



In the Matter of:

DAVID L. LEWIS,

ARB CASE NO. 04-117

COMPLAINANT,

**ALJ CASE NOS. 03-CAA-006
03-CAA-005**

v.

DATE: February 29, 2008

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Stephen M. Kohn, Esq., *Kohn, Kohn & Colapinto, LLP*, Washington, District
of Columbia**

For the Respondent:

**David P. Guerrero, Esq., *Office of General Counsel, U. S. Environmental
Protection Agency*, Washington, District of Columbia**

ORDER DENYING MOTION TO REOPEN THE RECORD

Dr. David L. Lewis filed whistleblower complaints with the United States Department of Labor (DOL) alleging that his employer, the United States Environmental Protection Agency (EPA), violated the employee protection provisions of six federal statutes.¹ A DOL Administrative Law Judge (ALJ) consolidated the complaints and,

¹ The Clean Air Act, 42 U.S.C.A. § 7622(a) (CAA) (West 2003); the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i)(1)(A) (SDWA) (West 2003); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9610(a) (CERCLA) (West 2005); the Toxic Substances Control Act, 15 U.S.C.A. § 622(a) (TSCA)

after a hearing, recommended that Lewis's complaints be dismissed. Lewis appealed to the Administrative Review Board (ARB). We issued a final decision on March 30, 2007, denying Lewis's complaints.² Lewis then filed a Motion to Reopen the Record and submitted fifteen exhibits to support his motion.

The ARB's Decision

In its March 30, 2007 decision, the ARB found that Lewis had proved by a preponderance of the evidence that he engaged in protected activity when he expressed his concerns to EPA and others that sewage sludge (bio-solids) fertilization posed risks to human health. Lewis complained that because of his written articles, speeches, and testimony publicizing the problems of sewage sludge, EPA retaliated against him when it condoned a negative peer review of one of his critical articles, disseminated a report that attacked his theories, impugned his international scientific reputation, prevented his future employment with the University of Georgia (UGA), failed to fund his research or credit his work, and collaborated with industry and EPA proponents of sewage sludge to avoid further investigation.

The ARB considered each of these claims and concluded that neither the negative peer review nor the future UGA employment were actionable because these claims occurred well beyond the 30-day limitations period for filing a complaint. The Board also concluded that Lewis did not demonstrate that disseminating the critical report adversely affected him. Further, we found that Lewis failed to prove that EPA's failure to fund other research or credit his work were caused by his protected activity and were thus discriminatory. Finally, we found that Lewis had waived any argument regarding the alleged collaboration.

Lewis's Motion

Lewis argues that after the record closed, he "came into possession" of EPA documents that show that EPA managers influenced UGA officials to deny him employment at UGA.³ Lewis argues that this new evidence clearly supports his position that the EPA's John Walker, who was involved in the negative peer review of Lewis's article and distributed the critical report, was acting on behalf of EPA to discredit Lewis's work and dissuade UGA from hiring him. According to Lewis, EPA's study grant to UGA shows a direct financial connection between Walker; his supervisor, Charles Gross;

(West 1998); the Federal Water Pollution Prevention and Control Act, 33 U.S.C.A. § 1367(a)(FWPPCA) (West 2001); and the Solid Waste Disposal Act, 42 U.S.C.A. § 6971(a) (SWDA) (West 2001). Regulations implementing these statutes are found at 29 C.F.R. Part 24 (2006).

² *Lewis v. U.S. Env'tl Prot. Agency*, ARB No. 04-117, ALJ Nos. 03-CAA-005, 006 (ARB Mar. 30, 2007).

³ Motion to Reopen at 1-3.

and the UGA's Julia Gaskins, who used information provided by Walker to badmouth Lewis to UGA faculty members. Lewis argues that this relationship made Walker's adverse actions against Lewis attributable to EPA.

EPA argues that Lewis's motion should be denied because the documents are neither new nor material. According to EPA, Lewis's assertion that he was unaware of a grant-based relationship between EPA and UGA until after the record closed is belied by his own deposition testimony. Response at 4-6. Also, Gross was not Walker's supervisor during the time of the EPA grant to UGA. Response at 6-8. Therefore, EPA concludes, none of the proffered evidence could change the ARB's determination that Lewis failed to prove that EPA retaliated against him.

The Legal Standard

When considering whether to reopen the record to admit new evidence, we rely upon the standard found in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges.⁴ The applicable rule 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.^{5]}

Thus, Lewis must demonstrate that the EPA documents were not readily available before the ALJ closed the record in April 2003 and that they are material. Evidence is material "when it is of sufficient weight to warrant a different outcome."⁶

Lewis's Evidence Is Not New or Material

In his affidavit Lewis states that, after the record closed, he "obtained access to numerous documents produced" in two lawsuits filed in Georgia pertaining to sewage sludge. He avers that he was not a party to either of the lawsuits and had no access to the documents.⁷ These are the documents that Lewis asks that we admit.

⁴ 29 C.F.R. Part 18 (2007). *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 95-CAA-010, slip op. at 6-7 (ARB Jan. 31, 2001).

⁵ 29 C.F.R. §18.54(c).

⁶ *Foley v. Boston Edison Co.* ARB No. 99-022, ALJ No. 97-ERA-056, slip op. at 5 n.4 (ARB Jan. 31, 2001), citing *Wright v. U.S. Postal Serv.*, 183 F.3d 1328, 1332 (Fed. Cir. 1999).

⁷ Motion, Exhibit 1.

But the standard for admitting these documents is not when Lewis had access to them, but whether they were available while the record was still open. Lewis offers no evidence to show that he could not have obtained the documents prior to April 2003. We note, moreover, that the attorney who filed the Georgia lawsuits in 1998 and 2001, and subsequently gave Lewis access to documents in those cases, testified on Lewis's behalf in this case about discussing with Lewis his potential as an expert witness in the Georgia cases.⁸

And even if this evidence was not readily available, none of it is material to the issue of whether EPA took any adverse employment action against Lewis. Nor does the proffered evidence prove or tend to prove that EPA retaliated against him because of his protected activity in publicizing the human health and safety risks of sewage sludge fertilization. Therefore, admitting this evidence would not change the outcome of this case.

CONCLUSION

Lewis did not show that the proffered evidence was new or material. Therefore, we **DENY** his motion.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

⁸ Hearing Transcript at 1029-68.