In the Matter of:

RAFAEL SANTAMARIA, **ARB CASE NO. 04-063**

COMPLAINANT, **ALJ CASE NO. 2004-ERA-6**

v. **DATE: May 31, 2006**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Edward A. Slavin, Jr., Esq., *St. Augustine, Florida*[1]

***For the Respondent*:**
Karol S. Berrien, Esq., *United States Environmental Protection Agency, Atlanta, Georgia*

FINAL DECISION AND ORDER

Rafael Santamaria, a program coordinator with the United States Environmental Protection Agency (EPA), filed a complaint with the Department of Labor, Occupational

[1] Effective October 20, 2004, the Administrative Review Board suspended Edward Slavin's privilege of practicing law before the Board. We imposed this sanction in response to the Supreme Court of Tennessee's August 27, 2004 decision to suspend Slavin's license for a period of two years. *In the Matter of the Qualifications of Edward A. Slavin, Jr.*, ARB No. 04-172 (Oct. 20, 2004). On May 12, 2006 the Supreme Court of Tennessee disbarred Slavin. Accordingly, while we will consider documents Slavin filed on Santamaria's behalf prior to his suspension, we will not permit him to represent Santamaria or any other party (other than himself) after that date.

Safety and Health Administration (OSHA) for retaliation pursuant to the "environmental whistleblower laws."[2] Santamaria alleged that his expressed concerns about EPA contracting constituted protected activity. OSHA denied Santamaria's complaint on October 30, 2003, and he subsequently requested a hearing before the Office of Administrative Law Judges (OALJ). EPA deposed Santamaria on January 8, 2004, and shortly thereafter, filed a motion for summary decision arguing, inter alia, that Santamaria failed to establish that he engaged in protected activity. Santamaria countered by filing his own motion for summary decision. On February 24, 2004, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) granting EPA's motion for summary decision and denying Santamaria's motion. We affirm the ALJ's February 24, 2004 R. D. & O. and deny the complaint.

BACKGROUND

When Santamaria filed his April 30, 2003 complaint, he worked as a regional coordinator with the minority business enterprise and women's business enterprise (MBE/WBE) utilization program.[3] The objective of EPA's MBE/WBE program is to

---

[2] The April 30, 2003 complaint did not specify which "environmental whistleblower laws" were allegedly violated. While OSHA initially docketed Santamaria's April 30, 2003 filing as an "ERA" complaint, thereby implicating the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003), Santamaria has not alleged any facts pertaining to the ERA. The environmental protection statues possibly implicated include: the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 1995); the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A § 9610 (West 1995); the Federal Water Pollution Control Act/Clean Water Act (FWPCA/CWA), 33 U.S.C.A. § 1367 (West 2001); the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300(j)-9(i) (West 1991); the Solid Waste Disposal Act (SWDA), 42 U.S.C.A. § 6971 (West 1995); and, the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998). The Regulations implementing the above-referenced environmental whistleblower protection provision are found at 29 C.F.R. Part 24 (2005). Although EPA has not raised the doctrine of sovereign immunity with respect to whistleblower complaints arising under FWPCA, SWDA and CAA, the Board recently held in *Erickson v. EPA*, ARB Nos. 03-002, 003, 004 & 064, ALJ Nos. 1999-CAA-2, 2001-CAA-8 & 13, 2002-CAA-3 & 18, slip op. at 9-12 (ARB May 31, 2006), that it was bound by the Office of Legal Counsel's opinion that Congress had waived the Federal government's sovereign immunity with respect to the whistleblower provisions under SWDA and CAA, but had not similarly waived sovereign immunity under FWPCA. As previously noted, Santamaria did not specify what environmental whistleblower Acts he brought his claim under. While EPA may be immune from suit under one or more of the six environmental whistleblower statutes, we resolve this case on other grounds because, as discussed *infra*, Santamaria did not allege activity that would be protected under any of the Acts.

[3] Sanatmaria has a 30-year employment history with EPA. Government's Exhibit (GX) -Q at 5-6, 120. He previously worked as an engineer in EPA's Water Division and

assure that minority and women-owned business enterprises receive an opportunity to participate in contracting and procurement for supplies, construction, services and equipment under federally-funded projects. Santamaria's duties included compiling data regarding grantee compliance with MBE/WBE utilization objectives. In his complaint he alleged EPA pressured him to approve questionable "false flag 'Minority Business Enterprises.'" Santamaria also claimed EPA assigned another employee to spy on him and he was reportedly subjected to a series of harassing meetings, most recently on April 17, 2003. He further alleged EPA improperly delegated some of his MBE/WBE compliance responsibilities to state-level agencies. According to Santamaria, these actions occurred in retaliation for his repeated complaints about EPA's lax enforcement of MBE/WBE-related regulations.

After OSHA denied his complaint in October 2003, Santamaria requested a hearing before the OALJ. The ALJ initially scheduled a hearing to commence on January 20, 2004, and both parties filed discovery requests, including a notice of deposition by EPA. At the January 8, 2004 deposition, Santamaria testified that he "routinely" complained to his supervisor, Matthew J. Robbins, that EPA was not enforcing the environmental regulations against the grantees and contractors.[4] He explained that EPA was not enforcing the MBE/WBE regulations under 40 C.F.R. Parts 30, 31 and 35 and particularly the six "affirmative steps."[5] Santamaria also testified that inadequate compliance resulted in inaccurate reporting to Congress regarding the amount of funds allocated to minority and women-owned business enterprises.[6] Additionally, he testified about the adverse impact on minority and women-owned businesses excluded from participating in federally-funded projects.[7]

Regarding alleged incidents of retaliation set forth in his April 30, 2003 complaint, Santamaria could not explain the term "false flag 'Minority Business Enterprises'" or identify anyone at EPA who allegedly pressured him to approve such an entity.[8] Santamaria also did not recall who he met with on April 17, 2003, or the topic of discussion.[9] And he retreated from his prior allegation that EPA assigned a management spy to work with him in early April 2003.[10]

---

later worked as an equal opportunity specialist. Santamaria assumed his current position as Region 4 MBE/WBE coordinator on February 13, 2000. GX-C, D.

[4] GX-Q at 22, 31-32, 41.

[5] *Id.* at 8-11, 24, 32.

[6] *Id.* at 91-92.

[7] *Id.* at 117, 129, 137.

[8] *Id.* at 51-53, 116-117.

[9] *Id*. at 98, 105.

On January 13, 2004, EPA requested a continuance of the scheduled hearing to file a motion for summary decision. That same day the ALJ issued an order cancelling the hearing. He also advised the parties that all other discovery issues would be held in abeyance until the motion for summary decision was resolved. EPA filed its motion for summary decision on January 26, 2004. It argued, among other things, that Santamaria's alleged whistleblowing did not constitute protected activity under any of the environmental statues. Santamaria filed his own motion for summary decision on February 11, 2004.[11] The ALJ ultimately found that Santamaria's complaints to EPA about MBE/WBE compliance enforcement were not protected activity under the applicable environmental statutes. Accordingly, he issued a February 24, 2004 Recommended Decision and Order (R. D. & O.) Granting Respondent's Motion for Summary Decision and Denying Complainant's Motion for Summary Decision.

Santamaria filed a timely appeal with the Administrative Review Board (ARB or Board) on February 26, 2004. The issue to be resolved is whether Santamaria engaged in protected activity under any of the six applicable environmental whistleblower protection provisions.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the Board.[12] We review a recommended decision granting summary decision de novo, thereby applying the same legal standards that governed the ALJ's decision-making process. Pursuant to 29 C.F.R. § 18.40(d), summary decision is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." In considering a motion for summary decision, the Board reviews the evidence in the light most favorable to the nonmoving party.[13] However, the nonmoving party may not rest upon the mere allegations or denials of its pleadings, but instead must set forth specific facts which could support a finding in its favor.[14] In addition to determining the

---

[10] *Id*. at 100-104.

[11] The February 11, 2004 filing was also captioned as a response to EPA's summary decision motion and a motion to compel full discovery from EPA.

[12] 29 C.F.R. § 24.8 (2005); *see* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

[13] *Friday v. Northwest Airlines, Inc.*, ARB No. 03-132, ALJ Nos. 2003-AIR-19 & 20, slip op. at 3 (ARB July 29, 2005); *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ No. 2000-CAA-9, slip op. at 3 (ARB Apr. 23, 2003).

[14] 29 C.F.R. § 18.40(c).

existence of any genuine issue of material fact, the Board must also determine whether the ALJ properly applied the applicable law.[15]

DISCUSSION

I. Legal Standard

To prevail on his claim Santamaria must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, and that the employer discharged, disciplined, or discriminated against him because the employee engaged in the protected activity.[16] Failure to prove any one of these elements results in dismissal of a claim.[17]

II. Santamaria's Alleged Protected Activity

EPA contends, inter alia, that Santamaria did not engage in protected activity under any of the applicable environmental whistleblower protection provisions. In response to EPA's motion for summary decision, Santamaria stated that his "protected concerns involve government spending pursuant to special appropriations and regular environmental appropriations, with EPA failing to assure that Minority Business Enterprises … and Women-owned Business Enterprises … legal requirements are complied with by … contractors."[18] The question to be resolved is whether Santamaria's expressed concerns about EPA's contracting practices implicate specific health and safety issues covered by any one of the six environmental statutes at issue. To defend against EPA's motion for summary decision, Santamaria must set forth specific facts which could support a finding that he engaged in protected activity under the respective Acts.

As a preliminary matter, Santamaria takes issue with the ALJ's decision to address EPA's motion for summary decision prior to the completion of discovery. Santamaria served EPA with a request for production of documents on December 31, 2003.[19] When the ALJ later learned of EPA's intent to file a motion for summary

---

[15] *Pickett*, slip op. at 4.

[16] *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1, slip op. at 5 (ARB Apr. 30, 2004).

[17] *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 16 (ARB Feb. 28, 2003).

[18] Complainant's Motion for Summary Decision and Response at 5.

[19] Pursuant to 29 C.F.R. § 18.19(d), EPA had 30 days to respond to Santamaria's December 31, 2003 discovery request.

decision, he cancelled the previously scheduled hearing and postponed any further discovery pending resolution of the potentially dispositive motion.[20] The ALJ has broad discretion in determining the scope of discovery.[21] Accordingly, an ALJ's evidentiary rulings will be reversed only when proven to be arbitrary or an abuse of discretion.[22]

Santamaria's December 31, 2003 discovery request cast a rather broad net and was not specifically tailored to elicit information regarding alleged protected activity.[23] But even if counsel had crafted a more precise request, Santamaria has not shown a need for further discovery to rebut EPA's summary decision motion.[24] Normally, an employee would be in the best position to describe his or her actions at a given date and time. In this instance, the requisite information should be a matter of personal knowledge, and therefore, additional discovery was unnecessary to counter EPA's claim that Santamaria did not engage in protected activity.[25] Accordingly, the ALJ did not abuse his discretion by suspending further discovery and addressing EPA's motion for summary decision.

In granting EPA's motion for summary decision, the ALJ found that Santamaria had not engaged in protected activity, and therefore, OALJ lacked jurisdiction over the complaint.[26] Under the environmental whistleblower provisions, an employee is

---

[20] January 13, 2004 Order Cancelling Hearing.

[21] 29 C.F.R. §§ 18.13, 18.14, 18.15, 18.29.

[22] *Friday*, slip op. at 4; *High v. Lockheed Martin Energy Sys.*, ARB No. 03-026, ALJ No. 1996-CAA-9, slip op. at 4 (ARB Sept. 29, 2004).

[23] The document production request included, but was not limited to "all documents, letters, reports, reports of interviews … bearing Mr. Santamarias [sic] name or identifiers." Complainant's Discovery Request (CDR) ¶ 1. Santamaria's counsel also requested "personnel and other business files" from every manager who supervised Santamaria or "responded to his concerns…." CDR ¶ 4.

[24] *See Saporito v. Central Locating Serv., Ltd.*, ARB No. 05-004, ALJ No. 2004-CAA-13, slip op. at 10 (ARB Feb. 28, 2006) (to establish an abuse of discretion the non-moving party must, at a minimum, show how further discovery could have permitted him to rebut the moving party's contentions).

[25] *Johnson v. Oak Ridge Operations Office*, ARB No. 97-057, ALJ Nos. 1995-CAA-20, 21 & 22, slip op. at 12-13 (ARB Sept. 30, 1999).

[26] R. D. & O. at 11. The ALJ correctly focused his analysis on whether Santamaria's actions constituted protected activity under the applicable environmental whistleblower statues. However, he erroneously concluded that by finding an absence of protected activity, he was effectively deprived of jurisdiction over the complaint. Where an employee's alleged protected activity is not in fact protected under the statutes at issue, the question is one of coverage under those statutes and not whether OSHA, OALJ or ARB has jurisdiction over the complaint. *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 2001-SWD-3, slip op.

protected for making "safety and health complaints 'grounded in conditions constituting reasonably perceived violations' of the environmental laws."[27] However, an employee-complainant is not protected simply because he subjectively believes the employer's conduct might affect the environment.[28] Similarly, a complaint based on assumptions and speculation does not constitute protected activity.[29] To be covered under the environmental whistleblower protection provisions, Santamaria must have engaged in activities that further the purpose of any one of the six environmental acts or relate to their administration and enforcement.[30]

When asked to identify any environmental laws and regulations EPA allegedly violated, Santamaria referenced 40 C.F.R. Parts 30, 31 and 35 and the six "affirmative steps" at 40 C.F.R. § 31.36(e).[31] In general, Parts 30, 31 and 35 provide uniform administrative requirements for grants and cooperative agreements with institutions of higher education, hospitals, non-profit organizations, and state and local governments.[32] The various grantees are expected to make a good faith effort to attract and utilize minority and women-owned businesses in their federally-funded projects by applying the six "affirmative steps."[33] The steps include, among other things, placing qualified small

---

at 4 n.3 (ARB Mar. 31, 2005); *Gain v. Las Vegas Metro. Police Dep't.*, ARB No. 03-108, ALJ No. 2002-SWD-4, slip op. at 4 n.5 (ARB June 30, 2004).

[27] *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 1995-CAA-12, slip op. at 2 (ARB Apr. 8, 1997) (quoting *Johnson v. Old Dominion Security*, 1986-CAA-3, 4 & 5, slip op. at 15 (Sec'y May 29, 1991).

[28] *Id.*; *Gain*, slip op. at 3 n.3.

[29] *Saporito*, slip op. at 6; *Crosby v. Hughes Aircraft Co.*, No. 1985-TSC-2, slip op. at 27-28 (Sec'y Aug. 17, 1993).

[30] *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 2000-CAA-20, 2001-CAA-09 & 11, slip op. at 6 (ARB June 30, 2004).

[31] GX-Q at 32, 49-50.

[32] 40 C.F.R. Parts 30, 31 and 35 include a multitude of regulations spanning the entire grant process, including initial application procedures, financial management guidelines, procurement practices, recordkeeping and reporting obligations, and closeout procedures once the specific project is complete. Santamaria's responsibilities, however, were limited to monitoring grantee compliance related to MBE/WBE utilization under 40 C.F.R. Parts 30, 31 and 35. GX-Q at 91-93, 97.

[33] 40 C.F.R. § 31.36(e); *see also* 40 C.F.R. §§ 30.44(b), 35.6580 (the six affirmative steps are similarly incorporated under 40 C.F.R. Parts 30 and 35). Certain programs arising under five of the six environmental statues at issue are covered under 40 C.F.R. Part 35. *See* 40 C.F.R. § 35.101.

and minority businesses and women's business enterprises on solicitation lists and assuring they are solicited whenever they are potential sources.[34] Additionally, grantees and their primary contractors are urged to arrange their project requirements and delivery schedules in a manner to encourage and permit maximum participation by minority and women-owned business enterprises.[35]

While the six "affirmative steps" are applicable to grants awarded for certain programs arising under CAA, SWDA, TSCA, FWPCA/CWA and SDWA, this alone does not establish that Santamaria's complaints regarding EPA's administration of the MBE/WBE utilization program constitute protected activity.[36] Neither the January 28, 2004 deposition nor Santamaria's pleadings specifically identify any of the six environmental statutes at issue. Although he repeatedly referred to violations of "environmental laws" and "regulations," Santamaria did not identify a single incident where an actual or perceived violation of an environmental health or safety regulation occurred. But he continually stressed the fact that EPA was not enforcing the MBE/WBE regulations on the grantees and contractors.[37] And on more than one occasion, Santamaria commented about the economic impact on minority and women-owned businesses that may have been unfairly excluded from the contracting and procurement process.[38]

It is undisputed that Santamaria voiced concerns to his immediate supervisor, Matthew J. Robbins, about grantee compliance with EPA's MBE/WBE utilization program. In a January 21, 2004 declaration, Robbins acknowledged the existence of MBE/WBE compliance problems within his office.[39] He attributed the problem, in part, to late notification by Congress of the identity of specific grantees of earmarked Federal funds. According to Robbins, EPA often learned of the grantees' identities well after the specific projects were underway. Thus, his office, and Santamaria in particular, was often in the position of playing catch-up, whereas the applicable regulations envisioned EPA's involvement at the initial stages of the process. Robbins also acknowledged that

---

[34] 40 C.F.R. § 31.36(e)(2). The six "affirmative steps" are not unique to EPA. The same provisions are applicable to other Executive Branch agencies, including the Department of Labor. *See* 29 C.F.R. § 97.36(e)(2).

[35] 40 C.F.R. § 31.36(e)(2).

[36] 40 C.F.R. § 35.101, entitled *Environmental programs covered by the subpart*, specifically references eight programs arising under the Clean Air Act, Safe Drinking Water Act, Solid Waste Disposal Act, Toxic Substances Control Act and Clean Water Act.

[37] GX-Q at 8-11,

[38] *Id*. at 117, 129, 137.

[39] GX-B.

another division within EPA improperly attempted to delegate some of Santamaria's MBE/WBE compliance responsibilities to at least one state-level agency.[40] Noticeably absent from Robbins's affidavit is any indication that Santamaria specifically voiced concerns about safety or health issues arguably within the ambit of the six environmental statutes. Furthermore, Robbins did not indicate that the MBE/WBE compliance problems had any detrimental effect on the environment per se. While MBE/WBE compliance may have been lax, there is no indication that the grantees, their contractors or subcontractors engaged in any activity detrimental to the environment.

The April 30, 2003 complaint, Santamaria's deposition, Robbins's January 21, 2004 declaration and counsel's response to EPA's motion all establish that Santamaria's complaints to his employer did not encompass any issues beyond the day-to-day responsibilities of his job as MBE/WBE coordinator. And those responsibilities did not directly pertain to public safety and health issues arising under any of the six environmental statues at issue. While we recognize the potential for overlap between Santamaria's duties and some of the environmental statutes, we note that the six "affirmative steps" do not apply to CERCLA and Santamaria did not identify any MBE/WBE compliance issues specifically related to federally-funded programs under CAA, SWDA, TSCA, FWPCA/CWA and SDWA. It is possible that some of the non-compliant grantees received funding for programs under CAA, SWDA, TSCA, FWPCA/CWA and SDWA, however, a complaint based on assumptions and speculation does not constitute protected activity.[41] Thus, even when the facts are viewed in a light most favorable to Santamaria the result remains the same.

Santamaria's expressed concerns pertain to socio-economic matters, rather than environmental health and safety issues. But however legitimate those concerns may be, the environmental statutes and their corresponding employee protection provisions were not enacted with the purpose of assuring the continued economic viability of minority and women-owned business enterprises.[42] Although Santamaria's complaint was couched in terms of alleged violations of environmental laws and regulations, his sole concern was "EPA contracting" compliance under the MBE/WBE utilization program.[43] There is no genuine issue as to any material fact regarding Santamaria's claimed protected activity. Because his activities are not protected under the environmental whistleblower provisions, EPA is entitled to summary decision as a matter of law.

---

[40] *Id.* at 5-6.

[41] *Saporito*, slip op. at 6; *Crosby*, slip op. at 27-28.

[42] *See generally Culligan*, slip op. at 6-8 (describing the legislative purpose and public safety and health objectives of CERCLA, FWPCA, CAA, SWDA, TSCA and SDWA).

[43] April 30, 2003 Complaint ¶ 2.

CONCLUSION

Santamaria failed to establish he engaged in protected activity under any of the six environmental whistleblower protection statutes. Because there was no genuine issue as to any material fact regarding Santamaria's claimed protected activity, the ALJ correctly found that EPA was entitled to summary decision. Moreover, the ALJ properly exercised his discretion in deciding to curtail further discovery. Accordingly, we affirm the February 24, 2004 Recommended Decision and Order granting EPA's motion for summary decision and **DENY** Santamaria's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge