In the Matter of:

DAVID L. LEWIS,

COMPLAINANT,

v.

SYNAGRO TECHNOLOGIES, INC., ROSS M. PATTEN and ROBERT O'DETTE,

RESPONDENTS,

and

DAVID L. LEWIS,

COMPLAINANT,

v.

WATER ENVIRONMENT FEDERATION,

RESPONDENT.

ARB CASE NO. 02-072

ALJ CASE NOS. 02-CAA-12
02-CAA-14

ARB CASE NO. 02-116

ALJ CASE NO. 02-CAA-17

DATE: February 27, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Stephen M. Kohn, Esq., Christopher J. Wesser, *Kohn, Kohn and Colapinto, P.C., Washington, D.C.*

For the Respondents, Synagro Technologies, Inc., Ross M. Patten and Robert O'Dette:
James B. Slaughter, Esq., Thomas A. Blaser, Esq., *Beveridge & Diamond, P.C., Washington, D.C.*

For the Respondent, Water Environment Federation:
David E. Nash, Esq., Keely J. O'Bryan, Esq., *Thomas Hine LLP, Cleveland, Ohio,* and Irving P. Cohen, Esq., *Thomas Hine LLP, Washington, D.C.*

ORDER OF CONSOLIDATION AND FINAL DECISION AND ORDER

On February 11, 2002, David L. Lewis filed a complaint against Synagro Technologies, Incorporated, and its Chief Executive Officer (CEO) seeking relief under the employee protection provisions of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C.A. § 1367 (West 2000), Solid Waste Disposal Act (SWDA), 42 U.S.C.A. § 6971 (West 1995), Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (West 1995), Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9(i) (West 2003), Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 1995), Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998), and the Department of Labor's (DOL) implementing regulations set out at 29 C.F.R. Part 24 (2002). On February 21, 2002, Lewis filed a supplemental complaint against a Synagro employee under the same provisions.[1] A Department of Labor Administrative Law Judge dismissed these complaints,[2] pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, on the grounds that he lacked subject matter jurisdiction because Lewis had failed to establish that he had an employment relationship with the Respondents. The ALJ also granted the Respondents Motion to Strike Discovery and denied Lewis's Motion to Compel Discovery. Lewis appealed the ALJ's actions to this Board.[3]

On March 20, 2002, Lewis filed a complaint against the Water Environment Federation (WEF), seeking relief under the whistleblower protection provisions and regulations cited in his *Synagro* complaint. This complaint against WEF was dismissed for lack of subject matter jurisdiction by the same ALJ, who noted that "the jurisdictional issues appear to be similar if not identical" to those in *Synagro*. The ALJ also denied Lewis's Motion for Jurisdictional Discovery on the basis that discovery would not

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[1] We hereafter refer to Synagro Technologies, Inc., as Synagro, and to Synagro; Ross M. Patten, Synagro's CEO, and Robert O'Dette, a Synagro employee, as the Synagro respondents.

[2] We hereafter refer to these complaints and the disposition below as *Synagro* or the Synagro case.

[3] The Respondents in *Synagro* also have filed before us a Motion to Strike Scandalous Pleadings (i.e., part of the Complainant's Brief in Support of Petition for Review) pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.

remedy the deficiency in Lewis's pleadings. Lewis appeals these actions by the ALJ. For the reasons that follow, we affirm the dismissal of Lewis's complaints and the denial of his motions for discovery.

Consolidation of Synagro and WEF Cases

In view of the substantial identity of the legal issues and the commonality of much of the evidence, and in the interest of judicial and administrative economy, the Synagro and WEF cases are hereby consolidated for the purpose of review and decision. *See Agosto v. Consol. Edison Co. of New York, Inc.*, ARB Nos. 98-007, 152, ALJ Nos. 96-ERA-2, 97-ERA-54 (ARB July 27, 1999); *Bonanno v. Stone & Webster Eng'g,* ARB Nos. 96-110, 165, ALJ Nos. 95-ERA-54, 96-ERA-7 (ARB Dec. 12, 1996).[4]

BACKGROUND

Lewis is a research scientist working at the University of Georgia (UGA) pursuant to an Intergovernmental Personnel Act (IPA) agreement with his employer, the Environmental Protection Agency (EPA) of the United States. Lewis also has engaged in outside employment as an expert witness and writer regarding the adverse effects of land-applied biosolids or sludge sewage.[5] In particular, Lewis participated as an expert witness for the plaintiffs in a private tort suit filed against Synagro, and authored an article that suggested problems with the health and safety risk assessment underlying federal environmental laws and regulations regarding the land application of sludge.

Synagro is a company whose business, in part, involves the land application of biosolids as a fertilizer. WEF is a non-profit organization whose mission is to provide educational information on water quality to the public, including, in conjunction with a cooperative agreement with the EPA, information regarding the use of biosolids.

Lewis alleges that Synagro, acting through its CEO, Ross M. Patten, contacted EPA and falsely accused Lewis of receiving payment for providing his expert opinion in

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[4] We note that Lewis's brief on appeal in *WEF* states that the legal issues raised in that case are substantially identical to those raised in *Synagro* and that Lewis incorporates in his *WEF* brief the legal arguments he raised in his brief to us in *Synagro*. Complainant's Brief On Appeal at 1.

[5] Lewis also alleges that he engaged in protected activity by raising "concerns with his supervision [sic], members of Congress, the news media, the Centers for Disease Control, and the EPA Office of Inspector General, among others, concerning" his belief that the use of biosolids has created health hazards. *See Synagro* complaint (Feb. 11, 2002).

the private tort suit.[6] Synagro's and Patten's aim, Lewis contends, was to encourage EPA to stop approving his outside employment as an expert witness and to investigate his profiting from such outside employment. Lewis also alleges that Robert O'Dette, a Synagro employee, falsely represented to Jim Bynum[7] that a professional journal had refused to publish an article by Lewis and that Lewis improperly received payment for his expert opinion. Lewis states that O'Dette made his remarks in order to interfere with Lewis's ability to engage in outside employment as an expert witness, to obtain future employment, and to be published.

According to Lewis's complaint against WEF, it is funded by and works jointly with his employer, the EPA. Lewis contends that WEF contacted EPA and falsely alleged that Lewis improperly received payment for his expert opinion, that his research was flawed and that he had engaged in research misconduct.[8]

Lewis submits that the Synagro respondents and WEF were retaliating against him for his outside employment as an expert witness, writer and researcher on the adverse health effects of land-applied sludge sewage. According to Lewis, his outside employment activities constitute activity protected by the whistleblower protection provisions cited above, and Respondents' comments, representations and allegations constitute discrimination prohibited by those provisions. The Respondents argue that subject matter jurisdiction under the cited whistleblower protection provisions is lacking or that Lewis has failed to make a prima facie case, or state a claim for which relief may be granted, because they are not Lewis's employer and do not have an employment relationship with him. The Synagro Respondents also contend that Lewis has failed to

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[6] Receiving payment allegedly would have violated the rules applicable to Lewis as a federal employee. *See Synagro* complaints (Feb. 11, 2002 and Feb. 21, 2002).

[7] In an affidavit attached to an affidavit of Lewis, dated April 8, 2002, accompanying [Lewis's] Opposition to Synagro's Combined Motions to Dismiss and to Strike Discovery Pleadings before the ALJ, Bynum describes himself as someone "who would like to employ Dr. Lewis as an expert in the sludge issues related to the harm caused by sludge contamination." *See* Lewis Affidavit, Attachment 8 (Apr. 8, 2002). Bynum states that he was contacted by O'Dette, a representative of Synagro, who "clearly wants to discourage my use of Dr. Lewis as an expert, and has provided me information which calls into question Dr. Lewis' credibility, science and his ability to be qualified as an expert." Bynum adds that "if the Synagro accusations against Dr. Lewis were true, I would not be able to employ him as an expert witness."

[8] In his WEF complaint, Lewis submits that EPA sent information to UGA about the scope of his IPA, knowing that Synagro would be able to discover that information under Georgia's Open Records statute. Lewis does not allege, however, that his employer, the EPA, has actually stopped approving his outside employment in any capacity.

make a prima facie case, or state a claim for which relief may be granted, because Lewis was not engaged in protected activity, they did not subject him to adverse employment action, their actions are protected under the Petition Clause of the First Amendment, their actions were not directed toward any protected activity, and their actions were justified.[9]

JURISDICTION AND STANDARD OF REVIEW

The environmental whistleblower statutes authorize the Secretary of Labor to hear complaints of alleged discrimination in response to protected activity and, upon finding a violation, to order abatement and other remedies. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). The Secretary has delegated authority for review of an ALJ's initial decisions to the ARB. 29 C.F.R. § 24.8 (2002). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the recommended decision of the ALJ. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

The Board is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). *See generally Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. United States Dep't of Agric.*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) in rejecting argument that

[9] Before the ALJ in the Synagro case, Lewis filed a Motion to Compel Discovery and the Respondents filed a combined Motion to Dismiss for lack of subject matter jurisdiction, for failure to make a prima facie case or state a claim for which relief may be granted, and because the Respondents' actions are protected under the Petition Clause of the First Amendment. The Respondents also filed a Motion to Strike Discovery Pleadings and an Opposition to Motion to Compel. The ALJ granted the Respondents' Motion to Dismiss for lack of subject matter jurisdiction and Motion to Strike Discovery Pleadings and denied Lewis's Motion to Compel Discovery. In the WEF case, the ALJ granted the Respondent's Motion to Dismiss for lack of subject matter jurisdiction and denied Lewis's Motion for Jurisdictional Discovery.

higher level administrative official was bound by ALJ's decision). An ALJ's findings constitute a part of the record, however, and as such are subject to review and receipt of appropriate weight. *Universal Camera Corp.,* 340 U.S. at 492-497; *Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991); *NLRB v. Stor-Rite Metal Products, Inc.,* 856 F.2d 957, 964 (7th Cir. 1988). The Board is bound by regulations duly promulgated by the Secretary, and is not authorized to rule on the validity of those regulations, *see* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272, 64,273 (Oct. 17, 2002); *see also* 29 C.F.R. § 8.1(b).

ISSUES

Whether the Respondents are covered employers under the whistleblower protection provisions of the SDWA, CAA and TSCA.

Whether the Respondents Synagro and its named officers are covered under the whistleblower protection provisions of the WPCA, SWDA and CERCLA.

Whether dismissal of the complaints and denial of the Complainant's discovery motions is proper.

DISCUSSION

The Synagro Respondents and WEF are not covered employers under the whistleblower protection provisions of the SDWA, CAA and TSCA.

Pursuant to the TSCA:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment….

15 U.S.C.A. § 2622(a). The CAA and the SDWA contain similar provisions. *See* 42 U.S.C.A. § 7622(a); 42 U.S.C.A. § 300j-9(i)(1). Lewis claims that he is an employee and the Respondents are employers who have violated this prohibition. Because Lewis's allegations, taken as true and making all reasonable inferences in his favor, do not show that the Respondents control (or controlled) Lewis's employment, we conclude that they are not covered employers.[10]

[10] We note that to discharge an employee or "otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment," control over those aspects of employment must exist.

In *Synagro*, the ALJ initially held that Lewis was not an employee of the Respondents, Synagro or its two named individual officers, under the common-law, right-to-control test because Synagro and its individually named officers did not control any of the relevant factors of Lewis's employment.[11] Synagro Recommended Decision and Order (R. D. & O.) at 3. Next, the ALJ held that Lewis's complaints did not satisfy the joint employer criteria enunciated in *Radio and Tel. Broad. Technicians v. Broad. Serv.*, 380 U.S. 255, 256 (1965).[12]

Lewis does not challenge these determinations. Instead, he contends that Synagro, its named officers, and WEF are "employers" subject to liability under the SDWA, CAA and TSCA environmental whistleblower provisions because they interfered with his employment. As support for this proposition, he relies on *Hill and Ottney v. TVA*, 87 ERA-23 and 24 (Sec'y May 24, 1989) and *Stephenson v. National Aeronautics & Space Admin.*, ARB No. 98-025, ALJ No. 94-TSC-5 (ARB July 18, 2000).

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[11] The common-law test for determining who qualifies as an "employee" under the environmental whistleblower statutes considers:

> the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-324 (1992), *quoting Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989); *Robinson v. Martin Marietta Serv, Inc.*, ARB No. 96-075, ALJ No. 94-TSC-7, slip op. at 5 (ARB Sept. 23, 1996); *Reid v. Methodist Med. Center*, 93-CAA-4, slip op. at 6 (Sec'y Apr. 3, 1995). "[A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

[12] In *WEF*, the ALJ focused on whether there was a "relevant nexus" between WEF and EPA, and found that there was not. Lewis's allegations, he determined, failed to show that WEF had any ability to influence the conditions of Lewis's employment with EPA. He therefore concluded it was not a covered employer.

Like the ALJ, we reject Lewis's argument, because it fails to recognize that control over employment is essential to being an "employer." We note that the factors enunciated in the various tests (common law, joint employer, etc.) all are means of ascertaining whether the requisite control exists. Interference of the type Lewis alleges (i.e., sending letters to EPA critical of Lewis's actions and providing negative information to an individual who might hire Lewis as an expert witness) coupled with receipt of EPA funding and engaging in joint educational activities with EPA (as in WEF's case) or being regulated by EPA (as in Synagro's case) do not manifest control over Lewis's employment.[13]

Lewis's "interference" argument was rebuffed by the ALJ, who read *Hill* and *Stephenson* as requiring a "relevant nexus" between the complainant's immediate employer and the respondent pursuant to which the respondent could control or change the terms, conditions, compensation, or privileges of the complainant's employment. *Synagro* R. D. & O. at 4; *WEF* R. D. & O. at 3. The ALJ ruled that Lewis's allegations failed to establish the relevant nexus because, unlike the respondents in *Hill* and *Stephenson*, neither Synagro or WEF was a contracting agency with the capability of controlling or changing the terms, conditions, compensation, or privileges of Lewis's employment. Therefore, he concluded that an employment relationship does not exist between Lewis and Synagro or its officers, or between Lewis and WEF, and they are not employers under the cited whistleblower provisions.

We agree with the ALJ that the Respondents are not employers under the SDWA, CAA and TSCA. Under the cases Lewis cites, an employer that is in a hierarchical relationship with the complainant's immediate employer and acts in the capacity of an employer with regard to the complainant may be subject to liability under the environmental whistleblower provisions, depending on the specific facts and circumstances of the particular case. (Acting in the capacity of an employer similarly applies with respect to joint employer liability.) *See Williams v. Lockheed Martin Energy Sys. Inc.*, ARB No. 98-059, ALJ No. 95-CAA-10, slip op. at 9-11 (ARB Jan. 31, 2001) (Brown, J., *dissenting*).[14] Taking all of Lewis's allegations as true and making all

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[13] We note that although Lewis alleges that EPA and WEF are engaged in joint activities, Lewis has not alleged that he was involved as an employee in those activities and that WEF controlled his employment thereby.

[14] Although the existence of an employment relationship in a particular case arising under the environmental whistleblower statutes may be determined based on a variety of factors, it is essential in finding coverage that the respondent putative employer exercised control over the terms, conditions, or privileges of the complainant's employment. *See, e.g., Williams*, ARB No. 98-059 slip op. at 6; *Stephenson v. National Aeronautics & Space Admin.*, ARB No. 96-080, ALJ No. 94-TSC-5, slip op. at 1-2 (ARB Apr. 7, 1997); *Stephenson v. National Aeronautics & Space Admin*, ARB No. 96-080, ALJ No. 94-TSC-5, slip op. at 2 (ARB Feb. 13, 1997); *Freels v. Lockheed Martin Energy Sys., Inc.*, ARB No. 95-

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reasonable inferences in his favor, neither Synagro or WEF exercised control over his employment. Patten and O'Dette likewise are not employers for that reason, as well as for the reasons enunciated in our prior decisions holding that an employee is not an "employer" under the comparable whistleblower protection provision of the Energy Reorganization Act. *See Bath v. United States Nuclear Regulatory Comm'n*, ARB No. 02-041, ALJ No. 01-ERA-41, slip op. at 4 (ARB Sep. 29, 2003), *citing Kesterson v. Y-12 Nuclear Weapons Plant*, ALJ No. 95-CAA-0012, slip op. at 10 (Aug. 15, 1996), *affirmed*, ARB No. 96-173 (ARB Apr. 8, 1997) (dismissing § 5851 complaint against employees of employer because the complainant "failed to set forth any allegations that, even if taken as true and construed in the light most favorable to him, establish an employment relationship with these individuals rather than a mere supervisory relationship").

Thus, the ALJ properly found that the Respondents were not covered employers under the relevant environmental whistleblower statutes.

The Respondents are not covered by the whistleblower protection provisions of the FWPCA, SWDA and CERCLA.

Pursuant to the FWPCA:

> No *person* shall fire, or in any other way discriminate against, or *cause* to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

See 33 U.S.C.A. § 1367(a) (emphasis added). The SWDA and CERCLA contain parallel provisions, *see* 42 U.S.C.A. § 6971(a); 42 U.S.C.A. § 9610(a). Because those Acts define "person" broadly,[15] Lewis argues that a "person" under the Acts' whistleblower

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110, ALJ Nos. 94-ERA-6, 95-CAA-2, slip op. at 7 (ARB Dec. 4, 1996); *Varnadore v. Oak Ridge National Lab.* (*Varnadore III*), 92-CAA-2&5, 93-CAA-1, 94-CAA-2&3, 95-ERA-1, slip op. at 24 (ARB June 14, 1996); *Hill and Ottney v. TVA*, 87-ERA-23, 24, slip op. at 1-3 (Sec'y May 24, 1989).

[15] The FWPCA, for example, provides: "Except as otherwise specifically provided, when used in this chapter: (5) The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C.A. § 1362(5). The other statutes contain comparable definitions. *See* 42 U.S.C.A. § 6903(15); 42 U.S.C.A. § 9601(21).

protection provisions does not mean only an employer, but any "individual" or "corporation."

In the Synagro and WEF cases below, the ALJ held that individuals are not "persons" under the FWPCA, SWDA and CERCLA whistleblower protection provisions unless they are also employers, citing holdings in the *Stephenson* case. *See Stephenson v. National Aeronautics & Space Admin.*, ARB No. 98-025, ALJ No. 94-TSC-5 (ARB July 18, 2000); *Stephenson v. National Aeronautics & Space Admin.*, ARB No. 96-080, ALJ No. 94-TSC-5, slip op. at 2 (ARB Feb. 13, 1997); *Stephenson v. National Aeronautics & Space Admin.*, 94-TSC-5, slip op. at 2 (Sec'y July 3, 1995), as well as *Varnadore v. Oak Ridge National Lab.* (*Varnadore III*), 92-CAA-2&5, 93-CAA-1, 94-CAA-2&3, 95-ERA-1 (ARB June 14, 1996). Synagro R. D. & O. at 5.[16]

The holdings in *Varnadore III* and *Stephenson* are, as Lewis asserts, arguably distinguishable because they involve the whistleblower provisions of the TSCA and the CAA, as opposed to the FWPCA, SWDA and CERCLA. However, the ARB has previously held that it was proper to dismiss whistleblower complaints filed under the SWDA and CERCLA where the facts showed that the respondent did not "act as an employer with regard to complainant." *See Williams,* ARB No. 98-059 slip op. at 6-8. An examination of the whistleblower provisions of the FWPCA, SWDA and CERCLA in their entirety, their legislative history, and the Secretary's implementing regulations, establishes that the "person" referred to in the pertinent sections of these statutes must have an employment relationship with the complainant or act in the capacity of an employer.

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," *see Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), "since the meaning of statutory language, plain or not, depends on context," *see Conroy v. Aniskoff*, 507 U.S. 515 (1993), *citing King v. St. Vincents Hosp.*, 502 U.S. 215, 221 (1991). Thus, the issue before us cannot be resolved by focusing on the term "person" in isolation, as Lewis suggests. We find instructive the analysis and conclusions of courts which have considered, under similar statutes, whether the use of the term "person" places liability on persons who are not employers.

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[16] In *Varnadore III*, slip op. at 23, the Board cited the Secretary's decision in *Stephenson*, ARB No. 96-080, slip op. at 2, that only employers, as distinguished from individuals who are not employers, are subject to the employee protection provisions of the TSCA and the CAA. The Board held that individuals were not subject to suit under the environmental whistleblower provisions of the TSCA and the CAA, which prohibit "employers" from retaliating against employees who engage in protected activity, and that persons who are not "employers" within the meaning given that word in the statutes may not be held liable for whistleblower violations.

The whistleblower protection provision at Section 507 of the FWPCA (33 U.S.C.A. § 1367) is "patterned after" the parallel provision of Section 105(c) of the Federal Mine Safety and Health Act (FMSHA), 30 U.S.C.A. § 815(c) (West 1972). *See* S. Rep. No. 92-414, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3748. Like the whistleblower protection provisions at issue, the FMSHA contains a discrimination prohibition using the term "person" and a broad definition of the term "person."[17] In *Meredith v. Fed. Mine Safety and Health Review Comm'n*, 177 F.3d 1042, 1053-1054 (1999), the United States Court of Appeals for the District of Columbia Circuit rejected the argument that anyone who literally is encompassed by the use of the term "person" is liable under the FMSHA whistleblower protection provision. The court looked at the text and structure of the Act as a whole, noting that the Act's remedy provisions (particularly, 30 U.S.C.A. § 815(c)(2)-(3) which permits the Commission to order "rehiring or reinstatement of the miner to his former position with back pay") "strongly imply that Congress was considering remedies limited to those available against mine operators and their agents," *Meredith*, 177 F.3d at 1055. For this and other reasons, the court held that federal government officials acting under the color of their authority are not liable under the whistleblower protection provision of the FMSHA. *See Meredith*, 177 F.3d at 1056.[18]

Similarly, the United States Court of Appeals for the Sixth Circuit rejected a "plain language" interpretation applying the term "person" to make supervisors liable personally for employment discrimination under the Rehabilitation Act. (The court held

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[17] Under the FMSHA, "'person' means any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." 30 U.S.C.A. § 802(f).

[18] We note that the FMSHA prohibition appears broader than the prohibition at issue. It states: "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or application for employment in any coal or other mine…." 30 U.S.C.A. § 815(c)(1). Moreover, the FMSHA remedy section provides for broader relief (contrast the FMSHA provisions for the Secretary to "propose an order granting appropriate relief" and the Commission's "granting such relief as it deems appropriate, including but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate," *see* 30 U.S.C.A. § 815(c)(2)- (3), with "requiring such action *to abate the violation* as the Secretary ... deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee …," *see* 33 U.S.C.A. § 1367(b) (emphasis added)). Thus, if anything, the FMSHA language would better support Lewis's argument for applying "person" literally for purposes of liability than does the language at issue.

that individuals who are not employers under Title VII cannot be held personally liable for retaliation under the Rehabilitation Act.) *Hiler v. Brown*, 177 F.3d 542, 547 (1999).[19]

When we turn to the whistleblower protection provisions at issue, we find that they are each contained within a section entitled "*Employee protection*," *see* 33 U.S.C.A. § 1367; 42 U.S.C.A. § 6971; 42 U.S.C.A. § 9610. All of them set forth the prohibition noted supra, as well as procedures for review and abatement of discrimination violating that prohibition. The specific language with respect to review and abatement of violations provides:

> Any *employee* or a representative of *employees* who believes that he has been *fired* or otherwise discriminated against by any person in violation of subsection (a) of this section may … apply to the Secretary of Labor for a review of *such firing* or alleged discrimination . . . . If he finds that such violation did occur, he shall issue a decision … requiring the *party committing such violation* to take such *affirmative action to abate the violation* as the Secretary of Labor deems appropriate, including … *rehiring* or *reinstatement* of the *employee* … to his former position with compensation.

See 33 U.S.C.A. § 1367(b); 42 U.S.C.A. § 6971(b); 42 U.S.C.A. § 9610(b) (emphasis added). The employee protection sections also provide for evaluations of potential loss or shifts of employment due to enforcement activities under the pertinent chapter. *See* 33 U.S.C.A. § 1367(e), 42 U.S.C.A. § 6971(e) and 42 U.S.C.A. § 9610(e).

Thus the whistleblower protection provisions at hand focus on discrimination that occurs in the employment context. This is evident from the section heading, "employee protection," the nature of the prohibited discrimination here at issue – discrimination against an employee (which implies discrimination with respect to the employee's employment, since it is his employment that makes him an employee) – and the persons protected (employees and their *authorized* representatives).

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[19] In *Hiler*, the court also noted that although Title VII was amended to encompass compensatory and punitive damages (i.e., remedies typically available against individuals), there is a long line of precedent which finds that Congress's intent that only employing entities be subject to suit, is clearly evidenced by the fact that the statute originally limited remedies to reinstatement and back pay. Those remedies typically are only obtainable from an employing entity. *Hiler*, 177 F.3d at 546. *But see Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1173 (11th Cir. 2003) (which analyzes the totality of the statutory text, as well as legislative history and the Department of Justice's broadly written implementing regulations, to find individual liability under the Americans With Disabilities Act).

There is only one act of discrimination specified, firing, and the remedy for discrimination is "affirmative action to abate the violation," including the "rehiring" or the "reinstatement" of the employee. If discrimination against an employee is discrimination with respect to employment, and if the "person" who commits the violation must take action to abate it, then by necessary implication the discriminating "person" must have the capacity to abate the violation by affecting the terms, conditions or privileges of the complainant's employment. Moreover, only an employer or one with control over the terms of employment can fire, rehire or reinstate an employee.[20] The conclusion follows from this language and statutory construct that "person" therefore means one who can control the employee's terms, conditions, or privileges of employment, which is the employer or one acting in the capacity of an employer.

The legislative history regarding the purpose of the FWPCA, the first of these environmental whistleblower protection statutes enacted, depicts the statute as protecting employees against discrimination by employers. It notes:

> Under this section *employees* … could help assure that *employers* do not contribute to the degradation of the environment. Any worker who is called upon to testify or who gives information with respect to an alleged violation of a pollution control law by his e*mployer* or who files or institutes any proceeding … against an e*mployer* may be subject to discrimination. The section would prohibit any firing or discrimination . . . .

See S. Rep. No. 92-414, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3748-49 (emphasis added).

Further, the Secretary's regulations establishing procedures to implement the Act cast all of the environmental whistleblower statutes, including the FWPCA, SWDA and

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[20] Lewis contends that use of the verb "cause" in the discrimination prohibition subsections (the (a) subsections) of the pertinent sections ("No person shall fire or … discriminate against, or *cause* to be fired or discriminated against, any employee") (emphasis added), means that a "person" under the FWPCA, SWDA and CERCLA need not be an employer. Used as he proposes, a "person" is any individual or corporation that might have some role, however small, in the chain of events leading to the discrimination. We observe that the use of "cause" as a verb in the remedy provisions (the (b) subsections) suggests a different interpretation ("the Secretary of Labor shall *cause* such investigation to be made as he deems appropriate) (emphasis added), i.e., that "cause" as used indicates the exercise of control to effectuate the result. *See* 33 U.S.C.A. § 1367(b), 42 U.S.C.A. § 6971(b), 42 U.S.C.A. § 9610(b).

CERCLA, as prohibiting "employers" from retaliating against employees who engage in protected activity, *see* 29 C.F.R. §§ 24.2(a), 24.3(a), 24.4(d)(3) (2002). Section 24.2(a), for example, states:

> No *employer* subject to the provisions of any of the Federal Statutes listed in Sec. 24.1(a), or to the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 et seq., may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in this section.

29 C.F.R. § 24.2(a) (emphasis added).[21] The Secretary noted in the comments provided with the regulations implementing the environmental whistleblower statutes at 29 C.F.R. § 24 that they were to provide "uniform procedures" for resolution of complaints under the statutes, including the FWPCA and SWDA, *see* 45 Fed. Reg. 1836 (Jan. 8, 1980), and described the environmental whistleblower sections (including the whistleblower protection provisions of the FWPCA, SWDA and CERCLA) as "provisions that prohibit discriminatory action by *employers* when employees report unsafe or unlawful practices of their employers that adversely affect the environment," *see* 59 Fed. Reg. 12506 (Mar. 16, 1994) (emphasis added).[22] The interpretations of the Secretary, as the official charged

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[21] Likewise, 29 CFR § 24.2(b) provides: "Any *employer* is deemed to have violated the particular federal law and the regulations in this part if such *employer* intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee …," (emphasis added). Further, 29 CFR § 24.3(a), which sets forth the complaint process, states: "*Who may file*. An employee who believes that he or she has been discriminated against by an *employer* …," (emphasis added). And the language of 29 CFR § 24.4(d)(3) is: "A request for a hearing shall be filed with the Chief Administrative Law Judge …. A copy of the request for a hearing shall be sent by the party requesting a hearing to the complainant or the respondent (*employer*), as appropriate, on the same day that the hearing is requested . . . ." (emphasis added).

[22] The Secretary added in the comments provided with the regulations at 29 C.F.R. § 24 that the Secretary "interprets all of the whistleblower statutes to apply to such internal whistleblower activities," *see* 59 Fed. Reg. 12508 (Mar. 16, 1994). Subsequently, in the comments provided with the revised regulations at 29 C.F.R. § 24 implementing the environmental whistleblower statutes, the Secretary observed that "[t]he Department's consistent interpretation" under the "environmental whistleblower laws" which the Department administers, "has been that employees who file complaints internally with an *employer* are protected from *employer* reprisals" "against the employee," *see* 63 Fed. Reg. 6614-6615 (Feb. 9, 1998) (emphasis added). The Secretary further noted, "The Department

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by the statute to implement these provisions, are entitled to deference. *See United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001); *see also Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). As stated above, the Board is bound by regulations duly promulgated by the Secretary, and is not authorized to rule on the validity of those regulations, *see* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272, 64,273 (Oct. 17, 2002). *See, e.g.*, *In re Slavin v. Biro*, ARB No. 02-109, ALJ No. 02-SWD-00001, H.U.D. ALJ No. 02-01-NAL, slip op. at 5 (ARB June 30, 2003); *In re Gen. Services Admin.*, ARB No. 97-052, slip op. at 8 n. 16 (ARB Nov. 21, 1997); *In re Fort Hood Barbers Ass'n*, ARB No. 96-181, slip op. at 3 n.2 (ARB Nov. 12, 1996), *aff'd sub nom. Fort Hood Barbers Assoc. v. Herman*, 137 F.3d 302 (5th Cir. 1998). *See also* 29 C.F.R. § 8.1(b).

Consequently, we agree with the ALJ that the Respondents are not liable under the whistleblower protection provisions of the FWCPA, SWDA and CERCLA because Lewis's allegations, taken as true and making all reasonable inferences in his favor, fail to show that they controlled the terms, conditions, or privileges of his employment; in other words, that they were his employer or acted in the capacity of an employer with regard to Lewis.

Dismissal of the complaints and denial of the Complainant's motions for discovery is appropriate.

For the foregoing reasons, we conclude that dismissal of the complaints is appropriate. We agree, therefore, with the ALJ's rulings on the Complainant's motions (granting of the Respondents' Motion to Strike Discovery Pleadings and denial of Lewis's Motion to Compel Discovery in the Synagro case). We further agree with the ALJ's denial of Lewis's Motion for Jurisdictional Discovery in the WEF case, because allowing such discovery would not change the ALJ's proper findings that WEF is not a covered employer under the applicable whistleblower statutes and does not have the capability to change the terms or conditions of Lewis's employment. WEF R. D. & O. at 4. Thus, we hold that the ALJ's denial of discovery was neither arbitrary nor an abuse of discretion, *see Johnson v. Oak Ridge Operations Office*, ARB No. 97-057, ALJ Nos. 95-CAA-20 to 22, slip op. at 8 (ARB Sept. 30, 1999).

Accordingly, the ALJ's granting of the Respondents' Motion to Strike Discovery Pleadings and denial of Lewis's Motion to Compel Discovery in the Synagro case are **AFFIRMED**, the ALJ's denial of Lewis's Motion for Jurisdictional Discovery in the

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has also published a proposed rule to provide new alternative dispute resolution ("ADR") procedures in … Departmental programs, including the various whistle blower statutes …. The proposed rule envisions a pilot program under the which the Department would … offer the *employer* and employees the option of mediation and/or arbitration." *See* 63 Fed. Reg. 6616 (Feb. 9, 1998) (emphasis added).

WEF case is **AFFIRMED**, and the complaints against the Respondents, Synagro and its named officers and WEF, are **DISMISSED**.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge