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Whistleblower Newsletter Nuclear and Environmental Cases

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[Nuclear and Environmental Whistleblower Digest II B 2]
SUBJECT MATTER JURISDICTION; THRESHOLD JURISDICTION; SUFFICIENT SPECIFICITY ALLEGING PROTECTED ACTIVITY

In ***Bertacchi v. City of Columbus***, 2003-WPC-11 (ALJ Aug. 26, 2005), the Respondent asserted that DOL did not have subject matter jurisdiction over the complaint. The Respondent's argument was that the Complainant had not satisfied the protected activity requirement because he never articulated a specific safety or health concern that had or would potentially result from Respondent's alleged violations -- the regulations at issue relating to administrative requirements rather than safety and/or health matters. The Complainant had written to the state EPA challenging a co-worker's application for an operator's license necessary to operate wastewater works in Ohio.

The ALJ, however, found that articulation of a "specific" concern was not a requirement of the prima facie case, and that the Respondent had synthesized a standard that mischaracterized the jurisdictional test. Noting that there were few

decisions addressing a threshold jurisdiction test, the ALJ examined two ALJ decisions in which the Complainant's allegations were found too vague to establish subject matter jurisdiction of DOL over the complaint.

In the instant case, the ALJ found that the Complainant had, in his complaint, alleged that his letter to the Ohio EPA blew the whistle on a perceived improper attempt to fraudulently obtain a Class IV operator license by an employee of Respondent, which was an allegation with sufficient specificity of protected activity for the claim to be found to arise under the subject matter jurisdiction of the U.S. Department of Labor, Office of Administrative Law Judges.

[Nuclear and Environmental Whistleblower Digest VII A 3]
FAILURE TO COOPERATE IN DISCOVERY; SANCTION OF IRREBUTABLE PRESUMPTION

In ***Dann v. Bechtel SAIC Co., LLC***, 2005-SDW-4, 5 and 6 (ALJ June 1, 2005), the ALJ found that a newly joined Respondent had not been acting in good faith and had made an intentional effort to deny to the Complainants highly relevant information to which they were entitled under the discovery rules (the originally named Respondent had responded in good faith). The ALJ also concluded that the newly joined Respondent may have been intentionally raising frivolous arguments for the purpose of financially and psychologically wearing down the Complainants and the sole practitioner who represented them. Accordingly, the ALJ imposed sanctions on the newly joined Respondent for its failure to comply with an earlier Order requiring it to provide full responses to the Complainants' discovery requests. The ALJ found that "Because many of the discovery requests to which Bechtel Nevada's has refused to fully respond pertain to Bechtel Nevada's motives in barring the Complainants from employment at the Nevada Test Site, it has been determined that the appropriate sanction is to irrebuttably determine for purposes of this proceeding that Bechtel Nevada's actions to bar the Complainants from employment at the Nevada Test Site were motivated at least in part by an intention to retaliate against the Complainants' protected activities...."

The Respondent filed with the ARB an appeal of this Order and a request that the ALJ be disqualified. The ARB issued an Order to Show Cause why the appeal should not be dismissed as interlocutory, and the Respondent subsequently withdrew the appeal.

[Nuclear and Environmental Whistleblower Digest VII A 5]
DISCOVERY; APPLICATION OF FRCP 33 TO QUESTION OF WHETHER NUMBER OF INTERROGATORIES IS EXCESSIVE; DISCRETION OF ALJ

In ***Dann v. Bechtel SAIC Co., LLC***, 2005-SDW-4, 5 and 6 (ALJ May 25, 2005), the Respondent requested a protective order on discovery, in part, on the ground that the Complainants had submitted an excessive number of interrogatories. The ALJ observed that "although Rule 33 of the Federal Rules of Civil Procedure normally limits parties in civil litigation to 25 interrogatories, Rule 33 also permits judges to authorize larger numbers of interrogatories in appropriate cases, as commonly occurs in whistleblower proceedings before the Office of Administrative Law Judges." The ALJ found that the such an exception was appropriate in the instant case based

on the Complainants' representations that the interrogatories were in lieu of depositions and because many of the interrogatories required only simple, short answers.

[Nuclear and Environmental Whistleblower Digest VII A 5]
DISCOVERY; PROTECTIVE ORDER FROM UNDULY BURDENSOME INTERROGATORIES

In ***Dann v. Bechtel SAIC Co., LLC***, 2005-SDW-4, 5 and 6 (ALJ May 25, 2005), the ALJ granted, in part, the Respondent's request for a protective order limiting discovery. A number of the Complainants' interrogatories appeared to require the Respondent to obtain information from third parties and possible third-party witnesses. The ALJ ruled that the Respondent would only be required to supply information now within its possession and would not be required to speculate concerning another Respondent's intentions or obtain any responsive information from the other Respondent, and that the Respondent would not be required to interview witnesses to obtain information not already known to it in response to interrogatories. The ALJ found that a large number of the Complainants' interrogatories asked the Respondent to provide or identify "each and every" fact, document, and witness having knowledge concerning a particular topic. The ALJ ruled that the Respondent could interpret such requests as calling only for each material fact, document containing material information, and witness with knowledge of material information (material facts and information to mean those that could have probative value in the proceeding). A couple interrogatories appeared to seek the same information; thus the Respondent was permitted to respond to only one of the two. Several interrogatories asked the Respondent to provide information demonstrating the non-existence of alleged facts; the Respondent was permitted not to respond to these interrogatories. Finally, the ALJ found that several interrogatories were not in fact seeking relevant information, but were instead merely argumentative and rhetorical; the Respondent was permitted not to respond to those interrogatories.

[Nuclear and Environmental Whistleblower Digest VII A 6]
DISCOVERY; INFORMATION ABOUT CRIMINAL RECORD

In ***Dann v. Bechtel SAIC Co., LLC***, 2005-SDW-4, 5 and 6 (ALJ May 13, 2005), the Respondent sought discovery about misdemeanor convictions or prior criminal charges or arrests of the Complainants, and filed a motion seeking enforcement of the discovery request by the ALJ. The ALJ found that the Complainants correctly pointed out that under the rules of evidence it is not ordinarily permissible to use felony convictions for impeachment purposes unless the convictions occurred within the past 10 years. The ALJ ruled, however, that

> [T]his does not mean that a respondent is barred from obtaining information in discovery about misdemeanor convictions or prior criminal charges or arrests. Misdemeanor convictions concerning false statements or acts of dishonesty are admissible if they occurred within the last 10 years and even information about prior arrests or criminal charges might reasonably be

> expected to lead to the discovery of admissible evidence. Accordingly, the Complainants will be required to provide Bechtel SAIC the requested information about misdemeanors that involved false statements or acts of dishonesty and information about any prior arrests or criminal charges. However, the Complainants need provide information about such incidents only if they occurred within the last 10 years

[Nuclear and Environmental Whistleblower Digest VII D 2]
DEPOSITION TESTIMONY OF COMPLAINANT MOVED INTO EVIDENCE AT CONCLUSION OF RESPONDENT'S CASE; ALJ MAY REQUIRE DESIGNATION OF RELEVANT PORTIONS

In ***Bertacchi v. City of Columbus***, 2003-WPC-11 (ALJ Aug. 26, 2005), the Respondent moved for admission of the Complainant's deposition testimony at the close of its case. The Complainant raised a number of objections, essentially based on fairness. The Respondent contended, essentially, that the deposition transcription was testimony that can be tacked onto that taken during the hearing. The ALJ found neither position convincing. He found that much of the deposition contained evidence that was immaterial, irrelevant, or unduly repetitious, and that it was the parties' obligation to designate those portions that they deemed necessary. *Zimmerman v. Safeway Stores, Inc.*, 410 F.2d 1041 (D.C. Cir. 1969) (stating that in cases concerning the admissibility of deposition transcripts of adverse parties, even courts that are bound by the federal rules of evidence "retain[] the discretion to exclude repetitious matter and to require counsel to identify" the parts deemed relevant). The ALJ, therefore, concluded that only those portions designated by the parties would be admitted into the record.

[Nuclear and Environmental Whistleblower Digest VII D 6]
WITNESS SEQUESTRATION; CALLING COURTROOM OBSERVER AS A REBUTTAL WITNESS WHERE IT WAS CREDIBLY ASSERTED THAT THERE HAD BEEN NO INTENT PRIOR TO THE HEARING TO CALL THE OBSERVER AS A WITNESS

In ***Bertacchi v. City of Columbus***, 2003-WPC-11 (ALJ Aug. 26, 2005), a representative of the Sierra Club had attended the hearing as an observer at the suggestion of the Complainant. Following the testimony of one of the Respondent's witnesses the Complainant called the Sierra Club representative as a rebuttal witness. A sequestration order had been in effect. The ALJ, however, declined to exclude the testimony from the record, finding credible the Complainant's assertion that he manifested no intent to call the representative as witness when he suggested that she should attend the hearing. The ALJ also found that the representative's testimony did not show intent to ambush Respondent and was based primarily on the testimony given by the Respondent's witness. The ALJ found persuasive the fact that Respondent had an opportunity to cross-examine the witness and that it concluded that her testimony did not, in fact, impeach its witness.

[Nuclear and Environmental Whistleblower Digest VIII B 1 d]
CREATION OF THE ARB DID NOT VIOLATE THE APPOINTMENTS CLAUSE OF THE CONSTITUTION

In ***Willy v. Administrative Review Board, USDOL***, No. 04-60347 (6th Cir. Aug. 24, 2005) (case below ARB No. 97-107, 1985-CAA-1), the Complainant contended that the creation of the Administrative Review Board (ARB) by the Secretary of Labor violated the Appointments Clause of the Constitution. The Fifth Circuit rejected this contention, holding that "the Secretary possesses the requisite congressional authority to appoint members to the ARB to issue final agency decisions" under the Reorganization Plan No. 6 of 1950 and 5 U.S.C. § 301. Slip op. at 15.

[Nuclear and Environmental Whistleblower Digest VIII B 2 a]
CREDIBILITY DETERMINATIONS; BROAD DEFERENCE TO ALL OF ALJ'S FINDINGS NOT MANDATED, ESPECIALLY WHEN CASE DID NOT TURN ON WITNESS CREDIBILITY

In ***Jones v. USDOL***, No. 04-3729 (6th Cir. Sept. 8, 2005) (case below ARB Nos. 02-093 and 03-010, ALJ No. 2001-ERA-21), the ARB had reversed the ALJ's finding in favor of the Complainant. On review, the court of appeals found that the ALJ's credibility evaluations of the only two witnesses to testify (the Complainant and his former manager) did not mandate broad deference to all of the ALJ's findings, especially where the case did not turn on witness credibility alone and where the ALJ'S credibility rulings did not purport to address all of the witnesses' testimony or dispose of all of the issues in the case (the ALJ had only found that the Complainant was credible in having been "hurt, disappointed [and] devastated"). The court therefore found that the ARB acted within its authority in drawing its own conclusions based on its independent review of the evidence.

[Nuclear and Environmental Whistleblower Digest VIII C 2]
JURISDICTION OF COURT OF APPEALS IN CERCLA APPEAL; ALTHOUGH CERCLA PROVIDES FOR INITIAL REVIEW IN DISTRICT COURT, DIRECT REVIEW BY COURT OF APPEALS APPROPRIATE WHERE COMMON FACTS AND ISSUES AND ANOTHER WHISTLEBLOWER LAW PROVIDING FOR COURT OF APPEALS REVIEW IS INVOLVED

In ***Anderson v. Metro Wastewater Reclamation District***, No. 03-9570 (10th Cir. Sept. 2, 2005) (case below ARB No. 01-103, ALJ No. 1997-SDW-7), the Tenth Circuit was confronted with an appeal of a DOL determination on the employee protection provision of seven environmental laws involving a common factual background and a common legal question. Six of the laws provided for review in the courts of appeal, but CERCLA provided for district court review. 42 U.S.C. §§ 9610(b), 9613(b). Citing *Ruud v. USDOL*, 347 F.3d 1086 (9th "Cir. 2003) (involving an appeal under CAA and CERCLA), the court determined that consolidated review before the court of appeals was appropriate.

[Nuclear and Environmental Whistleblower DigestIX C]
JOINDER OF PARTY NOT INVESTIGATED BY OSHA

In ***Dann v. Bechtel SAIC Co., LLC***, 2005-SDW-4, 5 and 6 (ALJ May 11, 2005), Complainant Dann filed a complaint with OSHA on behalf of himself and two other complainants alleging that he and the other complainants were fired by Bechtel SAIC for protected activity. Dann's letter did not specifically mention Bechtel Nevada, but did allege that there had been "blacklisting." It appeared that a copy of Bechtel Nevada letter to Local 525 informing the local's business manager that all three Complainants were "not eligible for employment with Bechtel Nevada" was attached to the complaint letter. In several follow-up letters to OSHA, Dann specifically complained about the Bechtel Nevada letter. OSHA, however, apparently limited its investigation to the allegations against Bechtel SAIC and did not consider Bechtel Nevada to be a separate employer. When the Complainants' requested an ALJ hearing, they raised the complaint that OSHA had failed to investigate the allegations against Bechtel Nevada. Subsequently, the counsel for all three complainants filed a motion asking that Bechtel Nevada be recognized as a proper respondent in the proceeding before the ALJ. Bechtel Nevada did not respond to the motion, but Bechtel SAIC did, essentially contending that joining Bechtel Nevada without first giving notice to Bechtel Nevada would violate that company's right to procedural due process. The ALJ, however, observed that since the submission of Bechtel SAIC's response, the Complainants had in fact served Bechtel Nevada with notice of their request that Bechtel Nevada be joined as a respondent. The ALJ observed that the ALJ proceeding is entirely de novo and was just beginning. The ALJ therefore ruled that joinder of Bechtel Nevada as a party would not infringe on its due process rights.

After the ALJ issued this ruling, Bechtel Nevada filed its tardy response to the joinder motion. It argued that the letter to the Union was a collective bargaining agreement requirement and that any dispute should be resolved through the CBA process. It also argued that because OSHA did not investigate it, due process would be violated if it was joined as a party before the ALJ. The ALJ, treating the response as a motion for reconsideration, rejected the CBA argument, finding that it might be an affirmative defense to the Complainant's blacklisting claim, but that it did not deprive him of jurisdiction to consider the claim. The ALJ found that because the ALJ hearing was de novo, joinder of Bechtel Nevada would not impinge on its due process rights. ***Dann v. Bechtel SAIC Co., LLC***, 2005-SDW-4, 5 and 6 (ALJ June 1, 2005).

[Nuclear and Environmental Whistleblower Digest IX C]
MOTION TO INTERVENE; MATERIAL CONTRIBUTION STANDARD

In ***Erickson v. U.S. Environmental Protection Agency, Region 4***, ARB Nos. 03-002 to 004, ALJ Nos. 1999-CAA-2, 2001-CAA-8 and 13, 2002-CAA-3 and 18 (ARB Sept. 14, 2005), the ARB had invited briefing on whether sovereign immunity bars any or all of the Complainant's environmental whistleblower complaints against EPA and the EPA Inspector General. A different Complainant who also had a case pending before the ARB against EPA sought leave to intervene to brief the issue. The Board, finding that in the absence of guidance in its own rules, it was guided by OALJ rules of procedure at 29 C.F.R. Part 18 and the Federal Rules of Civil Procedure,

concluded that the movant had failed "to suggest any reason why his participation would contribute materially to the disposition of the proceeding or why his interests are not adequately represented by the existing parties." The ARB also concluded that there was a need for expedition of the appeal. Thus, it denied intervention. *See* 29 C.F.R. § 18.10(b) and (c) (material contribution standard); FRCP 24(b) (discretion to grant motion for permissive intervention must be exercised with view of whether intervention would unduly delay or prejudice adjudication rights of original parties).

[Nuclear and Environmental Whistleblower Digest X P]
EVIDENCE; ATTORNEY-CLIENT PRIVILEGE IS NOT A PER SE BAR ON THE OFFENSIVE USE OF PRIVILEGED DOCUMENTS IN A WHISTLEBLOWER COMPLAINT

In ***Willy v. Administrative Review Board, USDOL***, No. 04-60347 (6th Cir. Aug. 24, 2005) (case below ARB No. 97-107, 1985-CAA-1), the Complainant was an in-house attorney who wrote a memorandum concluding that a subsidiary of the Respondent was exposed to liability for violating several federal environmental statutes. The memorandum was not well received by several employees of the Respondent. The Complainant was later fired and filed a complaint with DOL alleging that the firing was in retaliation for the memorandum. The Wage and Hour Division found in favor of the Complainant, and a request for ALJ hearing was filed.

During discovery, the Complainant sought production of his memorandum and related documents; the Respondent refused to produce the documents citing attorney-client privilege. Ruling on a motion to compel, the ALJ held that the documents, although confidential, were admissible, citing *Doe v. A Corp*., 709 F.2d 1043, 1048 (5th Cir. 1983). Before the Complainant could seek enforcement of the ALJ's order in district court, the ALJ issued a recommended decision finding that the Complainant's internal complaint was not protected activity under Fifth Circuit law. On appeal, the Secretary of Labor reversed the ALJ's finding on protected activity, and concluded that in-house attorneys are not excluded from protection under the ERA. On remand the Respondent continued to refuse to produce the memorandum and related documents, but the ALJ admitted several draft versions in the possession of the Complainant and found that the Complainant had been fired, in part, because of having written the memorandum. The ALJ, however, denied the claim on other grounds. [Editor's note: During the remand proceeding, the ALJ sealed the record in regard to the privileged documents].

On review, the Secretary found in favor of the Complainant, concluding in so finding that the memorandum was admissible evidence. The Secretary remanded for a calculation of back pay. By the time that the ALJ's decision on back pay was issued, the ARB had been delegated the authority to issue whistleblower decisions. The ARB concluded that, under federal law, no exception to the attorney client privilege existed to permit the admission of the memorandum and related documents. The ARB, finding that the without the privileged documents the cause of action failed, dismissed the complaint.

On review, the Fifth Circuit affirmed the ARB's finding that federal common law governs attorney-client privilege in ERA whistleblower complaints, but reversed its

conclusion that an attorney may use privileged documents only as a shield and never as a sword. The Fifth Circuit found that the case law only supports a narrower proposition -- that a party cannot simultaneously use confidential information as both a shield and a sword -- that "when a party entitled to claim the attorney-client privilege uses confidential information against his adversary (the sword), he implicitly waives its use protectively (the shield) under that privilege." Slip op. at 28. The Fifth Circuit went on find that the ARB had misinterpreted several decisions as standing for the proposition that the attorney-client privilege is a *per se* bar to an attorney's use of privileged information in a claim against his former client or employer. Rather, the Fifth Circuit found controlling its holding in *Doe v. A Corp*. (the decision cited by the ALJ in ruling on the original discovery dispute).

> In sum, neither the current Secretary nor Coastal has directed us to any case that can be stretched to stand for the broad proposition espoused by the ARB, that the attorney-client privilege is a per se bar to retaliation claims under the federal whistleblower statutes, i.e., that the attorney-client privilege mandates exclusion of all documents subject to the privilege. As we observed in Doe, "[a] lawyer . . . does not forfeit his rights [as an employee] simply because to prove them he must utilize confidential information," and we are disinclined to hold that he has. The ARB seriously misinterpreted our — and other circuits' — case law treating the attorney-client privilege. There are ample opportunities – such as those adverted to in both Doe and Kachmar – to protect privileged information such as that which Coastal now seeks to protect. The ALJ followed these procedures, and we find no error in his doing so.

Slip op. at 34-35 (footnote omitted). The court made it clear that its ruling was limited to the context of a hearing before an ALJ rather than a jury: "Today, we merely hold that no rule or case law imposes a per se ban on the offensive use of documents subject to the attorney-client privilege in an in-house counsel's retaliatory discharge claim against his former employer under the federal whistleblower statutes when the action is before an ALJ." Slip op. at 35.

[Nuclear and Environmental Whistleblower Digest XI A 2 c]
CAUSATION; KNOWLEDGE OF PERSONS WHO MADE EMPLOYMENT DECISION

The ARB affirmed the ALJ's finding that the Complainant failed to prove that the persons who had input into the decision not to offer him a principle auditor position following a corporate reorganization were aware of the Complainant's safety activities in earlier employment. The position to which the Complainant applied would have been a promotion; he did not apply for his current auditor position and was terminated when not selected for the applied for position in the reorganized company. The Complainant on appeal argued that a finding that a newly hired manager made the decision to terminate him without contact from anyone in upper management was preposterous and that he had been terminated as part of a broad conspiracy to cover up safety issues he had raised. The ARB, however, found that the Complainant's theory was barely even rank speculation and that without evidence that the managers who declined to offer him the position he applied for knew about the alleged protected activity, his claim of retaliation was absolutely

precluded. ***Shirani v. Comed/Exelon Corp.***, ARB No. 03-100, ALJ No. 2002-ERA-28 (ARB Sept. 30, 2005).

[Nuclear and Environmental Whistleblower Digest XI B 2 a]
LEGITIMATE NON-DISCRIMATORY REASON FOR DISCHARGE; REDUCTION IN FORCE ("RIF")

In ***Jones v. USDOL***, No. 04-3729 (6th Cir. Sept. 8, 2005) (case below ARB Nos. 02-093 and 03-010, ALJ No. 2001-ERA-21), the Court of Appeals indicated that an employee discrimination litigant faces a heightened burden of proof in the context of a RIF, because the RIF itself is evidence of a legitimate reason for the discharge. The court cited *Barnes v. GenCorp Inc.*, 896 F.2d 1467 (6th Cir. 1990) (Title VII case).

[Nuclear and Environmental Whistleblower Digest XII B 1 c]
PROTECTED ACTIVITY; INTERNAL COMPLAINT; 5TH CIRCUIT CONCEDES THAT *BROWN & ROOT* WAS INCORRECTLY DECIDED

In ***Willy v. Administrative Review Board, USDOL***, No. 04-60347 (6th Cir. Aug. 24, 2005) (case below ARB No. 97-107, 1985-CAA-1), the Fifth Circuit in a footnote conceded "Congress clarified by statute [i.e., the 1992 amendments to the ERA] that *Brown & Root*[, 747 F.2d 1029 (5th Cir. 1984),] was incorrect in holding that complaints to employers were not protected under 42 U.S.C. § 5851. Slip op. at n.9. In other words, Congress clarified that internal complaints are protected activity under the whistleblower provision of the ERA.

[Nuclear and Environmental Whistleblower Digest XIII B 18]
ADVERSE ACTION; POLITICAL ROUGH AND TUMBLE OF BOARD OF DIRECTORS OF PUBLIC ENTITY

In ***Anderson v. Metro Wastewater Reclamation District***, No. 03-9570 (10th Cir. Sept. 2, 2005) (case below ARB No. 01-103, ALJ No. 1997-SDW-7), the Complainant was a political appointee to the Board of Directors of a metropolitan wastewater reclamation district ("Metro") who complained that she was discriminated against under the environmental whistleblower statutes by the Board cutting her off or ruling her out of order at Board meetings, denying her requests to distribute materials, subjecting her to a disclaimer requirement when making public statements, among other actions. The Tenth Circuit affirmed the ARB's holding that the Complainant did not have standing to pursue claims under the environmental laws, and went on to observe that it had "difficulty understanding how those complaints amount to 'discrimination' from which these statutes afford protection. While frustrating and unpleasant, the matters about which she complains appear to be part of the rough and tumble of politics and the by-product of a minority position on a political board. * * * A political remedy is best suited to a political wrong."

[Nuclear and Environmental Whistleblower Digest XIV C]
COVERED LITIGANTS; AUTHORIZED REPRESENTATIVE OF EMPLOYEES; POLICITICAL APPOINTEE TO BOARD OF DIRECTORS OF GOVERNMENT ENTITY

In ***Anderson v. Metro Wastewater Reclamation District***, No. 03-9570 (10th Cir. Sept. 2, 2005) (case below ARB No. 01-103, ALJ No. 1997-SDW-7), the Tenth Circuit ruled that a political appointee to the Board of Directors of a metropolitan wastewater reclamation district ("Metro") was not an "authorized representative of employees" during her tenure as a Board director, and therefore lacked standing to sue under the employee protection provisions of seven environmental statutes.

The Court affirmed the ARB's holding that the plain language of the ERA, SDWA, CAA and TSCA only provide a cause of action to employees and not to their authorized representatives. The Court also affirmed the ARB's holding that the Complainant had failed to prove that she was an "authorized representative" of Metro employees and therefore failed to establish a necessary element of her claim under the CERCLA, SWDA and FWPCA.

First, the Court found that Congress' intent for the meaning of the term "authorized representative" was not clear, and therefore it would employ a *Chevron* deferential review on whether the ARB had presented a permissible interpretation. The final ARB decision required some tangible act of selection by employees in order for a person to be an "authorized representative of employees." The Court held that this construction was permissible.

Second, the Court agreed with the ARB's finding that, as a Board Director who was required to represent the citizens and not any particular segment of society or a particular interest group, the Complainant could not, as a matter of law "represent" Metro employees or union members. The Court agreed that any political motivation behind her appointment was not relevant. Finally, the Court found that substantial evidence supported the ARB's determination that the Complainant had failed to prove that she had been authorized to represent the employees or union members, and that any authorization amounted to self-authorization.

[Nuclear and Environmental Whistleblower Digest XIV C]
CAUSE OF ACTION; UNDER THE ERA, SDWA, CAA AND TSCA ONLY THE EMPLOYEE AND NOT HIS REPRESENTATIVE ARE COVERED

In ***Anderson v. Metro Wastewater Reclamation District***, No. 03-9570 (10th Cir. Sept. 2, 2005), the Tenth Circuit held that the plain language of the whistleblower provisions of the ERA, SDWA, CAA and TSCA prohibit discrimination based on an employee's or his representative's protected activity. A whistleblower cause of action, however, depends on discrimination directed toward the employee. The cause of action inures to the benefit of the employee and not his representative. In contrast, the CERCLA, SWDA and FWPCA also protect authorized representatives of employees.

[Nuclear and Environmental Whistleblower Digest XIV C]
DEFINITION OF "AUTHORIZED REPRESENTATIVE OF EMPLOYEES" INCLUDES A TANGIBLE ACT OF SELECTION

In ***Anderson v. Metro Wastewater Reclamation District***, No. 03-9570 (10th Cir. Sept. 2, 2005), the Tenth Circuit found that the Congress' intent in using the term "authorized representative of employees" in the whistleblower provisions of the CERCLA, SWDA and FWPCA was not clear. Therefore, under *Chevron*, its inquiry was whether the ARB's definition of the term to require some sort of tangible act of selection was a permissible construction of the statute. The court found that it was.

[Nuclear and Environmental Whistleblower Digest XIV C]
STANDING OF MEMBER OF BOARD OF DIRECTORS

In ***Anderson v. Metro Wastewater Reclamation District***, No. 03-9570 (10th Cir. Sept. 2, 2005), the Tenth Circuit affirmed the ARB's definition of the term "authorized representative of employees" as requiring some sort of tangible act of selection. The issue became, therefore, whether the Complainant fit that definition.

The Complainant had been appointed to the Board of Directors of a metropolitan sewage disposal district, which was a political subdivision of the State. The Complainant's nomination had been by the mayor of Denver who was responding to a union's request for a Board member sympathetic to the union's views. During her tenure the Complainant had been outspoken about environmental issues that she believed reflected the views of union members.

The ARB found that under the relevant law, Board members were legally required to represent the citizens and not any particular segment of society or a particular interest group, and that any political motive behind an appointment was not relevant. In addition, the ARB found that the Complainant's evidence of authorization amounted, at best, to self-authorization. The Tenth Circuit found that substantial evidence supported these findings, and that the Complainant did not have standing under the whistleblower provisions of CERCLA, SWDA or FWPCA.

[Nuclear and Environmental Whistleblower Digest XX E]
SOVEREIGN IMMUNITY; ARB INVITES BRIEFING ON WHETHER EPA HAS IMMUNITY FROM SUIT UNDER THE ENVIRONMENTAL WHISTLEBLOWER LAWS

In ***Erickson v. U.S. Environmental Protection Agency, Region 4***, ARB Nos. 03-002 to 004, ALJ Nos. 1999-CAA-2, 2001-CAA-8 and 13, 2002-CAA-3 and 18 (ARB Aug. 17, 2005), the ARB invited supplemental briefing on whether, in light of the Board's ruling in *Powers v. Tennessee Dept. of Environment & Conservation*, ARB Nos. 03-061 and 03-125, ALJ Nos. 2003-CAA-8 and 16 (ARB June 30, 2005) (errata Aug. 16, 2005), "sovereign immunity bars any or all of Erickson's environmental whistleblower complaints against EPA and the EPA Inspector General." In *Powers*, the ARB had ruled that Congress did not abrogate state sovereign immunity in the environmental whistleblower protection provisions.