In the Matter of:

ADRIENNE ANDERSON, **ARB CASE NO. 98-087**

COMPLAINANT **ALJ CASE NO. 97-SDW-7**

v. **DATE: March 30, 2000**

METRO WASTEWATER RECLAMATION DISTRICT,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Donald S. Holmstrom, Esq., *Bolder, Colorado*

For the Respondent:
Richard P. Brentlinger, Esq., *Inman Flynn & Biesterfeld, P.C., Denver, Colorado*

DECISION AND REMAND ORDER

This case arises under the employee protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9610 (1994), the Solid Waste Disposal Act (SWDA), 42 U.S.C. §6971 (1994), the Federal Water Pollution Control Act, (FWPCA), 33 U.S.C. §1367 (1994), and the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. §5851 (1995), and Department of Labor implementing regulations. 29 C.F.R. Part 24. Complainant Adrienne Anderson alleged that Respondent Metro Wastewater Reclamation District (Metro) discriminated against her in retaliation for raising health and safety concerns under those statutes. The Administrative Law Judge (ALJ) submitted a Recommended Order Granting Metro's Motion for Summary Decision (R. D. & O.) and holding that Anderson did not raise a genuine issue of material fact as to whether she is covered by CERCLA, FWPCA or SWDA as an "authorized representative of employees . . . ." R. D. & O. at 33. Because we find that the ALJ erred when he granted Metro's motion for summary decision, we remand this case to the ALJ for further proceedings consistent with this decision.

BACKGROUND

I. Factual Allegations.

Metro is a local sewage collection and treatment authority, established under the laws of Colorado, covering the city of Denver and a number of surrounding counties and municipalities.[1/] A board of directors apportioned among the member local governments by population governs Metro.

Pat Farmer, Oil Chemical Atomic Workers Local 2-477 (OCAW) chief negotiator for the Metro lab workers, wrote to Donna Good, in the Office of the Mayor of Denver on December 12, 1995, and requested that Anderson be appointed to fill an open position on the Metro board of directors. Farmer indicated that Anderson is a "recognized expert" on environmental issues and has "been helpful to the employees of the [Metro] District, who are represented by the Oil Chemical and Atomic Workers Union, in their fight for a fair contract." Motion for Summary Judgment, Exhibit C. The Mayor of Denver nominated Anderson to the Metro board of directors and in June 1996, the Denver City Council confirmed her appointment as one of Denver's representatives on the Metro board. R. D. & O. at 9. Almost immediately after becoming a Metro board member, Anderson began raising safety and health concerns about Metro's treatment of groundwater from the Lowry Landfill Superfund site.

Anderson spoke to the press about her concerns at an April 2, 1997 Environmental Protection Agency public hearing. She represented herself as a member of the Metro board who opposed its policies on the Lowry site. The Chairman of the Metro board, Richard Plastino, sent Anderson a letter on April 16, 1997, which admonished her to make a disclaimer when she spoke in public that she was expressing her own views only and was not speaking on behalf of the Metro board and warning her that failure to do so could result in censure by the board. Attachment to Anderson's complaint to OSHA. On May 20, 1997, Plastino sent another letter to Anderson advising her to make this disclaimer, suggesting explicit language for the disclaimer and again warning her of possible censure by the Metro board. Anderson also complained that on April 9, 1997, a memorandum was circulated to the Metro board "making unfounded accusations and insinuations of impropriety against" her. As a result of Metro's actions, Anderson asserts that her professional reputation has been damaged, her future income reduced and that she has suffered emotional distress and mental anguish.

II. Procedural History.

On May 2, 1997, Anderson filed a complaint with the Occupational Safety and Health Administration (OSHA) under the environmental whistleblower protection provisions of the CERCLA, SWDA, ERA and FWPCA as well as the Safe Drinking Water Act (SDWA), 42 U.S.C.

[1/] *See* pages 9-11 of the transcript of the September 17, 1997 pre-hearing conference for a description of the nature and scope of Metro's functions and its relationship with the member municipalities and other entities.

§300j-9(I) (1994), the Clean Air Act (CAA), 42 U.S.C. §7622 (1994), and the Toxic Substances Control Act (TSCA), 15 U.S.C. §2622 (1994). OSHA found that Metro discriminated against Anderson under the CERCLA, FWPCA and SWDA, but made no findings on her claims under the other statutes. Anderson did not appeal OSHA's failure to make findings under SDWA, CAA or TSCA, but did appeal "the denial" of her request for protection under the ERA. *See* Anderson's June 12, 1997 letter to the Department of Labor Chief ALJ. Both Anderson and Metro requested referral of the complaint to an Administrative Law Judge for administrative adjudication.

On December 1, 1997, Metro filed a Motion for Summary Decision, asserting that Anderson was not protected by the three environmental whistleblower laws because she was neither an employee of Metro nor an "authorized representative of employees." Metro argued that Anderson failed to present any written documentation establishing her claim to be the authorized representative of the employees represented by the OCAW. Anderson opposed the motion, presenting several affidavits and the minutes of a Metro board Operations Committee meeting.

The ALJ issued a recommended order granting Metro's motion for summary decision. He found that Anderson had failed to provide evidence in support of her claim that she is an "authorized representative" of the OCAW or Metro employees on Metro's board of directors. He stated that she had produced no correspondence between herself and the OCAW or the Mayor's office in support of her claimed representative status, nor any other documents establishing when and how she became an authorized representative. Accordingly, he concluded that

> [e]ven after reviewing the evidence in the light most favorable to Complainant, there is no genuine issue as to any material fact regarding Complainant's status as an "authorized representative" under the applicable statutes. Complainant has not offered sufficient evidence to support her standing to maintain this action, and thus Respondent is entitled to judgment as a matter of law.

R. D. & O. at 33.[2/]

[2/] Although OSHA did not explain why its finding of discrimination was limited to the CERCLA, FWPCA and SWDA, the ALJ nevertheless concluded:

> OSHA did not find merit to the complaints under the SDWA, the CAA and the TSCA because those acts do not provide protection for representatives of employees. Furthermore, no merit was found in the ERA claim, since Respondent is not an "Employer" as defined in that act, nor does the act provide protection for representatives of employees.

R. D. & O. at 2. The ALJ does not explain the basis for his conclusion that the SDWA, CAA, TSCA and ERA do not provide protection for employee representatives. Furthermore, since Metro has never disputed that it was **an** employer and the ALJ points to no record evidence to the contrary, we assume that the ALJ must have meant that Metro was not Anderson's employer, a fact she does not

(continued...)

DISCUSSION

I. Summary Judgment Standard.

An ALJ may grant summary judgment "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision," 29 C.F.R. §18.40(d). *Howard v. Tennessee Valley Authority*, Case No. 90-ERA-24, Final Dec. and Order of Dismissal, July 3, 1991, slip op. at 4. The standard for granting summary decision in whistleblower cases is the same as the standard for granting summary judgment under the analogous Fed. R. Civ. P. 56(e). *Freels v. Lockheed Martin Energy Systems*, ARB Case No. 95-110, ALJ Case Nos. 94-ERA-6, 95-ERA-6, ARB Dec. Dec. 4, 1996, slip op. at 5. A moving party must establish that there is no material issue of fact and that it is entitled to prevail as a matter of law. *Flor v. U.S. Dept. of Energy*, Case No. 93-TSC-0001, Sec. Dec. and Rem. Ord., Dec. 9, 1994, slip op. at 10, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). *Accord Mann v. United States*, No. 98-2201, 2000 WL 194306, at *3 (10th Cir. Feb. 18, 2000). An opposing party "may not rest upon mere allegations or denials [in the] pleading[s], but must set forth specific facts showing that there is a genuine issue for trial" and "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson*, 477 U.S. at 256-257. However, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 256. It is axiomatic that neither the district court (nor an ALJ) nor the court of appeals should weigh the evidence to determine the truth of any factual issue. The function of the trier of fact and the reviewing body is to determine whether there is evidence creating a genuine issue for trial. *Bell v. Conopco, Inc.*, 186 F.3d 1099, 1101 (8th Cir. 1999), citing *Anderson*, 477 U.S.at 249-51 (1986).

II. Standard of Review.

We review an ALJ's recommendation to grant summary judgment *de novo.* 5 U.S.C. §557(b); *cf., Mann v. United States, supra.*[3/] Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact in

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[2/](...continued)
dispute.

[3/] As we recently stated in *Whitaker v. CTI-Alaska, Inc.*, ARB Case No. 98-036, ALJ Case No. 98-036, Dec. & Ord. of Rem., May 28, 1999, at 3 n. 4:

> Our authority to review summary judgment recommendations *de novo* comes not only from the Administrative Procedure Act, but also from the nature of summary judgment itself, which goes only to the questions (1) whether the correct legal standard has been applied, and (2) whether the factual allegations are sufficiently specific and uncontroverted, *i.e.* that no material issues of fact are disputed. Because the analysis on summary judgment is only about whether triable claims have been presented, the special functions and contributions of the presiding judge are not brought into play.

dispute, and whether the ALJ correctly applied the relevant substantive law. *Whitaker v. CTI-Alaska, Inc*., ARB Case No. 98-036, ALJ Case No. 98-036, Dec. & Ord. of Rem., May 28, 1999, at 3. As indicated above, we do not weigh the evidence or determine the truth of the parties' allegations; we only determine whether there is a genuine issue for trial. *Id.*

III. Meaning of the Term "Authorized Representative."

Before examining the record evidence to determine whether there is a genuine issue that Anderson was the "authorized representative" of Metro employees represented by OCAW Local 2-477, we must determine the meaning of that statutory phrase.[4/] We cannot agree with the ALJ that, in the absence of a statutory definition of the phrase, we may simply apply the plain meaning of the words derived from their common and ordinary usage as defined in a dictionary.

Instead, we are guided in our interpretation of the statutes at issue here by the Supreme Court's prescription for statutory construction in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Chevron,* the Court held that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. The Court went on to explain that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n. 9. *Accord OFCCP v. Keebler Co.,* ARB Case No. 97-127, ALJ Case No. 87-OFC-20, Fin. Dec. & Ord., Dec. 21, 1999, slip op. at 16 . In addition to the plain language of the statutory provisions, the traditional tools include an examination of the legislative history, the statute's structure, and the canons of statutory construction. *Association of American Railroads v. Surface Transp. Bd.,* 162 F.3d 101, 106 (D.C. Cir. 1998); *Timex V.I. v. United States*, 157 F.3d 879, 882

[4/] The SWDA, 42 U.S.C. §6971(a); the CERCLA, 42 U.S.C. §9610(a) and the FWPCA, 33 U.S.C. §1367(a), each provide:

> 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 . . . ."

Emphasis supplied. The SDWA, 42 U.S.C. §300j(d)(i)(1); the CAA, 42 U.S.C. §7622(a); the TSCA, 15 U.S.C. §2622(a) and the ERA, 42 U.S.C. §5851(a)(1) provide:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (**or any person acting pursuant to a request of the employee)** [engaged in protected activities] . . . .

Emphasis supplied.

(Fed. Cir. 1998). *See also Citizen Band Potawatomi Indian Tribe of Oklahoma v. L. W. Collier*, 142 F.3d 1325, 1332, 1334 (10th Cir. 1998)(traditional tools of statutory construction include language, legislative history, and historical circumstances).

Congress has supplied no statutory definition of the phrase "authorized representative." Accordingly, we turn to the legislative history of the environmental whistleblower acts. The legislative history of the Federal Water Pollution Control Act Amendments of 1972 states that the employee protection provision "is patterned after the National Labor Management [sic] Act and a similar provision in [the Coal Mine Health and Safety Act]." Federal Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3748. The legislative history of the whistleblower protection amendment to the ERA states that "[t]his amendment is substantially identical to provisions in the Clean Air Act and the Federal Water Pollution Control Act" and that the whistleblower protection provisions of those two acts "were patterned after the National Labor Management Act [sic] and a similar provision in Public Law 91-173 relating to the health and safety of the Nation's coal miners [the Coal Mine Health and Safety Act]." Authorization Appropriations – Nuclear Regulatory Commission, Fiscal Year 1979, S. Rep. No. 95-848, *reprinted in* 1978 U.S.C.C.A.N. 7303.

The employee protection provision of the National Labor Relations Act, 29 U.S.C. §158(a)(4) (1994), does not include the phrase "authorized representative of employees." The Coal Mine Health and Safety Act employee protection provision does cover "any authorized representative of miners," Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173, §110(b)(1), *reprinted in* 1969 U.S.C.C.A.N. 823, 841, and the legislative history explains the meaning of the term "representative of the miners:"

> [T]he term "representative of the miners" includes any individual or organization that represents any group of miners at a given mine and does not require that the representative be a recognized representative under other labor laws.

Conf. Rep. No. 91-761, Statement of the Managers on the Part of the House, *reprinted in* 1969 U.S.C.C.A.N. 2503, 2582.

While this legislative history does not directly address the issue before us, it is instructive to the extent that it strongly supports an expansive reading of the term "authorized representative," *i.e.*, an authorized representative under the Coal Mine Health and Safety Act is "**any** individual or organization that represents **any** group of miners" and is not limited to "a recognized representative under labor laws." Because the legislative history of the FWCPA – forerunner of all the environmental statutes at issue here – specifically points to the Coal Mine Health and Safety Act as its source, it is clear that the term "authorized representative" has a comparably broad meaning.

Furthermore, a broad reading of the term is consistent with the remedial nature of the whistleblower statutes under which Anderson pursues this action. *Accord Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir. 1977)(statutory term "employee" must be given liberal interpretation in remedial legislation prohibiting an employer from discriminating against an employee for filing a discriminatory employment charge). *See also United States v. An Article of*

Drug, Bactounidisk, 394 U.S.784, 798 (1969)(acknowledging "well-accepted principle that remedial legislation . . . is to be given a liberal construction consistent with the [legislation's] overriding purpose."); *Landers v. Commonwealth Lord Joint Venture,* Case No. 83-ERA-5, 1983 WL 189790 at *4, Dec. and Fin. Ord., Sept. 9, 1983 (the statutory term "employee" in ERA must be given a "most liberal" interpretation in light of the "evils the Act was designed to prevent"). Thus, without deciding the exact breadth appropriately accorded the phrase "authorized representative," we do conclude that it encompasses any person requested by any employee or group of employees to speak or act for the employee or group of employees in matters within the coverage of the environmental whistleblower statutes which prohibit retaliation against "authorized representatives."[5/]

Furthermore, as Metro recognizes, a union has the right to authorize representatives to perform services on the part of the union. Respondent's Reply to Complainant's Opposition to Respondent's Motion for Summary Decision at 7. *Cf.,General Electric Co. v. NLRB,* 412 F.2d 512, 516 (2d Cir. 1969)(Section 7 of the National Labor Relations Act, 29 U.S.C. §157, guarantees labor organizations the right to "choose whomever they wish to represent them in formal labor negotiations"). Therefore, an individual selected by a union representing employees covered by the whistleblower protection provisions to speak or act for the union (and by extension the employees) in matters within the purview of the environmental statutes at issue here is also protected by the statutes' prohibitions of retaliation against "authorized representatives."

We acknowledge that some appellate courts have deferred to the Secretary of Labor's interpretation of the term "authorized representative of miners" as embodied in regulations defining the term, rather than initially construing the term based on the traditional tools of statutory interpretation as we have done here. *E.g., Thunder Basin Coal Co. v. Federal Mine Safety and Health Review Commission,* 56 F.3d 1275, 1278 (10th Cir. 1995); *Kerr-McKee Coal Corp. v. Federal Mine Safety and Health Review Commission,* 40 F.3d 1257, 1262 (D.C. Cir. 1994); *Utah Power & Light v. Secretary of Labor,* 897 F.2d 447, 450 (10th Cir. 1990). In those cases, at issue were very precise and specific attributes of authorized representatives of miners which the courts concluded the Federal Mine Safety and Health Amendments Act of 1977 (which amended the Federal Coal Mine Health and Safety Act of 1969) did not expressly address, but which the Secretary of Labor did address by regulation. *See, e.g., Thunder Basin Coal Co.,* 56 F.3d at 1278; *Kerr-McKee Coal Corp.,* 40 F.3d at 1262; *Utah Power & Light,* 897 F.2d at 450. However, none of the opinions contain any extended discussion of the courts' inability to construe the statutory term using the traditional tools of statutory interpretation. The courts' analyses instead were focused almost exclusively on whether the Secretary's interpretation was based on a permissible construction of the statute. *See, e.g., Thunder Basin Coal Co.,* 56 F.3d at 1278-1281; *Kerr-McKee Coal Corp.,* 40 F.3d at 1261-1265; *Utah Power & Light,* 897 F.2d at 449-452. In this case, the Secretary has adopted no regulation defining "authorized representative." Therefore, given the broad nature of the issue before us and the relevant legislative history, we are not constrained, by the cases in which the courts deferred to the Secretary's interpretation, from construing the statutory phrase "authorized representative" in this case. Accordingly, Anderson is an "authorized representative" of Metro

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[5/] As noted at footnote 4, the ERA does not specifically prohibit discrimination against "authorized representatives." As discussed more fully at page 8, we do not decide here whether the ERA, 42 U.S.C. §5851(a)(1), protects employee representatives from retaliation, but instead request further briefing on the issue upon remand.

employees if a Metro employee or group of Metro employees requested her to speak or act for the employee or group of employees in matters within the coverage of the SWDA, CERCLA, or FWPCA, or if a union representing Metro employees (*e.g.*, OCAW) requested her to speak or act for the union (and by extension the employees) in matters within the purview of these statutes.

We note that one of the statutes at issue here, the ERA, does not specifically extend coverage to "authorized representatives of employees," but does protect an employee whose representative engages in protected behavior on behalf of the employee. The ALJ apparently assumed, without any documented analysis, that because the ERA does not include specific language addressed to the coverage of "authorized representatives," employee representatives do not fall within the ERA's whistleblower protection. Anderson, in her briefs to the ALJ and the ARB, noted the difference between the ERA's statutory language, 42 U.S.C. §5851(a)(1), and that of the SWDA, 42 U.S.C. §6971(a); CERCLA, 42 U.S.C. §9610(a) and the FWPCA, 33 U.S.C. §1367(a). However, she apparently assumed, without discussion, that if she was covered as an "authorized representative" under the CERCLA, FWPCA, and SWDA, she was covered under the ERA as well. Metro also failed to discuss the issue whether the ERA prohibits retaliation against an authorized representative who engages in protected activity.

On remand, the parties are requested to brief, and the ALJ to resolve, the issue whether Anderson falls within the ERA's coverage. In particular, the parties should address the applicability of general principles of principal-agent law, the legislative history of the environmental whistleblower acts indicating that the employee protection provisions of the ERA are "substantially identical" to those of the CAA and FWPCA and the Secretary of Labor's regulations, which do not distinguish between the ERA and the CERCLA, FWCPA, and SWDA in describing the purpose and scope of the Acts, 29 C.F.R. §24.1; the general obligations and prohibited activities under the Acts, 29 C.F.R. §24.2(a) -(c); and those who may file complaints under the Acts, 29 C.F.R. §24.3(a).

IV. Existence of Genuine Issue of Fact.

Now that we have construed the statutory term "authorized representative," we next determine whether there is a genuine issue of fact relevant to the issue whether Anderson was an **?**authorized representative" of Metro employees. We hold that there is and accordingly, for the reasons discussed below, we disagree with the ALJ that this case should be summarily dismissed. We hold that the ALJ applied an incorrect legal standard to evaluate Anderson's burden as the party opposing the motion for summary decision. Viewing the evidence in the light most favorable to Anderson, the nonmoving party, we find that Anderson has shown that there is a genuine issue of material fact whether she was the "authorized representative" of Metro's employees and she is entitled to a trial on the merits of that element of her case.

The ALJ acknowledged that the affidavits of Marilyn Y. Ferrari and Donald S. Holmstrom "would appear to be the strongest arguments to support [Anderson's] contention that she is an 'authorized representative' under the applicable whistleblower statutes." R. D. & O. at 14. Metro argues that the affidavits are not sufficient to raise a genuine issue of fact because they are not supported by any documentary evidence and therefore lack credibility and because they are "self-serving." Metro Reply brief at 4, 16. However, a judge may not generally consider the credibility of witnesses when considering a motion for summary judgment unless the witness told a different

story under oath before the witness recognized the legal significance of the truth or the witness' statement is incontrovertibly contradicted by documentary evidence. *Stewart v. RCA Corporation*, 790 F.2d 624, 628 (7th Cir. 1986). *But see Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 893 (5th Cir.1980)(under limited circumstances even a subsequent contradictory affidavit will defeat motion for summary judgment). Ferrari's and Holmstrom's statements are neither controverted by prior testimony nor by documentary evidence. Furthermore, the fact that Anderson relied upon affidavits that were "self-serving" is hardly surprising. As the Ninth Circuit commented in discussing the decision of a district court judge to reject a party's affidavit and grant summary judgment because he found the affidavit to be "self-serving and conclusory:"

> Mr. Shumway's affidavit was of course "self-serving," as the district court noted. And properly so, because otherwise there would be no point in his submitting it. That an affidavit is self-serving bears on its credibility, not on its cognizability for purposes of establishing a genuine issue of material fact.

United States v. Shumway, 199 F.3d 1093, 1104 (9th Cir. 1999).

Both Ferrari and Holmstrom swear to a number of material facts based upon personal knowledge. Ferrari states that she was employed by Metro as a Laboratory Technician from 1975 until her retirement in 1997. She served as OCAW Local 2-477's Vice President for several years prior to her retirement and has been the OCAW's representative to the Executive Board of the Denver Area Labor Federation from 1995 to the present. Exhibit 2 attached to Anderson's Opposition, paragraphs 1, 2. Ferrari asserts that, because of OCAW's perception that Metro was opposed to OCAW's health and safety concerns and refused to bargain in good faith, she contacted members of the Mayor's staff about the appointment of a director to the Metro Board "who would represent our interests." *Id*., paragraph 10. Ferrari's affidavit further states that:

> Based on discussions with co-workers and union leaders, including Pat Farmer, chief negotiator for the Metro lab workers, and Donald Holmstrom, President of OCAW Local 2-477, I contacted Adrienne Anderson and asked her if she would be willing to have OCAW Local 2-477 submit her resume to the Mayor of Denver for appointment as our representative on the Metro Board. She agreed, ...

Id., paragraph 11. Ferrari's affidavit avers, at paragraph 18, that the OCAW leadership "on many occasions asked and directed [Anderson] to act on our [OCAW] behalf in raising points before the [Metro] Board, which she has done."

Donald Holmstrom, President of Local 2-477 of OCAW, stated in his affidavit:

> The leadership of the local acting on behalf of its members who work at the Metro plant, asked Adrienne Anderson to serve as our representative on the Metro Board. She agreed. We then requested that the Mayor of Denver appoint Adrienne Anderson to Metro's

> Board of Directors as our representative on the Board. I participated in the decisions to make these requests.

Exhibit 3 to Complainant's Opposition, paragraph 2. His affidavit further avers that "Anderson has served as the authorized representative on the Metro Board of members of Local 2-477 . . . . She [has] taken our direction on issues to pursue before the Board . . . ." *Id.* at paragraph 3.

Anderson also submitted a personal affidavit in support of her response to Metro's motion for summary judgment. In the affidavit Anderson stated that:

> In the Fall of 1995, Marilyn Ferrari, Vice President of OCAW 2-477 and a Metro lab employee, contacted me and asked me if I would be willing to have OCAW 2-477 submit my resume to the city of Denver for consideration as their representative to the Metro Board. I agreed that they may do so, and that I would gladly act on their behalf to represent workers' concerns at the sewer plant at the level of the board. In December, 1995, OCAW 2-477 submitted my resume to the city of Denver's staff person for Boards and commissions, Donna Good.

Exhibit 1 attached to Anderson's Opposition, paragraph 9.

The Ferrari, Holmstrom and Anderson affidavits all include "such facts as would be admissible in evidence"[6/] before the ALJ upon the affiants' testimony. Moreover, the ALJ must accept them as true for purposes of determining whether there is a genuine issue of fact precluding summary judgment. *Shumway,* 199 F.3d at 1104. The Ferrari, Holmstrom and Anderson affidavits indisputably constitute affirmative evidence in support of Anderson's contention that she is an "authorized representative" of Metro employees. Nevertheless, the ALJ failed to discuss why the assertions of fact in these affidavits are not sufficient to raise a genuine issue of material fact.

Furthermore, the ALJ did not draw the inferences most favorable to Anderson as the nonmoving party with respect to other evidence in the record. One of the Metro by-laws requires a member of the Metro board to refrain from participation in discussion of, and directs that a member may not vote on, any matter in which the member has a personal or private interest. Affidavits submitted by Metro show that Anderson participated in and voted on two occasions on proposed salary increases for Metro employees. The ALJ drew the inference that these actions by Anderson violated the Metro by-laws and inferred that "[h]ad [Anderson] been, or had she believed herself to be, an authorized representative of the OCAW . . . she should have recused herself from voting on a pay increase that would affect OCAW members, in order to avoid a conflict of interest." R. D. & O. 18-19. A justifiable inference which the ALJ could have drawn from these incidents, and one more favorable to Anderson as the nonmoving party, was that Anderson believed the by-law in question did not apply because she did not have a "personal or private interest" in the matter under discussion.

[6/] Fed. R. Civ. Pro. 56(e).

The ALJ also gave considerable weight to a statement Anderson made at a Metro Operations Committee. The minutes reflect a statement by Anderson that neither at that time, nor at the time she was appointed to the Metro board, did she "work for" OCAW. Exhibit 8 to Complainant's Opposition. Rather than draw a legitimate inference in favor of Anderson, that the statement simply meant she was not an OCAW employee, the ALJ found that this statement "conclusively demonstrated" that Anderson was not the authorized representative of OCAW. R. D. & O. at 19.

Ultimately, the ALJ applied an incorrect legal standard to the evidence, including the affidavits. He held that "the evidence, viewed in the light most favorable to [Anderson], fails to prove that [Anderson] is an 'authorized representative' of the OCAW . . . ." R. D. & O. at 14. But Anderson's burden in opposing a motion for summary decision was not to prove the facts on which she would bear the ultimate burden at trial. Her burden at this stage was only to show that there was a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249-51. The Ferrari, Holmstrom and Anderson affidavits were sufficient to carry this burden.

Viewing the affidavits submitted by Anderson and the other evidence in the light most favorable to Anderson and drawing all legitimate inferences from them in her favor, as we are constrained to do on a motion for summary decision, we find that it would be justifiable for a trier of fact to infer that the OCAW leadership had empowered Anderson to represent the union's interests on the Metro board, *i.e.*, that Anderson was the authorized representative of OCAW. That this inference may be inconsistent with other evidence discussed above and the inferences the ALJ drew from the evidence simply shows that there is a genuine issue of material fact on this question which cannot be disposed of in summary fashion, but only after a trial on the merits. Of course, in remanding this case for hearing, we emphasize that we have reached no conclusion regarding the merits of Anderson's complaint.

V. Lawyer–Witness Concerns.

Finally, we note that since Holmstrom submitted his affidavit in this case, Anderson's former counsel has withdrawn and Anderson has authorized Holmstrom, a licensed attorney in the State of Colorado, to represent her in this action. Rule 3.7(a) of the Colorado Rules of Professional Conduct provides:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.

The Comment to the rule explains:

> Combining the roles of advocate and witness can involve a conflict of interest between the lawyer and client and can prejudice the opposing party. If a lawyer is both counsel and witness, the lawyer

> becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his or her own credibility.

Accordingly, if Anderson intends to rely upon Holmstrom's testimony upon remand, the ALJ should determine whether it is appropriate to permit Holmstrom to continue to represent Anderson.

VI. Conclusion.

For the reasons discussed above, we reject the ALJ's recommendation that Metro's motion for summary decision be granted and that this case be dismissed. This case is remanded to the ALJ for further proceedings consistent with this decision.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member