the district court in *Donovan v. Diplomat Envelope, Inc.*, 587 F.Supp. 1417 (E.D. N.Y. 1984), *aff’d*, 760 F.2d 253 (2d Cir. 1985) (table), concluded that, “it is clear that the defendant in an action under 29 U.S.C. §660(c) need not be an employer.” 587 F. Supp. at 1425. And while the court recognized that the remedial provisions of OSHA appeared primarily designed for relief against the employer, it nevertheless concluded: “We cannot rule out the possibility that damages might under some circumstances be appropriately imposed upon an employer’s officer responsible for a discriminatory discharge.” *Id.*; *cf. Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1541-44 (W.D. Mich. 1989) (holding individual corporate officers or directors personally liable in certain circumstances under section 107 of CERCLA).

The employee whistleblower protection provisions of CERCLA and the SWDA are identical, in both instances, to the whistleblower protection provision of the Water Pollution Control Act (WPCA), 33 U.S.C. §1367 (1994), which in turn is patterned after the whistleblower protection provision of the Mine Health and Safety Act (MSHA), 30 U.S.C. §815(c) (1994). The legislative histories of the WPCA^{8/} and MSHA^{9/} indicate that Congress clearly contemplated

^{8/} See, *e.g.*, 1972 U.S.C.C.A.N. 3668, 3748-49 (“the person committing the violation could be assessed (continued...)”)

individual liability under both Acts. *See, generally, Meredith v. Federal Mine Safety & Health Review Commission*, 177 F.3d 1042, 1052-56 (D.C. Cir. 1999) (discussing MSHA legislative history and interpretation of section 106(a) of MSHA to include, in addition to the mine operator employer, “any other person directly or indirectly involved”).

Consistent with the express statutory language of CERCLA and the SWDA, and the foregoing legislative history, the ALJ should not have dismissed Williams’ claims under these two Acts against the individual Respondents. However, as was mentioned at the outset, the ALJ did not commit reversible error in dismissing the individual Respondents, or in dismissing DOE, as party-Respondents in light of the fact that Complainant failed to allege or otherwise establish that any cognizable adverse action was taken against him within the applicable statutes of limitations periods.

E. COOPER BROWN
Member

^{8/}(...continued)
the costs incurred by the employee to obtain redress”).

^{9/} *See, e.g.*, 1977 U.S.C.C.A.N. 3401, 3436 (“the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved”).