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Issue Date: 31 March 2004

Case Nos.: 2004-MIS-2[1] and 2004-STA-12

In the Matter of the Qualifications of

EDWARD A. SLAVIN, JR.,
Counsel for Complainant in In re **DANIEL SOMERSON,** *Complainant*
v. **EAGLE EXPRESS LINES INCORPORATED,** *Respondent,* **2004-STA-12**.

ORDER DENYING AUTHORITY TO APPEAR

On December 24, 2003, the undersigned issued a *Notice of Judicial Inquiry and Order to Show Cause* ("*Notice of Judicial Inquiry*") [EX 32-C][2] noticing that the U.S. Department of Labor, Office of Administrative Law Judges ("OALJ") intended to deny attorney Edward A. Slavin, Jr. ("Slavin") the privilege of appearing before this office in Case No. 2004-STA-12 or any other future case in which Slavin seeks to represent a client before OALJ. Following consideration of Slavin's filings in response, Slavin is hereby denied the authority to appear in a representative capacity in any proceeding before OALJ.

BACKGROUND

Attorney Slavin represented Complainant Daniel Somerson ("Somerson") before the undersigned in *Somerson v. Mail Contractors of America*, 2003-STA-11. The complaint in that

[1] The caption has been amended to include a new case number to distinguish between this matter as it relates to Somerson's 2004-STA-12 complaint, and the more general question of Slavin's qualifications to appear before OALJ globally (2004-MIS-2).

[2] ALJ Exhibits in this Decision are cited as [EX #]. A list of such exhibits is found in this decision, *infra*.

case was based on an assertion that the Respondent, the Respondent's attorney and his law firm acted contrary to the employee protection provisions of the Surface Transportation Assistance Act by proffering before Administrative Law Edward Terhune Miller in Case No. 2002-STA-44 "filings" intended to "induce" Judge Miller to dismiss the complaint. I found that the complaint in Case No. 2003-STA-11 was specious, and had the sole purpose of intimidating and harassing the Respondent's counsel in a continuation of attacks Somerson had made on witnesses and attorneys in the case before Judge Miller. In regard to Slavin's actions in filing 2003-STA-11, I found that they violated rules of professional responsibility and breeched the duty that an attorney owes his client. Slavin's conduct was reported to the Tennessee Board of Professional Responsibility, the jurisdiction in which Slavin maintains his bar membership. *Somerson v. Mail Contractors of America*, 2003-STA-11 (ALJ Jan. 10, 2003). [EX 15-B] My decision recommending dismissal of the complaint was affirmed by the Administrative Review Board ("ARB") in *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 2003-STA-11 (ARB Oct. 14, 2003). [EX 15-E] In the ARB's decision, it affirmed my finding that:

> Attorney Slavin's response to Respondent's motion to dismiss fails to address the arguments therein, a clear indication that he does not believe that there is any merit to the complaint. Rather, he sets forth a vicious attack on Mail Contractors of America's attorneys, an attack completely irrelevant to any issue here.

Somerson, *supra* at 5 [HTML]. During the appeal before the ARB, Slavin lied to the ARB about the date he received an ARB order relating to briefing, resulting in the striking of Somerson's brief. *Id*., USDOL/OALJ Reporter at 4-5 [PDF]. The same lie resulted in the striking of Somerson's appellate brief in his appeal of Judge Miller's recommended dismissal of Case No. 2002-STA-44. *Somerson v. Mail Contractors of America*, ARB No. 03-055, ALJ No. 2002-STA-44, USDOL/OALJ Reporter at 6-7 [PDF] (ARB Nov. 25, 2003), *appeal filed* No. 03-16522 (11th Cir.). [EX 15-H]

As Associate Chief Judge, all whistleblower hearing requests are referenced to me to initiate the process for assignment of a presiding judge. Because a motion to vacate the ARB decision affirming my decision in *Somerson*, 2003-STA-11 was dismissed in November of 2003, *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 2003-STA-11 (ARB Dec.

16, 2003), [EX 15-I] and because in my role as the judge responsible for day-to-day management of the whistleblower program at OALJ, I was aware of many other instances of misconduct by Slavin both before me and other judges and tribunals, it became evident that the time had come to conduct a Judicial Inquiry into Slavin's qualifications as a legal representative. Thus, when Case No. 2004-STA-12 was docketed the decision was made to initiate a 29 C.F.R. § 18.34(g)(2) hearing on whether Slavin would be permitted to continue to represent clients before OALJ.

CONTENTS

PROCEDURE

In *Webb v. Carolina Power & Light Co.*, 1993-ERA-42 (ARB Aug. 26, 1997), the ARB held that "[w]here the integrity of the Department's adjudicative processes are at stake, the presiding Administrative Law Judge should take all appropriate steps to resolve the uncertainty surrounding questionable conduct."[3] *Id*., USDOL/OALJ Reporter at 10 [HTML]. The ARB has also held that it is beyond doubt that administrative tribunals have inherent authority to bar persons from appearance before them on grounds of improper conduct. " *Macktal v. Brown & Root, Inc*., 1986-ERA-23, USDOL/OALJ Reporter at n.3 [HTML] (ARB Nov. 20, 1998) (citing *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494 (1926) and *Touche Ross & Co. v. SEC*, 609 F.2d 570, 581 (2d Cir. 1979); *see also Rex v. Ebasco Services, Inc.*, 1987-ERA-6, USDOL/OALJ Reporter at 4-5 [HTML] (Sec'y Mar. 4, 1994); *Koden v. United States Department of Justice*, 564 F.2d 228, 232-233 (7th Cir. 1977). The purpose of a disciplinary proceeding is not to punish but to inquire into the fitness of an officer of the court to continue in that capacity and to protect the public and the courts "from the official ministration of persons unfit to practice." *In re Ming*, 469 F.2d 1352, 1352 (7th Cir. 1972).

The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. § 18.34(g)(3) state, in pertinent part:

> (3) *Denial of authority to appear*. The administrative law judge may deny the privilege of appearing to any person, within applicable statutory constraints, e.g. 5 U.S.C. 555, who he or she finds after notice of and opportunity for hearing in the matter does not possess

[3] *See, e.g., Tadeusz Kucharski, in re Judicial Inquiry re Miroslaw Kusmirek*, 2000-INA-116 (BALCA Sept. 18, 2002) (Chief ALJ conducted an evidentiary hearing into whether lay representative forged documents; representative given a six month suspension for being recklessly negligent in maintaining a willful ignorance about the details of the application and in relying solely on a third party intermediary for communication with his client); *Hasan v. Nuclear Power Services, Inc*., 1986-ERA-24 (ALJ Sept. 25, 1986) (disqualification of Respondent's law firm where an associate questioned Complainant without his counsel present during a document review); *Wilkinson v. Texas Utilities*, 1992-ERA-16 (ALJ Aug. 19, 1992) (Complainant's counsel disqualified for failure to appear at hearing; failure to engage in exchange of documents and witness list; dilatory tactics; *ex parte* communication; felony convictions); *Joseph W. Thomas*, 2004-MIS-3 (ALJ Mar. 26, 2004) (attorney denied authority to appear before OALJ based on Louisiana suspension; the suspension was, based in part on conduct before DOL OALJ). See also in regard to an ALJ's duty to determine whether an attorney should be disqualified for a conflict of interest *Duncan v. United States Secretary of Labor*, 69 Fed. Appx. 822, 823 (9th Cir. May 30, 2003) (case below ARB No. 99-011, ALJ No. 1997-CAA-12) and *Smiley v. Director*, OWCP, 984 F.2d 278, 282 (9th Cir. 1993).

> the requisite qualifications to represent others; or is lacking in character or integrity; has engaged in unethical or improper professional conduct; or has engaged in an act involving moral turpitude. No provision hereof shall apply to any person who appears on his or her own behalf or on behalf of any corporation, partnership, or association of which the person is a partner, officer, or regular employee.

In the ARB decision in *In re Slavin*, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003), [EX 16-B] the concurring opinion provided guidance on the procedures under section 18.34(g)(3). Section 18.34(g)(3) requires that an ALJ must afford notice and opportunity for a hearing. The regulation does not 1) mandate that a different ALJ conduct the disqualification hearing than the one assigned to the merits of the case; 2) state that the hearing must include an evidentiary hearing for the taking of testimony where the facts are not in dispute; or 3) authorize calling the ALJ seeking disqualification as a witness. Finally, the circumstances will dictate whether a denial of authority to appear in one case under section 18.34(g)(3) necessarily applies to all other cases. *Id*., USDOL/OALJ Reporter at 27 [PDF]. For example, if the disqualification is for a conflict of interest, the disqualification would not necessarily apply to other cases. *See, e.g., Wooten v. Mine Safety Appliances Co*., 1999-BLA-777 (ALJ Aug. 12, 1999) (disqualification of law firm representing two putative responsible operators with potential conflicts of interest).

Thus, the *Notice of Judicial Inquiry* provided notice to Slavin of the intention of the U.S. Department of Labor, Office of Administrative Law Judges to deny him the privilege of appearing before OALJ. Attached to the *Notice of Judicial Inquiry* was an Appendix detailing judicial findings and admonishments relating to Slavin of which official notice is taken in this proceeding. *See* 29 C.F.R. § 18.45. This detailed Appendix was proffered in order to give Slavin fair and full notice of the grounds on which the proposed disqualification was based.[4]

Slavin was also informed that an evidentiary hearing could be requested. He was notified, however, that the hearing request was to clearly state those issues over which there

[4] A supplemental *Official Notice of Prior Judicial Proceedings* was issued on February 17, 2004 providing Slavin with notice of three additional ARB decisions over which official notice is being taken in this Judicial Inquiry. [EX 32-L] Additional official notice has also been taken in this decision of several ruling issued by the ARB and ALJs subsequent to issuance of the *Notice of Judicial Inquiry*.

exists a genuine issue of material fact concerning the matters stated in the Appendix to the *Notice of Judicial Review*. Slavin was notified that any hearing request was to state clearly the issues of material facts on which evidence or testimony is intended to be presented as well as the nature of the evidence, and why such evidence is exculpatory or otherwise relevant. Slavin was informed that if he did not present an issue of material fact requiring an evidentiary hearing, the matter would be resolved based on the response to the Order To Show Cause.

Whether Slavin requested an evidentiary hearing and/or presented issues of fact requiring an evidence taking proceeding

The initial question to be decided in this matter is whether a hearing needs to be scheduled for the presentation of evidence, or whether the hearing in this matter will be confined to the matters noticed in the *Notice of Judicial Inquiry* and Slavin's responses thereto. As noted in the previous section, Slavin was given clear and unambiguous notice in the *Notice of Judicial Inquiry* that in order for such an evidence-taking hearing to be scheduled, he would need to "state clearly the issues or material facts on which evidence or testimony is intended to be presented as well as the nature of the evidence, and why the evidence is exculpatory or otherwise relevant."

Every word of Slavin's responsive filings have been carefully and fully considered. In none of his filings in this matter did Slavin make a direct declarative statement that he was requesting a section 18.34(g)(3) hearing.[5] Nonetheless, I find that such a request was implicit in his responses. None of his filings, however, describe what evidence on an issue of material fact or facts might be presented in an evidentiary proceeding. Thus, although Slavin clearly is contesting the *Notice of Judicial Inquiry*, he did not identify why an evidence taking hearing may be required. For example, on Page 1 of his January 14, 2004 letter Slavin states "False imputations, including witness intimidation, are retaliatory and defamatory." [EX 32-D] By this statement, it appears that Slavin contests whether he was involved in witness intimidation in the *Somerson* matter before Judge Miller. Such a cryptic denial does not show a need for an oral,

[5] Slavin, in contrast, repeatedly requested a hearing on the merits of Somerson's 2004-STA-12 complaint.

evidentiary hearing. Obviously, it does not provide any notice of what evidence he proposes to offer on this issue.

By letter dated January 27, 2004, Slavin filed a motion on behalf of Somerson to take the depositions of counsel for Respondent in Case No. 2004-STA-12, the Chief Administrative Law Judge, the undersigned, and an OALJ staff attorney. [EX 32-G] The letter is five pages in length but does not state on what subject their deposition testimony is sought. It is not obvious why the named deponents would have information reasonably calculated to lead to the discovery of admissible evidence in regard to whether Slavin engaged in misconduct in the cases cited in the Appendix to the *Notice of Judicial Inquiry*. The mere filing of a motion to depose opposing counsel and court personnel does not establish the existence of a material fact requiring the scheduling of an evidence-taking hearing in this matter.

Slavin states in his January 14, 2004 letter response that he intends to proffer former Chief Administrative Law Judge Nahum Litt as an expert witness in this matter. Not stated, and not obvious, is what expert testimony Judge Litt would provide. The only light Slavin sheds on the expected testimony is a quotation from an article that appeared in the Dayton City Paper of January 8, 2004 in which Judge Litt is quoted as expressing the opinion that "...dysfunctionality in OSHA and the OALJ is symptomatic of the overall inefficacy of the DOL whistleblower system" and that "[t]he DOL mindset assumes the whistleblower is probably wrong."

Expert witnesses may offer testimony in the form of opinion on a matter of scientific, technical or other specialized knowledge where it "will assist the judge as trier of fact to understand the evidence or determine a fact in issue." *See* 29 C.F.R. § 18.702. In the instant proceeding, the issue for decision is whether Slavin's prior misconduct should be sanctioned by a denial of authority to appear in DOL OALJ proceedings, and not whether the administration of whistleblower laws by the Department of Labor is dysfunctional. Any expert opinion testimony on the efficacy of DOL administration of whistleblower law is irrelevant to the issue presented. Thus, the mere naming of Judge Litt as an expert witness does not establish the need for scheduling an evidence-taking hearing on the proposed disqualification of Slavin.

Slavin was afforded several extensions of time to respond to the *Notice of Judicial Inquiry*. A final response was due on February 20, 2004, nearly two months after the *Notice of Judicial Inquiry* was issued. Although he filed a January 14, 2003 letter/motion and a January 27, 2004 letter/motion, Slavin did not take advantage of the opportunity to state any *specific* rebuttal or argument on any *specific* matter cited in the *Notice of Judicial Inquiry*.

Thus, although Slavin's responsive filings undoubtedly exhibit the intent to contest the *Notice of Judicial Inquiry*, they do not set out specific evidence that he intends to present in an evidence taking hearing on any contentions or factual disputes concerning matters relevant and material to the documentation on which OALJ has proposed disqualification as stated in the Appendix to the *Notice of Judicial Inquiry*. The *Notice of Judicial Inquiry* put Slavin on clear notice that he would need to do so in order for such a hearing for the taking of evidence to be scheduled. Accordingly, this matter will be decided based solely on the matters on which official notice has been taken, and on the arguments made in Slavin's responsive filings.

ALJ EXHIBITS

The following documents are received as ALJ Exhibits 1 through 32:

Documents Related to the Appendix to the *Notice of Judicial Inquiry:*

1. *Varnadore v. Oak Ridge National Laboratory, Lockheed Martin Energy Systems and U.S. Department of Energy*
ARB No. 99-121, ALJ Nos. 1992-CAA-2 and 5, 1993-CAA-1, 1994-CAA-2 and 3, 1995-CAA-1

A.	06/23/95	ALJ Recommended Order
B.	09/06/96	ARB Order
C.	04/06/98	*Varnadore v. Sec'y of Labor*, 141 F.3d 625 (6th Cir. Apr. 6, 1998)
D.	06/18/99	*Lockheed Martin Energy Systems, Inc. v. Slavin* (E.D.Tenn. June 18, 1999)
E.	08/17/99	*Lockheed Martin Energy Systems, Inc. v. Slavin* (E.D.Tenn. Aug. 17, 1999)

F. 12/06/99 *Lockheed Martin Energy Systems, Inc. v. Slavin* (E.D.Tenn. Dec. 6, 1999)
G. 07/14/00 ARB Final Decision and Order
H. 11/08/00 *Varnadore v. USDOL*, No. 00-4164 (6th Cir. Nov. 8, 2000) *appeal dismissed for lack of timeliness*
I. 11/18/01 *Turpin v. Barker*, No.01-CV-484 (E.D.Tenn. Oct. 18, 2001)

2. *Kesterson v. Y-12 Nuclear Weapons Plant*
ARB No. 96-173, ALJ No. 1995-CAA-12
A. 04/08/97 ARB Final Decision and Order
B. 05/06/98 *Kesterson v. Sec'y of Labor*, No. 97-3579 (6th Cir. May 6, 1998) *appeal dismissed for want of prosecution*

3. *Johnson v. Oak Ridge Operations Office*
ARB No. 97-057, ALJ Nos. 1995-CAA-20, 21 and 22
A. 08/24/95 ALJ Order (Ruling on Motion to Remand)
B. 10/08/96 ALJ Order
C. 01/06/97 ALJ Order to Show Cause
D. 02/04/97 ALJ Order Barring Attorney Slavin from Future Appearances
E. 09/30/99 ARB Final Decision and Order
F. 02/12/02 Excerpt from transcript of Tenn. Bd. of Professional Responsibility Proceeding, Volume II
ALJ Nos. 1999-CAA-7, 8, 9, 10
G. 01/23/00 Letter from Complainants to Judge Sutton regarding termination of Slavin as their attorney

4. *Seater v. Southern California Edison Co.*
ARB No. 96-013, ALJ No. 1995-ERA-13
A. 09/27/96 ARB Decision and Order of Remand
B. 02/04/97 ALJ Post-Remand Order No. 7
C. 02/11/97 Excerpt from Transcript of Telephone Conference Call

5. *Cox. v. Lockheed Martin Energy Systems, Inc.*
ARB No. 99-040, ALJ No. 1997-ERA-17
03/30/01 ARB Final Decision and Order

6. *Rockefeller v. U.S. Department of Energy*
ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6
A. 09/28/98 ALJ Recommended Decision and Order
B. 12/4/98 ALJ Recommended Decision and Order of Dismissal with Prejudice
C. 10/31/00 ARB Final Decision and Order

D. 11/20/01 *Rockefeller v. USDOL*, Nos. 00-9545, 01-9529 (10th Cir. Nov. 20, 2001) *appeal dismissed (default)*
E. 01/24/03 ALJ Recommended Decision and Order
F. 03/28/03 ALJ Recommended Decision and Order

7. *Williams v. Lockheed Martin*
ARB Nos. 99-054 and 99-064, ALJ Nos. 1998-ERA-40 and 42
A. 03/22/99 ALJ Recommended Decision and Order Granting Summary Judgment
B. 07/13/99 ARB Order
C. 09/29/00 ARB Final Decision and Order

8. *Erickson v. U.S. Environmental Protection Agency*
ALJ Nos. 1999-CAA-2, 2001-CAA-8 and 13, 2002-CAA-3
A. 01/24/02 ALJ Order Denying Motion to Disqualify
B. 10/15/02 ALJ Order Denying Motion to Consolidate
C. 01/29/04 ARB Order
D. 10/17/02 ARB Order to Show Cause

9. *Moore v. U.S. Department of Energy*
ARB No. 00-038, ALJ No. 1999-CAA-15
A. 01/30/01 ARB Final Decision and Order
B. 12/19/01 *Moore v. USDOL*, Nos. 01-9511, 01-9531 (10th Cir. Dec. 19, 2001) *appeal dismissed (default)*

10. *Pickett v. Tennessee Valley Authority*
ARB No. 00-076, ALJ Nos. 1999-CAA-25, 2000-CAA-9
A. 11/02/00 ARB Order
B. 11/16/00 ARB Order Denying Complainant's Motion to Reconsider
C. 05/12/03 ARB Order Denying Complainant's Motion to Vacate Decision and to Disqualify the Panel Members

11. *Gass v. U.S. Department of Energy*
ARB No. 03-093, ALJ Nos. 2000-CAA-22, 2002-CAA-2
A. 07/11/03 ARB Order Returning Motion to Set Briefing Schedule
B. 07/11/03 ARB Order to Show Cause
C. 07/25/03 ARB Errata
D. 10/09/03 ARB Order Granting Extension of Time
E. 01/29/04 ARB Final Order Dismissing Petition for Review

12. *Pickett v. Tennessee Valley Authority*
ARB No. 02-076, ALJ No. 2001-CAA-18
10/09/02 ARB Order Dismissing Appeal

13. *High v. Lockheed Martin Energy Systems, Inc.*

ARB No. 02-091, ALJ No. 2002-CAA-1

11/24/03 ARB Final Decision and Order

14. *Puckett v. Tennessee Valley Authority*
ALJ No. 2002-ERA-15

11/21/02 Recommended Decision and Order of Dismissal for Failure to Comply with Lawful Orders

15. *Somerson v. Mail Contractors of America, Inc.*
ARB Nos. 03-042 and 03-055, ALJ Nos. 2002-STA-44, 2003-STA-11

A. 12/16/02 ALJ Recommended Decision and Order Dismissing Complaint and Certifying Facts Relating to Intimidation and Harassment of Witnesses and Counsel to Federal District Court (2002-STA-44)

B. 1/10/03 ALJ Recommended Decision and Order Dismissing Complaint and Referring Matter to the Tennessee Supreme Court's Board of Professional Responsibility (2003-STA-11)

C. 02/06/03 Letter from Chief ALJ to NARA OIG regarding Slavin's accusation that Judge Miller illegally destroyed federal records

D. 02/06/03 Letter from Chief ALJ to Slavin requesting that he correct factual misrepresentations made to the ARB ("unfriendly letter")

E. 10/14/03 ARB Final Order Striking the Complainant's Brief and Dismissing the Complaint (2003-STA-11)

F. 10/18/03 Letter from Director, Life Cycle Management Division, National Archives to Department of Labor stating that Slavin's complaint accusing DOL OALJ of unauthorized destruction of documents was found to be unsupported by DOL OIG

G. 10/21/03 ARB Final Order Dismissing Appeal (2002-STA-44 and 2003-STA-11 "unfriendly letter" appeal)

H. 11/25/03 ARB Final Order Striking the Complainant's Brief and Dismissing the Complaint (2002-STA-44)

I. 12/16/03 ARB Order Denying Complainant's Motion to Vacate (2003-STA-11)

J. 09/08/03 District Court Order finding Somerson in contempt

16. *Greene v. U.S. Environmental Protection Agency, In re Slavin*
ARB No. 02-109, ALJ No. 2002-SWD-1

A. 06/20/02 ALJ Order of Disqualification

B. 06/30/03 ARB Final Decision and Order

17. *Powers v. Pinnacle Airlines, Inc.*
ALJ No. 2003-AIR-12

A. 04/23/03 ALJ Order to Show Cause

B. 05/21/03 Order Barring Edward Slavin from Appearing as

Complainant's Counsel

18. *Erickson v. U.S. Environmental Protection Agency*
ALJ No. 2003-CAA-11
04/14/03 Order Denying Motion for Disqualification/ Recusal of Administrative Law Judge

19. *Slavin v. Office of Administrative Law Judges*
ARB No. 03-077, ALJ No. 2003-CAA-12
A. 03/10/03 ALJ Recommended Order of Dismissal
B. 07/11/03 ARB Order Returning Letter Requesting Board to Modify Briefing Schedule
C. 07/11/03 ARB Order to Show Cause
D. 08/22/03 ARB Order Dismissing Appeal

20. *Blodgett v. Tennessee Department of Environment and Conservation*
ARB No. 03-138, ALJ No. 2003-CAA-15
A. 12/19/03 ARB Order to Show Cause
B. 03/22/04 ARB Final Decision and Order

21. *Steffenhagen v. Securitas Sverige*
ARB No. 03-139, ALJ No. 2003-SOX-24
A. 08/05/03 ALJ Recommended Decision and Order
B. 09/30/03 ARB Order to Show Cause
C. 01/13/04 ARB Final Order Dismissing Complaint

22. *Howick v. Campbell-Ewald Co.*
ALJ No. 2003-STA-6
A. 08/20/03 ALJ Order Denying Motion in Limine
B. 09/18/03 ALJ Recommended Decision and Order- Dismissal of Complaint
C. 10/21/03 ALJ Order Denying Reconsideration

23. Tennessee State Court Decisions
A. 02/07/02 *Campbell v. Travelers Ins. Co., 2002 WL 215663 (Tenn. Workers Comp. Panel Feb. 7, 2002)*
B. 12/30/02 *Vest v. Goswitz, 2002 WL 31895401 (Tenn. Ct. App. Dec. 30, 2002)*

24. 12/04/98 Referral of Unprofessional Conduct of Edward A. Slavin, Jr. in Proceedings before the OALJ, USDOL
A. 10/22/98 Memo from Office of Investigative Assistance to Judge Vittone re: Correspondence from Edward A. Slavin, Jr.
B. 09/30/98 Fax from Edward Slavin to ARB, USDOL
C. 01/06/97 *Johnson v. Oak Ridge Operations Office*, ALJ Nos. 1995-

		CAA-20, 21 and 22, Order to Show Cause
D.	02/4/97	*Johnson v. Oak Ridge Operations Office*, ALJ Nos. 1995-CAA-20, 21 and 22, Order Barring Edward Slavin from Future Appearances
E.	01/27/97	Letter from Edward Slavin to Judge Barnett
F.	02/28/97	Confidential Memo from Advisory Committee to Judge Vittone re: Complaint of Edward Slavin
G.	09/11/98	*Rockefeller v. Westinghouse Electric Co., U.S. Dept. of Energy*, ALJ Nos. 1998-CAA-10 and 11, Order to Show Cause
H.	09/28/98	*Rockefeller v. Westinghouse Electric Co., U.S. Dept. of Energy*, ALJ Nos. 1998-CAA-10 and 11, Order Barring Counsel from Future Appearances
I.	10/01/98	Letter from Edward Slavin to Judge Burch
J.	10/16/98	Letter from Judge Vittone to Edward Slavin
K.	09/09/94	Fax from Edward Slavin to Judge Vittone requesting reassignment of case
L.	11/12/94	Fax from Edward Slavin to Judge Vittone requesting peer review of Judge Mahony
M.	11/14/94	Fax from Edward Slavin to Judge Vittone requesting recusal and peer review of Judge McColgin
N.	04/03/97	Fax from Edward Slavin to Judge Vittone requesting peer Review of Judge Tureck
O.	09/26/94	Letter from Judge Vittone to Edward Slavin re: request for recusal and peer review
P.	01/29/97	Fax from Edward Slavin to Judge Kaplan re: *Seater v. Southern California Edison Co.*, ALJ No. 1995-ERA-13
Q.	02/10/97	Report of Contact by Edward Slavin from Connie Murphy
R.	03/12/97	Report of Contact by Edward Slavin from Todd Smyth
S.	03/27/97	Fax from Edward Slavin to Judge Vittone re: OALJ website
T.	04/07/97	Letter from Edward Slavin to Judge Vittone re: free speech rights, FOIA requests
U.	09/29/94	Letter from Judge Vittone to Edward Slavin re: return of fax transmissions
V.	03/25/97	Fax from Edward Slavin to Judge Barnett re: peer review
W.	11/20/98	Letter from Edward Slavin to Judge Vittone re: *Rockefeller v. Westinghouse Electric Co., U.S. Dept. of Energy*, ALJ Nos. 1998-CAA-10 and 11
X.	11/23/98	Letter from Slavin to Judge Avery re: *Moore v. U.S. Dept. of Energy*, ALJ No. 1998-CAA-16
Y.	09/24/98	*Rockefeller v. Westinghouse Electric Co., U.S. Dept. of Energy*, ALJ Nos. 1998-CAA-10 and 11, Motion for Judicial Recusal and Response to Order to Show Cause

Additional documents:

25. *Gass v. U.S. Dept. of Energy*
ARB No. 03-035, ALJ No. 2002-CAA-2
01/14/04 ARB Final Order Dismissing Petition for Review

26. *Blodgett v. Tennessee Dept. of Environment and Conservation*
ARB No. 03-043, ALJ No. 2003-CAA-7
03/19/04 ARB Final Decisions and Order

27. *Santamaria v. U.S. Environmental Protection Agency*
2004-ERA-6
A. 01/28/04 ALJ Order
B. 02/24/04 ALJ Recommended Decision and Order

28. *Howick v. Campbell-Ewald Co.*
2004-STA-7
A. 02/05/04 ALJ Order to Show Cause
B. 02/27/04 ALJ Recommended Decision and Order

29. *Board of Professional Responsibility of the Supreme Court of Tennessee v. Slavin*
No. 154861-3
12/03 Chancery Court for Knox County, Tennessee Order by Hon. Richard E Ladd imposing three year suspension on Slavin

30. *In re Edward A. Slavin, Jr.*
Civ. No. 3:00-cv-519 (E.D. Tenn)
10/24/00 U.S. District Court, Eastern District of Tennessee Order denying Slavin's *Pro Hac Vice* Petition and denying motion to recuse all judges in Eastern District of Tennessee

31. 04/02/97 Letter from Chief ALJ to Slavin directing Slavin to communicate only by letter due to recent abuse of OALJ staff by telephone, e-mail and fax.

32. **Somerson v. Eagle Express Lines Inc., 2004-MIS-2 and 2004-STA-12:**

A. 11/13/03 OSHA Determination Letter
B. 11/29/03 Somerson's request for hearing
C. 12/24/03 Notice of Judicial Inquiry and Order to Show Cause
D. 01/14/03 Letter from Slavin to Chief Judge Vittone (Requesting Hearing on Somerson's Case, Requests relating to Order to Show Cause, etc.)
E. 01/15/03 Letter from Slavin to ARB, petition for Writ of Mandamus
F. 01/21/03 Order (granting extension of time to respond to Order to Show Cause)

G.	01/27/04	Somerson's Motion for Leave to take videotaped depositions
H.	01/28/04	Slavin letter to Chief Judge Vittone requesting that Somerson's case be scheduled
I.	02/05/04	Order (extending time to respond to the Order to Show Cause)
J.	02/10/04	ARB Order to Show Cause why petition for writ of mandamus should not be dismissed for lack of jurisdiction
K.	02/17/04	Office Notice of Prior Judicial Proceedings
L.	02/20/04	Slavin letter to Chief Judge Vittone requesting that Somerson's case be scheduled, and requesting stay of Judicial Inquiry pending ARB review
M.	02/23/04	Somerson motion to alter ARB briefing schedule
N.	02/24/04	Order Denying Stay
O.	02/26/04	ARB Order Granting Extension of Time
P.	03/22/04	Somerson's response to ARB Order to Show Cause

PENDING MOTIONS

Motion to recuse

On pages 9 and 10 of Slavin's January 14, 2004 responsive letter Slavin argues that

> DOL and OALJ have an inherent conflict of interest as counsel defending their own actions directed against Mr. Somerson and his counsel. Past and present DOL employees are trial witnesses, including former DOL Chief Judge Nahum Litt (1979-1995) against whom the DOL OALJ Front Office has directed retaliatory obloquy. Any Front Office employee would have a conflict of interest hearing this case or the Order issued on Christmas Eve. ... Likewise, this Honorable Court is empowered to order disqualification, but it should not be put in front of a trial witness to decide issues in this case. * * * Due to their prior involvement, Judges Vittone, Burke, *et al.* should have recused themselves for conflict of interest. ... *Sua sponte*, the DOL OALJ Front Office must recuse itself from ruling on [a] 'quarrel' started by the Front Office.

Response at 9-10 (citations omitted). [EX 32-D]

Apparently the point of this argument is that Slavin intends to call the undersigned and other court personnel as witnesses before some unspecified tribunal to testify about unspecified

actions directed against him and his client, rendering it improper for me to hear the instant section 18.34(g) proceeding. However, the question for decision is whether Slavin's course of conduct in a variety of judicial proceedings so calls into question his qualifications as a representative that he should be denied authority to appear before the Department of Labor's Office of Administrative Law Judges. Innuendo that OALJ personnel have somehow, something to answer for in regard to treatment of Slavin and Somerson falls far short of establishing grounds for recusal.[6] Also, Slavin's motion oddly asks for the court to "*sua sponte*" recuse itself, making it ambiguous as to whether Slavin is actually filing a motion to recuse or merely suggesting that the court consider recusal by its own motion. Certainly, Slavin did not file the supporting affidavit required for a recusal motion under 29 C.F.R. § 18.31(b).

Moreover, the regulation at 29 C.F.R. § 18.34(g)(3) is, in its very nature, in the form of a judicial inquiry rather than an adversarial proceeding. It provides that "the administrative law judge" may deny any person the privilege of appearing before OALJ for the reasons enumerated in the regulation after notice of and opportunity for hearing in the matter. This is consistent with the nature of attorney disciplinary proceedings in state courts. The court in *Mildner v. Gulotta*, 405 F.Supp. 182, 191 (E.D.N.Y. 1975), *aff'd*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976), put it this way:

> Disciplinary proceedings, while perhaps susceptible to such a label as 'quasi-criminal' or to such a terse description as 'comparable to a criminal rather than to a civil proceeding,' [*Erdmann v. Stevens*, 458 F.2d 1205 (2d Cir. 1972)] at 1209, are in reality neither. *In re Ming*, 469 F.2d 1352, 1353 (7 Cir. 1972). As the *Ming* court put it,
>
> > "(s)uch proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice. *Ex parte Wall*, 107 U.S. 265, 2 S.Ct. 569, 27 L.Ed. 552 (1882). Thus the real question at issue in a disbarment proceeding is the public interest and an attorney's right to

[6] Slavin complains bitterly that the *Notice of Judicial Review* was issued on Christmas Eve. The only holiday, however, that would have fallen between the time Slavin would have been likely to received the *Notice* and the due date for response was New Year's Day. The original response due date was not until January 15, 2004 -- ample time to fashion a response. In addition, as noted earlier, Slavin was subsequently given an extension until February 20, 2004 to respond.

> continue to practice a profession imbued with public trust. *In re Fisher*, 179 F.2d 361 (7th Cir. 1950), *cert. denied sub nom. Kerner, et al. v. Fisher*, 340 U.S. 825, 71 S.Ct. 59, 95 L.Ed. 606 (1950)." *Id*.

Similarly, it is recognized that in the admission and discipline of attorneys, the court is not acting as a prosecuting "party" as in a typical adjudicatory proceeding. *In re Rose*, 22 Cal.4th 430, 453, 993 P.2d 956, 971, 93 Cal.Rptr.2d 298, 314-15 (2000). Rather, attorney disciplinary proceedings are "*sui generis*." *Id*.

Accordingly, the motion to recuse is denied.

Motion for leave to take videotaped depositions

In a January 27, 2004 letter motion, Slavin on behalf of Somerson moves for leave to take videotaped depositions of counsel for the Respondent and certain OALJ court personnel. The motion includes a demand for copies of "everything" bearing the name of Slavin or Somerson in the possession of DOL and the Respondent. [EX 32-G] The letter contains a discourse on the impropriety of denying broad discovery in whistleblower cases, but does not explain why the deposition testimony is being sought.[7]

In the *Notice of Judicial Inquiry* issued on December 24, 2003, the assignment of a presiding judge to hear the merits of Somerson's whistleblower complaint was stayed pending resolution of the issue of whether Slavin would be allowed to appear. Thus, to the extent that the proposed deposition of counsel for the Respondent may relate to the merits of the complaint, the motion is denied as the case is not yet before a presiding ALJ.

To the extent that the motion may relate to the 29 C.F.R. § 18.34(g)(3) proceeding on Slavin's qualifications, it is denied for the lack of a showing of relevance. *See Hasan v. Burns &*

[7] Moreover, this is not a whistleblower proceeding but a proceeding regarding on an attorney's qualifications to appear before OALJ which only incidently is occurring preliminary to a whistleblower adjudication. Thus, the caselaw on discovery in whistleblower proceedings cited by Slavin is out of context.

Roe Enterprises, Inc., ARB No. 00-080, ALJ No. 2000-ERA-6 (ARB Jan. 30, 2001) (requirement of relevance of discovery must be firmly applied); *Freels v. Lockheed Martin Energy Systems, Inc.*, 1995-CAA-2, 1994-ERA-6 (ARB Dec. 4, 1996) (discovery properly denied where it concerned a matter over which there was no material issue of fact). In addition, the demand for production of all documents bearing Slavin and Somerson's names is denied as overly broad.

Finally, in regard to the motion to depose court personnel, the motion is grounded in the supposition that OALJ becomes a "party" against which discovery made be had if section 18.34(g)(3) procedure is invoked. The concurring opinion in *In re Slavin*, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003), [EX 16-B] however, observed that the section 18.34(g)(3) procedure does not authorize calling the ALJ seeking disqualification as a witness. If not so, an attorney could block any disciplinary proceeding by the simple expedient of naming as a witness the judge who observed the misconduct and instituted a section 18.34(g)(3) proceedings. *See also Mildner v. Gulotta*, 405 F.Supp. 182, 195 (E.D.N.Y. 1975)), *aff'd*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976) ("... a disciplinary proceeding is not a full-blown trial but an inquest -- a gathering of facts concerning the conduct of an attorney, a subject more likely to be illuminated by the evidence of the attorney's own acts than by what is said or not said by someone else."); *Razatos v. The Colorado Supreme Court*, 746 F.2d 1429, n.4 (10th Cir. 1984), *cert. denied*, 471 U.S. 1016, 105 S.Ct. 2019,85 L.Ed2d 301 (1985) (quoting *Milder*, *supra* with approval); *In re Rose*, 22 Cal.4th 430 440, 443, 452-53, 993 P.2d 956, 962, 964, 971, 93 Cal.Rptr.2d 298, 304-05, 307, 314-15 (2000) (state bar court and disciplinary proceedings are *sui generis* and not necessarily governed by procedures applicable to ordinary civil and criminal litigation).

Other motions

All other motions and requests contained in Slavin's responsive documents are either rendered moot by this Order or so lacking in merit as to not require discussion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Slavin's filings in response to the *Notice of Judicial Inquiry* did not directly address any of the particular misconduct stated by the documents identified in the Appendix to that *Notice*. One possible exception is that on Page 1 of his January 14, 2004 letter Slavin states "False imputations, including witness intimidation, are retaliatory and defamatory." Since the only citation involving witness intimidation occurred in the *Somerson* case, I find that the only factual circumstance Slavin has specifically contested is whether he was involved in witness intimidation in that case. The factual circumstances related in the remaining documents stand unchallenged.

Rules governing Professional Conduct

The United States Department of Labor, Office of Administrative Law Judges conducts hearings throughout the United States. Attorneys are not required to be members of the bar in the state in which a hearing is conducted, but only to be a member in good standing "admitted to practice before the Federal courts or before the highest court of any State, the District of Columbia, or any territory or commonwealth of the United States...." 29 C.F.R. § 18.34(g). Thus, for purposes of this Judicial Inquiry, citations will be made to the AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT (2002 edition) ("MRPC"). *See* MRPC 8.5 and TRPC 8.5 (in applying choice of law on disciplinary conduct, where the conduct is in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits govern, unless the rules of the tribunal provide otherwise). As noted previously, Slavin is a member of the Tennessee Bar. On August 27, 2002, the Tennessee Supreme Court approved new Tennessee Rules of Professional Conduct (TRPC). Those rules went into effect on March 1, 2003. *See generally* Website of the Tennessee Bar Association's Standing

Committee on Ethics and Professional Responsibility (http://www.tba.org/committees/Conduct/index.html (visited February 27, 2004)). In regard to the matters of concern in this Judicial Inquiry, the TRPC do not differ significantly with the MRPC or the prior Tennessee Model Code of Professional Responsibility except as discussed below.

Participation in harassment and intimidation of officers of the court

1. Somerson v. Mail Contractors of America

As noted in the *Background* section to this decision, in *Somerson v. Mail Contractors of America*, 2003-STA-11 (ALJ Jan. 10, 2003), *aff'd Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 2003-STA-11 (ARB Oct. 14, 2003), [EX 15-B and EX 15_E] Slavin assisted Somerson in pursuing a vexatious lawsuit the purpose of which was to intimidate and harass the Respondent, the Respondent's counsel, and counsel's law firm. Specifically, the ground for this suit was that the Respondent retaliated against Somerson in violation of the STAA whistleblower laws because the Respondent filed a motion for a protective order in Case No. 2002-STA-44 to stop Somerson from transmission of anonymous e-mails to persons named as witnesses in that case and to Respondent's counsel, and to stop establishment of anonymous websites directed at Respondent's counsel,[8] both of which contained vulgar, abusive, and implicitly threatening messages. At the time, Somerson was subject to a consent order entered by the U.S. District Court for the Middle District of Florida in which Somerson had agreed to conduct himself within the bounds of appropriate respect and decorum in OALJ proceedings. This consent order was grounded in Somerson's misconduct in a prior proceeding. Rather than counseling Somerson against conduct that violated both the court order[9] and was potentially

[8] Somerson communicated the existence of these websites to counsel, thereby inviting them to be viewed.

[9] Somerson was later found by the U.S. District Court for the Middle District of Florida to be in contempt of the earlier consent order because of his behavior in Case No. 2002-STA-44 and fined $5,000. *In re Somerson*, No. 3:02-cv-1158-J-20TEM, 3:02-cv-121-J-20TEM (M.D. Fla. Sept. 8, 2003), *appeal dismissed for want of prosecution*

criminal acts of intimidation of witnesses and court officials,[10] Slavin assisted Somerson in the filing and pursuit of a specious law suit alleging that Respondent's filing of the motion for protective order was retaliation under STAA whistleblower law. Thus, Slavin was more than a mere bystander to the intimidation and harassment of witnesses and opposing counsel in the case before Judge Miller, but rather an active participant.

As described more fully in the next subsection, the filing of this subsequent law suit was used in the case before Judge Miller to further attempt to bully the Respondent and its lawyer. This is abuse of legal process of the worst kind. I find that Slavin's participation in the filing and pursuit of Case No. 2003-STA-11 provides clear and convincing evidence of violations of MRPC 3.1 (pursuit of non-meritorious claim) and MRPC 8.4(d) (conduct prejudicial to the administration of justice).

2. Somerson v. Mail Contractors of America, Inc.

In *Somerson v. Mail Contractors of America, Inc.*, 2002-STA-44, slip op. at n.5 (ALJ Dec. 16, 2002), *aff'd Somerson v. Mail Contractors of America*, ARB No. 03-055, ALJ No. 2002-STA-44 (ARB Nov. 25, 2003), *appeal filed* No. 03-16522 (11th Cir.) [EX 15-A and 15-H]

No. 03-15112-H (11th Cir. Mar. 15, 2004). [EX 15-J] The district court found that the following materials originated and published by Somerson violated the consent order: (1) An e-mail directed to a prospective witness, Eli Gray, titled "ELI GRAY WEARING STRIPES," whereby Somerson suggested that "all that remains are the criminal charges and resulting indictments" for "conspiracy, racketeering to name a few" and demanded "Turn yourself in before we have to hunt you down like a dog." (2) An e-mail directed to Larry Cole , who had previously testified and was identified for recall, which stated "I should have asked him 'do I need to tell them to bring an ambulance or a Hearst'"and in another e-mail (titled "Every breath you take, every move you make, I'll be watching you") states "You asked for it *shithead*, now you gotta BELLY-FULL of trouble. (You ain't seen nothin yet)." The e-mail also calls Mr. Cole "truly evil" and an individual who is "guilty of extreme perjury in a Federal Truck Safety Case (2002-STA-44 Somerson v. Mail Contractors of America)." (3) Repeated e-mails to opposing counsel, Oscar Davis, with derogatory remarks like "Choke on this Cracker-Head" and "I'll bet you run of bacon around your blubber-ball waist before you run of server space - your peckerhead!" and "You don't have the balls." The e-mails include links to websites, including one with a picture of opposing counsel with large headings such as "Oscar Davis Sucks! ... This Rude Loudmouthed Hay-Seed Racist Baffoon from Arkansas Actually 'Practices' Law?" The district court found that Somerson's e-mails and websites were "of a harassing nature, and are hostile and crude to say the least."

[10] Attempts to intimidate a witness or other person in any proceeding before any department or agency of the United States is a criminal offense. 18 U.S.C. § 1512.

-- the case underlying the complaint described in the previous subsection -- Slavin filed documents for the purpose of implicitly threatening the ALJ and in assistance to his client's intent to harass opposing counsel. The circumstances are described by the presiding ALJ as follows:

> [A]ttached to [the motion filed by Slavin to vacate an order to show cause] are two extraneous documents: a "Confidential Civil, Criminal and Administrative Complaint Against United States Department of Labor Chief Administrative Law Judge John Vittone," dated November 8, 2002, addressed to the DOL Inspector General, and a "new STA complaint of improper Mail Contractors of America management coercion, intimidation and harrassment–vengeful activities intended to induce DOL Judge Edward Terhune Miller to grant an unlawful dismissal of his pending DOL whistleblower case on the basis of Mr. Somerson's First Amendment and whistleblower protected activity..." and "nam[ing] Mr. Oscar Davis and Friday, Eldridge and Clark as Respondents because their actions appear to cross the bounds of zealous representation and are little different than the intimidation of civil rights plaintiffs during the 1950s and 1960s," addressed to OSHA. The reason for these submissions was not stated. The submission of the complaint filed against the Chief Judge, especially since it has no relevance to the issues in this case, may be intended as an implicit threat against this tribunal. The new complaint against counsel, as well as Respondent, which is not directly relevant to the pending complaint, has the obvious attributes of continuing harassment of counsel.

Id., USDOL/OALJ Reporter at n.5 [PDF]. I find that the above-noted actions by Slavin in Case No. 2003-STA-11 provide clear and convincing evidence of violations of MRPC 3.5 (conduct intended to disrupt a tribunal) and MRPC 8.4(d) (conduct prejudicial to the administration of justice).

Following Judge Miller's dismissal of the complaint in *Somerson v. Mail Contractors of America, Inc.*, 2002-STA-44 based on Somerson's misconduct, Judge Miller returned to the Respondent certain documents, under protective order, which had been pending *in camera* review, as well as certain documents that had been in the temporary custody of the ALJ while they were being used for the examination of witnesses. Neither set of these documents had been received into evidence before the ALJ. *See Somerson v. Mail Contractors of America, Inc.,* 2002-STA-44 (ALJ Dec. 30, 2002) (Protective Order Regarding Certain Documents Submitted by Respondent for In Camera Inspection); *Somerson v. Mail Contractors of America, Inc.,* 2002-STA-44 (ALJ Dec. 30, 2002) (Second Protective Order); *Somerson v. Mail Contractors of America, Inc.,* 2002-STA-44 (ALJ Dec. 30, 2002) (Implementing Order Supplementing

Protective Orders). Slavin then filed documents with Judge Miller, the ARB, and the National Archives and Records Administration ("NARA") Office of Inspector General accusing Judge Miller of violating a criminal statute, 44 U.S.C. § 3106, by returning the documents. *See* [EX 15-C]

Although the charge that Judge Miller had violated a criminal statute was clearly specious, the Chief ALJ immediately drafted a letter to NARA OIG to explain the circumstances. [EX 15-C]

NARA OIG referred the matter to the DOL OIG. DOL OIG has determined that Slavin's charge of criminal conduct by Judge Miller had no merit. [EX 15-F]

I find that Slavin's filing of this specious OIG complaint had the purpose of retaliation against Judge Miller for dismissing *Somerson's* complaint, and that this action provides clear and convincing evidence of violations of MRPC 3.5 (conduct intended to disrupt a tribunal) and MRPC 8.4(d) (conduct prejudicial to the administration of justice). This episode is also a classic example of why Slavin's actions are repugnant to his professional obligations, as the time and effort used to defend an ALJ against an utterly specious charge of criminal conduct took the time of the Chief ALJ, two OIG offices, and officials at NARA away from more productive work on meritorious matters.

Client's case or appeal dismissed because of Slavin's actions

1. Howick v. Campbell-Ewald Co

In *Howick v. Campbell-Ewald Co.*, 2003-STA-6 (ALJ Sept. 18, 2003) [EX 22-B], the ALJ dismissed the complaint because of Slavin's and his client's record of delay and malfeasance.

The procedural history of *Howick v. Campbell-Ewald Co.* establishes the context of Slavin's conduct. For example, in *Howick v. Campbell-Ewald Co.*, 2003-STA-6 (ALJ Aug. 20, 2003) [EX 22-A], for example, Slavin filed "motions in limine," seeking to bar the Respondents from the following:

> 1. Invading the zone of witness privacy with irrelevant, impertinent, coercive, vexatious questions about prior employment and activities unrelated to issues before the Court, including but not limited to any questions seeking to interrogate witnesses about the associations or the identity of other persons engaging in protected activity. (citations omitted);
>
> 2. Refusing to provide employees/contractors under Respondent's control;
>
> 3. Delaying the beginning of the hearing with extensive legal arguments;
>
> 4. Delaying witness testimony with unfair scheduling difficulties or time constraints;
>
> 5. Putting managers on the stand without reading and reviewing key documents;
>
> 6. Refusing to provide or bring documents based on dubious "relevance" or other objections contrary to the authority in DOL, (citations omitted);
>
> 7. Refusing to provide documents based on putative attorney-client privilege and work product doctrine protection, when any such privilege or protection has been waived, e.g. in support of an inchoate "advice of counsel defense";
>
> 8. Making "speaking objections" or speeches instead of stating the legal basis for objections as contemplated by the rules, or addressing Mr. Howick or his counsel instead of the Court or raising voices or otherwise showing incivility, disrespect or contempt or efforts to delay the proceeding; or
>
> 9. Placing under surveillance Mr. Howick, the Court, any present or former employee of Respondents or the Court, any witness or visitor, or any other associated persons (e.g. family, household or staff), including employees listed or interviewed pursuant to the Court's July 25, 2003 Order. (citations omitted);

> 10. Attempting ex parte contacts with the Court, directly or indirectly (e.g. through staff, family, work, charitable/religious, neighbor, business or other associations).

The ALJ found that the motion was a "frivolous waste of this Court's resources" because it was not filed in response to any specific conduct by the Respondent. The ALJ noted that Slavin himself stated in the motion that the motion was unnecessary, it merely being a statement of "counsel's expectations of integrity applicable to administrative hearings." The ALJ cautioned Slavin "against filing frivolous pleadings, motions, or other papers for an improper purpose or without evidentiary support for factual contentions."

In his *Recommended Decision and Order - Dismissal of Complaint*, the ALJ described in detail the events leading up to the dismissal of the complaint. In brief, Complainant and his counsel for a variety of reasons delayed Complainant's deposition for over seven months until only four days before the hearing, requested rescheduling of the hearing multiple times, delayed answering interrogatories and requests for production of documents for over six months, filed frivolous motions (such as the motion *in limine* detailed above), requested subpoenas just after 4:00 pm on a Friday the week before the hearing when they had filed a witness list several days earlier, and failed to have trial exhibits marked, indexed and exchanged despite having been ordered to do so prior to the hearing. The ALJ found that this dilatory conduct materially prejudiced the Respondent's ability to mount a meaningful defense, effectively preventing the Respondent from developing or pursuing any evidence that may have arisen out of the Complainant's deposition. Slavin had failed to prepare Complainant's exhibits for hearing despite several warnings from the ALJ that the Complainant was dangerously close to having his complaint dismissed or having other sanctions imposed.[11] The ALJ stated that the Complainant's lack of preparedness to begin trial coupled with his failure to request a continuance were the "quintessential straw that broke the camel's back." The ALJ wrote: "While any one action of Complainant and his counsel independently might not have warranted dismissal as a sanction,

[11] Although the ALJ did not specifically cite it as a grounds for dismissal, during the hearing when Slavin was given an opportunity to state why the case should not be dismissed for failure to prosecute, Slavin chose to attack the ALJ's integrity, alleging that he had been hostile toward protected activity. *See* Slip op. at n.12 and surrounding text.

the overall effect of the dilatory and contemptuous behavior of Complainant and his counsel materially prejudiced Respondent's ability to mount a meaningful defense to Complainant's allegations, wasted the time and resources of the Office of the Administrative Law Judges, and offended traditional notions of fair play and substantial justice. The actions of Complainant and his chosen counsel led to congestion of the undersigned's calendar." Slip op. at 28.

Following the ALJ's dismissal of the complaint, Slavin filed the following motion for reconsideration:

> Having expended so much intellectual effort in an effort to deny the validity of Mr. Howick's unopposed Motion for Partial Summary Judgment, your Honor has exposed the failings of the Department of Labor as an adjudicator of whistleblower cases. There was no prejudice to Respondent by postponing Mr. Howick's deposition from the date suggested by Respondent unilaterally, without adequate notice (August 29) until the date suggested by Mr. Howick (September 4). The deposition was completed and your Honor had no basis to conclude that there was in any way any prejudice to Respondent's case by accommodating counsel's bereavement or Mr. Howick's colonoscopy and other health concerns..[sic]
>
> The conclusion that Mr. Howick somehow failed to prosecute his case when:
>
> > A. The [sic] was ready, willing and able to proceed with examination of his witnesses and so stated without dispute on the record;
> >
> > B. No prejudice to Respondent was identified by the Court or Respondent; and
> >
> > C. The Court previously ordered Mr. Howick, pro se, to sign an extension of the DOL deadlines, without any basis in law.
>
> This performance by the Court is cruelly unfair. Your Honor's order regarding depositions required Mr. Howick to spend thousands of dollars only to see his case dismissed:-- [sic] since that was apparently your intention, you should have done so before the trial, rather than giving the illusion that you were about to be fair and hold a trial. Since your dismissal did not state it was with prejudice, it was without prejudice, meaning that it can be vacated: since the deposition of Mr. Howick is in the record and your Honor has had an opportunity to read it, the dismissal must be vacated.

Howick v. Campbell-Ewald Co., 2003-STA-6 (ALJ Oct. 21, 2003). [EX 22-C] The ALJ found that the motion, filed about one month after the recommended decision was issued, was not

timely. In the alternative, he found that the motion presented no grounds for reconsidering his earlier recommended decision.

I find that the ALJ's decision in Case No. 2003-STA-6 provides clear and convincing evidence that Slavin violated MRPC 1.1 (lack of competent representation), MRPC 3.5(d) (conduct intended to disrupt a tribunal), and MRPC 8.4(d) (conduct prejudicial to the administration of justice).

2. Puckett v. Tennessee Valley Authority

In *Puckett v. Tennessee Valley Authority*, 2002-ERA-15 (ALJ Nov. 21, 2002) [EX 14], the ALJ dismissed the complaint based on Slavin's repeated refusal to comply with the ALJ's orders and display of contumacious conduct. In his decision, the ALJ recounted the procedural history of the proceeding. Respondent attempted to depose the Complainant and made requests for documents. Eventually, the ALJ denied a motion, filed by Slavin, for a protective order and to reschedule the Complainant's deposition. The ALJ ordered the Complainant to provide all documents responsive to TVA's request for production of documents by a certain date. The same day the ALJ issued this order (which had been e-mailed to the parties), Slavin faxed a motion for an on the record conference call, and suggested "that the Court be prepared to address":

> 1. The Court's legal and factual reasons for:
>
> A. Declining to order remand for investigation;
>
> B. Not granting Puckett's discovery motions or addressing their merits;
>
> C. Not ordering simultaneous exchange and production of discovery;
>
> 2. The federal constitutional requirement for a neutral decision maker;
>
> 3. DOL's historic desuetude of whistleblower law enforcement in states under suzerainty of the Atlanta and Dallas OSHA offices, including OSHA's apparent unlawful refusal to investigate Puckett's case; and

4. Whether the Court has been prejudiced against or for any party of any counsel.

The ALJ then recounted Slavin's additional conduct:

> That same afternoon Counsel faxed a letter renewing the motions he had made in his April 15, 2002 letter and which were denied in the Court's April 17, 2002 Order.
>
> Further, on April 18, 2002, Counsel sent a letter to District Chief Judge Mills seeking his views on the foregoing matters and my rulings. Counsel noted that he was not requesting "formal peer review at this time." A copy of this letter was faxed to the Court.
>
> On April 18, 2002, the Court denied the request for an on the record conference call and the request for simultaneous exchange of discovery. The Court did shorten the time for TVA's response to discovery to April 30, 2002. The Parties were advised that the Court's Orders dated April 2, 2002, and April 17, 2002, set specific dates for the accomplishment of certain tasks and the Court expected these tasks to be accomplished as ordered. The Court faxed the Order to the Parties.
>
> Within minutes of the Court's Order being faxed, the Court received by fax Puckett's five page Emergency Motion requesting "that the Court vacate the April 17, 2002 Order in this matter and modify the schedule agreed to by the parties." Counsel also requested a conference call.
>
> Waiting for me on my arrival at the office on April 19, 2002, was a two page Supplement to the Motion that had been faxed the previous evening. Despite the fact that the Court had advised the Parties that absent prior explicit permission, filings by facsimile (fax) would not be accepted, every ruling by the Court was followed by a flurry of unauthorized faxes from Counsel. As requested by Counsel, the Court held a conference call on April 19, 2002.
>
> The May 24, 2002 affidavit submitted by Linda J. Sales-Long to the Administrative Review Board is an accurate summary of the conference call. The Court began by stating that the Parties had agreed to the deadlines set in my previous orders and that I thought my previous orders were clear. Counsel then accused me of not reading his submissions. For the first time, Counsel indicated that he had two briefs due the following week. I stated I had read all his submissions and had found nothing to support his various motions and there was nothing in any of his submissions about a schedule conflict. Counsel then began to ask questions concerning my military background. I told Counsel that the purpose of the conference call was not to interrogate me but to give him the opportunity to present any matters that might be relevant to the motions. I then inquired about the pending briefs and Counsel responded that he would not be interrogated and refused to answer my inquiries. I then informed Counsel that my previous orders were clear and I expected compliance. His response was, "We'll see about that."

At no time during the conference call did I raise my voice, become abusive or snap my fingers as alleged by Counsel in his various correspondence to Judge Mills, Judge Vittone and the ARB.1/

On April 19, 2002, the Court was notified by fax that Puckett had filed an interlocutory appeal with the ARB. The Court was advised that Puckett would not be available for deposition or provide documents until the ARB had ruled. By Orders dated April 19 and May 10, 2002, the Court suspended further proceedings until the ARB ruled on the interlocutory appeal.

During the course of the interlocutory appeal, Counsel made the following comments concerning the Court:

> 1. Abusing the public trust, snapping his fingers, ALJ was irascible, conducted himself like a martinet, violated DOL standard of conduct, spoke in an ominous, threatening manner, subjected Puckett to a Procrustean bed.
>
> 2. ALJ may be extremely preoccupied, conducts himself in a hierarchical, authoritarian, demeaning, aggressive and uncivil manner.
>
> 3. Resembles Captain Queeg in The Caine Mutiny.
>
> 4. Bad judging, bad manners and misapplication of the law by biased judges.
>
> 5. Judge has a chip on his shoulder and a mental state that suggests he should be referred for a psychiatric fitness-for-duty exam and undergo sensitivity training.
>
> 6. Misfeasance, malfeasance and/or nonfeasance.
>
> 7. Some military-minded DOL ALJs sometimes show heartlessness.
>
> 8. Judge is a de facto defense lawyer.
>
> 9. Judge contaminated the reservoir.
>
> 10. Judge showed lack of objectivity and displeasure with citizens suing the government.
>
> 11. Judge acted as a cat's paw for federal agencies.
>
> 12. Judge treated Puckett like a digit to be counted or a minority to be marginalized.
>
> 13. Judge behaved badly, frozen in the ice of his own indifference.
>
> 14. Judge shows disdain, hostility and bias.

> 15. Judge's actions were both secret law and underlaw (lawbreaking by government officials charged with enforcing the law).
>
> 16. Judge gave only a wink and a nod at Due Process.
>
> 17. Judge is insensitive bordering dangerously upon mind-altering bias.
>
> 18. Judge exhibited extreme unfairness.
>
> 19. Counsel is embarrassed that a once-great organization would have ever hired me as a judge.
>
> 20. Judge is universally prejudiced against whistleblowers.
>
> 21. Judge's lack of objectivity tarnishes DOL's reputation for fairness.

During the interlocutory appeal, TVA sought to strike Puckett's brief as it contained scandalous, disparaging, and impertinent remarks about the ALJ. While denying the motion, the ARB shared TVA's concern that the parties at the very least comply with the most basic elements of decorum required of a legal professional. The ARB found Puckett's argument, while

> clearly on the razor's edge of acceptability, was not quite of the same degree of immaterial, offensive excoriation for which they sanctioned Counsel in *Pickett v. TVA*, ARB No. 00-076, ALJ No. 99-CAA-25 (ARB Nov. 2, 2000).

The ARB reiterated that unsupported, gratuitous disparagement of an ALJ's integrity and ability does not serve the interest of Counsel's client and the use of odiums, sarcasm and vituperative remarks have no place in a brief and are wholly unwarranted. The ARB noted that resort to the use of such statement is an indication of a lack of confidence in the law and the facts to support the position of the one using them.

Upon receipt of the ARB's Final Order Denying Complainant's Interlocutory Appeal, by Order dated October 1, 2002, the Court again set the case for hearing and set a discovery schedule similar to that agreed to by the Parties at the April 1, 2002 telephone conference. The Court ordered Complainant to provide all documents responsive to Respondent's request for production of documents in such a manner as to ensure that Respondent would receive them no later than October 11, 2002. The deposition of Complainant was to be completed between October 14, 2002, and October 31, 2002, and Respondent was to provide all documents responsive to Complainant's discovery request no later than three days after completion of Complainant's deposition. Complainant's reply to Respondent's Motion for Summary Decision was due on November 12, 2002. The Parties were again reminded that absent prior explicit permission, filings by fax would not be accepted.

By letter dated October 7, 2002, Counsel again asked that the case be remanded to OSHA for investigation and advised the Court that he sent the discovery documents, not to TVA, but to District Judge Mills for safekeeping only to be sent to TVA upon its agreement to simultaneous exchange. In the letter to Judge Mills, and in spite of the

ARB's admonishment that unsupported, gratuitous disparagement of an ALJ's integrity and ability does not serve the interest of Counsel's client and the use of odiums, sarcasm and vituperative remarks have no place in a brief and are wholly unwarranted, Counsel continued his verbal assault on the Court. Counsel's remarks included:

> 1. That I be referred to a board-certified psychiatrist for review of my abrasive, insulting, martinet personality, which boards dangerously on diagnosable mental illness.
>
> 2. That I am below the standard of care and behind the time.
>
> 3. That I show signs of Section 8 behavior.
>
> 4. That I treat persons appearing before me as subordinates and act in a rude manner.
>
> 5. Implying that I have cruel behavior, am immature, surly and seemingly intoxicated with power, acting like a demigod and behaving insensitively due to reasons of ego, insecurity and arrogance.
>
> 6. Implying that I have a diagnosable psychiatric condition and suggesting that I be placed on a sabbatical for treatment.
>
> 7. That I engaged in rude, callous behavior and that I should attend sensitivity training and possibly be removed from my position.

On October 9, 2002, I denied the Motion for Remand and advised the Parties that I expected compliance with the October 1, 2002 Scheduling Order.

On October 15, 2002, the Court, having received a copy of Complainant's October 9, 2002 letter to Judge Mills in which Complainant indicates that he has no intention of complying with the Court's October 1, 2002 Order, ordered Puckett to Show Cause as to why the complaint should not be dismissed for Complainant's failure to comply with the Court's Order.

By letter dated October 22, 2002, Complainant advised the Court that on that day he would be sending the box of documents returned by Judge Mills to TVA by priority mail, under protest, preserving all rights and remedies. I advised the Parties that the Court's October 16, 2002 Order To Show Cause and the October 1, 2002 Scheduling Order remained in effect. TVA received the discovery documents on October 25, 2002.

Upon receipt of the Scheduling Order, TVA had contacted Counsel to set a date for the deposition of Puckett. As Counsel failed to contact TVA concerning dates for the deposition, on October 4, 2002, TVA noticed Puckett's deposition for October 28, 2002. There is no indication that at any time prior to Friday, October 25, 2002, Counsel ever indicated any problem with the scheduling of Puckett's deposition for Monday, October 28, 2002.

On the afternoon of October 25, 2002, (the last business day before the scheduled deposition) Counsel contacted my secretary and requested permission to fax "Motions" to

the Court. Based on the past abuses of Counsel, the request was denied. In spite of the lack of permission to fax documents to the Court, Counsel faxed a request that the deposition be conducted telephonically citing schedule conflicts. Counsel was advised that the Court expected its prior Orders to be carried out. TVA contacted Counsel and informed him that they would be in Huntsville for the deposition as scheduled. Due to the fact that Puckett had not provided the discovery documents as ordered by the Court, TVA was unable to do a telephone deposition as belatedly requested by Counsel. Counsel advised TVA to stay in Knoxville and save the ratepayers money.

On October 28, 2002, TVA and the court reporter were in Huntsville for Puckett's deposition. Neither Puckett nor Counsel appeared.

On October 28, 2002, the Court received a copy of an October 25, 2002 letter to Judge Mills. Counsel mischaracterized his request to the Court as a request to send a one page document by fax. In reality, the request was to fax "motions." Counsel then again accused the Court of being a "cat's paw" for TVA and questions my judicial temperament and fitness.

On October 29, 2002, Complainant filed his Response to the Show Cause Order. Complainant's complete response follows:

> The Court's Order to Show Cause, should be vacated, as Mr. Puckett (after reasonably and seasonably requesting reconsideration while sending his documents to Judge Mills) timely provided his documents to TVA once the documents were returned by Judge Mills and Judge Price rejected his appeal for fairness and equal treatment. Facing permanent prejudice, Mr. Puckett acted reasonably to protect his rights. For DOL to become "one great system for the administration of justice," it must reject "justice-defeating technicalities" like those suggested by the Court and urged by TVA. Internatio-Rotterdam, Inc. v. Thomson, 218 F.2d 514, 517, 531 (4th Cir. 1955).

The remaining two paragraphs of the Response concern Counsel and Puckett's failure to attend the October 28, 2002 deposition.

On or about October 31, 2002, the Court received a copy of Judge Vittone's October 28, 2002 letter to Puckett and Counsel. Apparently, Counsel had filed a request for peer review which included charges that I was mentally unbalanced. As stated by Judge Vittone, this is the kind of "unsupported, gratuitous disparagement of an ALJ's integrity and ability" about which the ARB had exorcized Counsel previously in this case.2/

On October 31, 2002, the Court received Puckett's request for a telephone deposition that represented that Counsel "has schedule conflicts that preclude his being in Alabama early next week." By Order dated November 1, 2002, the Court ordered Counsel to identify the "schedule conflicts" and include the date the "schedule conflict" was set and include copies of any orders or other papers setting the "schedule conflicts" for October 28 or October 29, 2002, and identify efforts to reschedule the "schedule conflicts" and indicate whether he had attended the "schedule conflicts."

On November 9, 2002, Counsel filed a response. Counsel only cited an October 31 deadline for an ARB brief in a Lockheed Martin case and a State Court of Appeals brief in a medical malpractice case. Counsel did not provide any papers setting the dates these briefs are due, identified no effort to reschedule the due dates for the briefs and did not indicate whether he filed the briefs. Further, nowhere has Counsel ever indicated any reason why he did not return TVA's telephone calls attempting to schedule Puckett's deposition nor any reason why he waited until the afternoon of the last business day before the scheduled deposition to attempt to notify the Court or TVA of this alleged "schedule conflict."

_____

1/ In fact, I cannot snap my fingers.

2/ It is not only the Court that has been the object of Counsel uncivil remarks. During a telephone conversation with TVA counsel following Puckett's aborted deposition, Counsel allegedly called TVA's counsel uncharitable, unchristian like, dishonest and unethical. Counsel has compared TVA to a serial murderer who is still at loose in the community and still commits murders.

As a result of all of this conduct, the ALJ dismissed *Puckett's* case. The ALJ wrote:

I note that the abuse came from Counsel and not from Puckett. However, all the documents containing disparagement of the Court's integrity were served on Puckett and he was thus fully aware of the odiums, sarcasm and vituperative remarks being made by Counsel. As stated by the Court in Pyramid Energy, Ltd. v. Heyl & Patterson, Inc. 869 F.2d 1058 (7th Cir. 1989) and as cited by the Secretary in Malpass, "[A] court may dismiss an action with prejudice against a plaintiff for the actions of his counsel because a party who chooses his counsel freely should be bound by his counsel's actions . . . otherwise, the court's power to control its docket, and compel attorneys to proceed within the time frame set by the court and not their own would erode and eventually disappear . . . . A trial court is entitled to say, under proper circumstances, that enough is enough . . . and less severe sanctions than dismissal need not be imposed where the record of dilatory conduct is clear."

Sanctions less severe than dismissal have been ineffective in past cases involving Counsel. Counsel has been disqualified, warned, sanctioned, censured and reprimanded for his past unprofessional conduct. See, e.g., Greene v. Environmental Protection Agency, 2002-SWD-1 (ALJ June 20, 2002); Johnson v. Oak Ridge Ops. Office, ALJ Case Nos. 95-CAA-20, 21, and 22, Order Barring Attorney Edward A. Slaven from Future Appearances (Feb. 4, 1997); Seater v. Southern Cal. Edison Co., ARB Case No. 96-013 (ALJ Case No. 95-ERA-00013), Post-Remand Order No. 7 (Feb. 4, 1997); Rockefeller v. United States Dep't of Energy, ALJ Case Nos. 98-CAA-10 and 11, Order Barring Counsel from Future Appearances (Sept. 28, 1998); Rockefeller v. Carlsbad Area Office (CAO, United States Dep't of Energy, ARB Case Nos. 99-002, 99-067, 99-068, and 99-063 (ALJ Case Nos. 98-CAA-10 and 11, 99-CAA-1, 99-CAA-4, and 99-CAA-6) (Oct. 31, 2000); Williams v. Lockheed Martin, ARB Case Nos. 99-054 and 99-064 (ALJ

> Case Nos. 98-ERA-40 and 42) (Sept. 29, 2000); Lockheed Martin Energy Systems v. Slavin, No. 3:98-CV-613 (E.D. Tenn. Dec. 6, 1999); Pickett v. Tennessee Valley Authority, ARB Case No. 00-076 (ALJ Case Nos. 99-CAA-25 and 00-CAA-9) (Nov. 2, 2000); Erickson v. Environmental Protection Agency, 1999-CAA-2 (ALJ Jan. 2, 2002); Campbell v. Travelers Insurance Co., 2002 Tenn. LEXIS 43 (E.D. Tenn. 2002). Counsel continues to disregard and/or disobey the orders and warning issued by this Court, other ALJs, the ARB and the federal courts. Counsel has exhibited a drawn out history of deliberately proceeding in a dilatory manner and his continued disregard of the Court's Orders indicates that with anything less than dismissal, Counsel will never understand the severity of potential consequences for not complying with the Court's Orders.

Thus, in *Puckett*, Slavin chose to resist discovery orders with which he disagreed with gratuitous disparagement of the ALJ's character and defiant disobedience, escalating to the point where his conduct caused his client to have his case dismissed by the ALJ without a hearing on the merits. I find that the ALJ's decision in Case No. 2002-ERA-15 provides clear and convincing evidence that Slavin violated MRPC 1.1 (lack of competent representation), MRPC 3.5(a) (seeking to influence a judge by improper means), MRPC 3.5(d) (conduct intended to disrupt a tribunal), MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (conduct prejudicial to the administration of justice).

3. Pickett v. Tennessee Valley Authority

In *Pickett v. Tennessee Valley Authority*, ARB No. 02-076, ALJ No. 2001-CAA-18 (ARB Oct. 9, 2002) [EX 12] the ALJ issued an order recommending that the Respondent, Tennessee Valley Authority ("TVA") pay Pickett's counsel an attorney's fee of $14,621.82 for services rendered and costs Pickett incurred in successfully litigating his complaint under a number of environmental whistleblower statutes. Pickett filed an appeal of this recommended order with the Board pursuant to 29 C.F.R. § 24.8. Despite three extensions of time to file an appellate brief, Slavin failed to timely file the brief. Shortly after the ARB issued an Order to Show Cause why the appeal should not be dismissed, Slavin filed a fourth request for extension of time, stating as grounds hearings before two other ALJs. The Board ruled:

> In this case, after the Board granted Pickett three enlargements of time, Pickett failed to file either the promised brief or even a request for a further enlargement by

> September 5, 2002, the filing date specified in the Board's order. In fact, Pickett did not communicate with the Board for more than two weeks after the due date for his brief had passed. In this communication, Pickett's counsel requested a fourth enlargement of time citing a head cold and longer than anticipated trial schedules, but not even suggesting a date by which he would file Pickett's brief. To date, the Board has accommodated Pickett's counsel's schedule, in an attempt to offer Pickett every reasonable opportunity to file a brief in this case. However, we do not find counsel's head cold or busy trial schedule a sufficient explanation for his failure, not only to file a brief as ordered, but to even timely communicate his apparent inability to do so.

Id. at 3 [HTML].

I find that the ARB's dismissal of the attorney fee appeal in Case No. 2001-CAA-18 provides clear and convincing evidence that Slavin violated MRPC 1.1 (lack of competent representation) and MRPC 1.3 (lack of diligence).

4. Steffenhagen v. Securitas Sverige

In *Steffenhagen v. Securitas Sverige, AR*, ARB No. 03-139, ALJ No. 2003-SOX-24 (ARB Jan. 13, 2004) [EX 21-C] the ARB dismissed the complaint based on failure to prosecute where the Complainant failed to file a timely brief or motion for enlargement of the briefing schedule based on good cause. In *Steffenhagen*, the ALJ had ruled that the complaint should be dismissed because the Complainant had failed to serve notice of his complaint upon the named Respondents without good cause. Slavin filed a motion to vacate the ALJ's order and a protective petition for review with the ARB requesting that no briefing order be issued "due to the pending motion to reconsider and the death of his father." The ALJ denied the motion to reconsider, and the ARB issued a briefing schedule. According to the ARB:

> The briefing schedule was addressed to Steffenhagen's counsel at his official address, a post office box in St. Augustine, Florida. David B. Wallace, signing as counsel's agent, accepted delivery of the Order on September 13, 2003. Steffenhagen signed for delivery of the Order on September 2, 2003.
>
> On September 23, 2003, the Board received two motions via facsimile from Steffenhagen – one requesting the Board to remand the case to OSHA and the other to hold the briefing schedule in abeyance. The Board declined to file these documents and

returned them to Steffenhagen because of his counsel's repeated and obdurate refusal to comply with the Board's filing requirements. *See e.g., Gass v. Lockheed Martin Energy Systems*, ARB No. 03-093, ALJ No. 2000-CAA-22 (ARB July 11, 2003) (Order Returning Motion to Set Briefing Schedule); *Erickson v. United States Envtl. Prot. Agency*, ARB Nos. 03-02, 03, 04, ALJ Nos. 1999-CAA-2, 2001-CAA-8, 13, 2002-CAA-3, 18 (ARB Oct. 17, 2002).

Because Steffenhagen did not timely file a brief in accordance with the briefing order, the Board issued an Order requiring Steffenhagen to show cause why the Board should not dismiss his petition for review for failure to prosecute his case. *See McQuade v. Oak Ridge Operations Office*, ARB No. 02-087 (Oct. 18, 2002); *Pickett v. TVA,* ARB No. 02-076 (Oct. 9, 2002).

On October 3, 2003, Steffenhagen filed a motion to stay the briefing schedule pending a remand for an OSHA investigation.

> In response to the Show Cause Order, Steffenhagen averred that:
> [he] informed his counsel (when counsel was in Detroit or Dayton working on a STA case only two weeks after his father's death) that [he] received the Board's briefing order and that the deadline for his brief was on September 23, 2003. Counsel wrote down the date. Counsel then called ARB about the deadline on this and other cases on [Friday] September 19, 2003: he did **not** receive a response from ARB until after the close of business on [Tuesday] September 23, 2003, the following week and that response was oddly worded and rather impolite, to say the least.

Complainant's Response to Order to Show Cause at 1.

In discussing the Complainant's responses to the Order to Show Cause, the ARB indicated that the fault for the failure to timely file a brief laid squarely with Slavin. The Board wrote:

> Steffenhagen has failed to demonstrate good cause for his failure to comply with the Board's briefing schedule and to timely file his brief. In an apparent attempt to shift responsibility to Steffenhagen, Steffenhagen's counsel, Edward Slavin, asserts that on some unspecified date Steffenhagen told Slavin that his brief was due on September 23, when in fact it was due on September 22. It is not the responsibility of a client to maintain his attorney's calendar. Slavin's agent accepted service of the Board's briefing order on September 13. Steffenhagen offers no explanation for his counsel's failure to adhere to its unambiguous requirement that Steffenhagen's brief must be filed on or before September 22. Slavin's refusal to comply with the Board's briefing order in this case is not an isolated incident. *See e.g., McQuade v. Department of Energy*, ARB No. 02-087, ALJ Nos. 99-CAA-7, 8, 9, 10 (ARB Oct. 18, 2002); *Pickett v. Tennesee Valley Auth.*, ARB No. 02-076, ALJ No. 01-CAA-18 (ARB Oct. 9, 2002). *Cf., Somerson v. Mail Contractors of America*, ARB No. 03-055, ALJ No. 02-STA-044 (ARB Nov. 25,

2003)(brief of complainant represented by Slavin struck because the brief was not filed in compliance with Board's briefing order).

Furthermore, when filing an untimely request for a stay of the briefing schedule, Slavin once again failed to comply with the Board's filing requirements even though he was well aware from previous experience that such failure would result in the Board's refusal to accept the documents. *See e.g., Gass v. Lockheed Martin Energy Systems*, ARB No. 03-093, ALJ No. 2000-CAA-22 (ARB July 11, 2003) (Order Returning Motion to Set Briefing Schedule); *Erickson v. United States Envtl. Prot. Agency*, ARB Nos. 03-02, 03, 04, ALJ Nos. 1999-CAA-2, 2001-CAA-8, 13, 2002-CAA-3, 18 (ARB Oct. 17, 2002).

Finally, when Steffenhagen did belatedly file a motion for stay, which complied with the Board's filing requirements, Steffenhagen failed to demonstrate good cause for the stay of briefing. The only basis for the stay that Steffenhagen alleged was to remand the case to OSHA to investigate. However, whether the ALJ properly denied the request for remand was one of the very issues upon which Steffenhagen sought review. Therefore, Steffenhagen's request for a stay of briefing based on his renewed request for investigation was baseless, given the necessity of briefing to resolve the very issue of whether the ALJ properly found that applicable regulations precluded remand for investigation.

While we recognize that Steffenhagen is not personally responsible for the failure of his attorney to either timely file a brief or a motion for enlargement based on good cause, as the Board held in *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-6, (ARB Aug 27, 2002):

> Ultimately, clients are accountable for the acts and omissions of their attorneys. *Pioneer Investment Services Co., v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 396 (1993); *Malpass v. General Electric Co.*, Nos. 85-ERA-38, 39 (Sec'y Mar. 1, 1994). As the Supreme Court held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:
>
> > Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all fact, notice of which can be charged upon the attorney."

Link v. Wabash Railroad Company, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).2/

2/ The Court did note, however, "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. at 634 n.10.

I find that the ARB's dismissal of the appeal in Case No. 2003-SOX-24 provides clear and convincing evidence that Slavin violated MRPC 1.1 (lack of competent representation) and MRPC 1.3 (lack of diligence).

I also observe that the ground for dismissal cited by the ALJ -- failure to serve the complaint as required by the applicable regulation -- is also attributable to Slavin's mishandling of the complaint. The ALJ observed:

> The record fails to establish that Complainant served the named Respondents with notice of his complaint. Complainant has named no fewer than seventeen Respondents, including alleged foreign corporations, individuals, labor unions and the United States Department of Energy. See, Complaint of Complainant. OSHA has asserted that Complainant failed to comply with repeated requests for contact information concerning the named respondents. Complainant has taken no action to remedy this defect by serving notice of his complaint upon any of the parties he alleges to be in violation of the Act. Although the complaint includes a notation that suggests certain individuals were provided copies of the document, none of those individuals are among the named Respondents to Complainant's action.

Steffenhagen v. Securitas Sverige, AR, 2003-SOX-24, USDOL/OALJ Reporter at 2 [HTML] (ALJ Aug. 5, 2003). [EX 21-A]

5. Gass v. U.S. Department of Energy

In *Gass v. U.S. Department of Energy*, ARB No. 03-035, ALJ No. 2002-CAA-2 (ARB Jan. 14, 2004) [EX 25], the appeal was dismissed based in large part on Slavin's failure to timely file a petition for review. In this case, the ALJ issued a recommended decision on November 20, 2002, but the Board did not receive Gass's petition for review until December 18, 2002. The applicable regulation only provides for 10 days to file such a petition. 29 C.F.R. § 24.8(a). The ARB then received from the ALJ the following communication:

> On November 20, 2002, the [R. D. & O.] was mailed to the named parties and their counsel at the last known addresses. Specifically, a copy was sent to Mr. Slavin in

> Saint Augustine and Ms. Gass in Jacksonville, Florida. On December 20, 2002, by telefax, I received notice from the complainant, Ms. Gass, that her attorney, Mr. Slavin, intended to file and request a stay of the Recommended Decision and Order, pending resolution of another case involving Ms. Gass (200CAA22) that is pending before Administrative Law Judge Michael Lesniak. … Additionally, Ms. Gass explained that she had problems communicating with her counsel and receiving mail and messages at her new address in Jacksonville, Florida (which is the same address that appears on the Recommended Decision and Order service sheet). In closing Ms. Gass states "I am within 10 days of notification of this decision."

The ARB thereafter issued an order to show cause why the Board should not dismiss the appeal because Gass had failed to file a timely petition for review. Gass did not timely respond. Several days after the due date, she filed a response containing several motions. The response alleged problems with USPS forwarding of mail and delivery of it to her by the management at her new address as the reason why she did not timely file the petition for review.

The Board issued a second show cause order directing Gass to show cause why her case should not be dismissed for her failure to timely reply to the Board's earlier show cause order. Gass responded that her counsel was ill with the flu and had no recollection of seeing the Order to Show Cause until January 29, 2003, when he received a telephone call and facsimile copy of the Order from the Board. The Board stated that "[a]ttached to the response was Declaration from Nahum Litt stating that he spoke to Gass's counsel several times a day between January 15th and the 22nd and that he could tell that he was ill." Gass did not dispute the Respondent's contention that even if Gass did not timely receive the ALJ's recommended decision, there was no indication that Slavin did not timely receive it.

In considering Gass's responses to its orders to show cause, the ARB found that principles of equitable tolling did not apply to relieve her of the failure to file a timely petition for review. The Board laid the responsibility for the failure squarely on Slavin, writing:

> While Gass has averred that she did not timely receive the R. D. & O., the ALJ also served her counsel with the decision, and he has not disputed, much less established, that he failed to timely receive the decision. "Extraordinary circumstances" is a very high standard that is satisfied only in cases in which even the exercise of diligence would not have resulted in timely filing. *See, e.g., Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999)("complete psychiatric disability" during the entirety of the limitations period);

Alvarez-Machain v. United States, 107 F.3d 696 (9th Cir. 1996) (incarceration in a foreign country for the entirety of the limitations period). "Extraordinary circumstances" does not extend to excusable neglect. *Irvin v. Dep't of Veterans Affairs,* 498 U.S. 89 at 96. And in any event, there was no evidence of excusable neglect here because Gass's counsel was timely served with the R. D. & O. and has offered no explanation for his failure to timely file the petition for review. *Accord Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 44 (3d Cir. 1976), *aff'd sub nom Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, (1977) (no excusable neglect in case in which clerk notified a party's attorney, rather than the party, and the attorney offered no explanation for having failed to file the petition for review within the allotted time).

While we recognize that Gass is not personally responsible for her counsel's failure to timely file the petition for review, as the Board recently held in *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-6, slip op. at 5-6 (ARB Aug. 27, 2002):

> Ultimately, clients are accountable for the acts and omissions of their attorneys. *Pioneer Investment Services Co., v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 396 (1993); *Malpass v. General Electric Co.*, Nos. 85-ERA-38, 39 (Sec'y Mar. 1, 1994). As the Supreme Court held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:
>
> > Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all fact, notice of which can be charged upon the attorney." *Link v. Wabash Railroad Company*, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).4/

4/ The Court did note, however, "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. at 634 n.10.

I find that the ARB's decision in Case No. 2002-CAA-2 provides clear and convincing evidence that Slavin violated MRPC 1.1 (lack of competent representation) and MRPC 1.3 (lack of diligence).

6. Gass v. Lockheed Martin Energy Systems, Inc.

In a second case in which Slavin's client was Linda Gass, *Gass v. Lockheed Martin Energy Systems, Inc.*, ARB No. 03-093, ALJ No. 2000-CAA-22 (ARB Jan. 29, 2004) [EX 11-F], Slavin's failure to timely file an appellate brief or respond to an order to show cause resulted in a dismissal of his client's appeal. In that case, Gass's appellate brief was due on or before June 9, 2003. The brief was not timely filed, and on June 20, 2003, the Board received a fax from Gass (via Slavin) requesting the Board to modify its briefing schedule. Slavin, although having been repeatedly admonished to put requests for the Board to take action in the form of a motion with an appropriate caption, including the Board's docket number, did not include the Board's docket number on the filing. Thus, the Board Board refused to accept the proffered documents. The Board also issued an order to show cause why the Board should not dismiss her Petition for Review for failure to prosecute her case. Complainant was thereafter granted three extensions of time to respond to the order to show cause. Still, Gass failed to file a response to the show cause order. On January 6, 2004, Gass sent a copy of a letter addressed to her counsel terminating "our relationship" to the Board. In its discussion of its decision to dismiss the appeal, the ARB wrote:

> ... Gass's counsel was well aware of the consequences of the failure to respond to an Order to Show Cause. *Slavin v. Office of Administrative Law Judges*, ARB No. 03-077, ALJ No. 03-CAA-12 (ARB Aug. 22, 2003)(case brought by Gass's counsel dismissed for failure to prosecute when counsel failed to file an opening brief as provided in Board's briefing order and to respond to Board's order to Show Cause).
>
> Furthermore, when filing an untimely request for a stay of the briefing schedule, Gass's counsel once again failed to comply with the Board's filing requirements even though he was well aware from previous experience that such failure would result in the Board's refusal to accept the documents. *See e.g., Erickson v. United States Envtl. Prot. Agency*, ARB Nos. 03-02, 03, 04, ALJ Nos. 1999-CAA-2, 2001-CAA-8, 13, 2002-CAA-3, 18 (ARB Oct.17, 2002).
>
> While we recognize that Gass is not personally responsible for the failure of her attorney to timely file a brief and to respond to the Order to Show Cause:
>
> > Ultimately, clients are accountable for the acts and omissions of their attorneys. *Pioneer Investment Services Co., v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 396 (1993); *Malpass v. General*

Electric Co., Nos. 85-ERA-38, 39 (Sec'y Mar. 1, 1994). As the Supreme Court held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all fact, notice of which can be charged upon the attorney." *Link v. Wabash Railroad Company*, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).4/

Gass v. United States Dep't of Energy, ARB No. 03-035, ALJ No. 02-CAA-2, slip op. at 7 (Jan. 14, 2004).

_____

4/ The Court did note, however, "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. at 634 n.10.

I find that the ARB's decision in Case 2000-CAA-22 provides clear and convincing evidence that Slavin violated MRPC 1.1 (lack of competent representation) and MRPC 1.3 (lack of diligence).

7. Blodgett v. Tennessee Dept. of Environment and Conservation

Official notice is taken pursuant to 29 C.F.R. § 18. 45 that in *Blodgett v. Tennessee Dept. of Environment and Conservation,* ARB No. 03-043, ALJ No. 2003-CAA-7 (ARB Mar. 19, 2004) [EX 26], the ARB dismissed the complaint based on the Complainant's failure to prosecute and his failure to file a response to the ARB's Show Cause Order to explain his failure to file an appellate brief. The Board wrote:

> Blodgett has failed to file a response to the Board's Order to Show Cause why his case should not be dismissed for failure to prosecute. Furthermore, Blodgett's counsel was well aware of the consequences of the failure to respond to an Order to Show Cause. Slavin v. Office of Administrative Law Judges, ARB No. 03-077, ALJ No. 03-CAA-12 (ARB Aug. 22, 2003) (case brought by Blodgett's counsel dismissed for failure to

prosecute when counsel failed to file an opening brief as provided in Board's briefing order to respond to Board's Order to Show Cause).

While we recognize that Blodgett is not personally responsible for the failure of his attorney to timely file a brief and to respond to the Order to Show Cause:

> Ultimately, clients are accountable for the acts and omissions of their attorneys. *Pioneer Investment Services Co., v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 396 (1993); *Malpass v. General Electric Co.*, Nos. 85-ERA-38, 39 (Sec'y Mar. 1, 1994). As the Supreme Court held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:
>
> > Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all fact, notice of which can be charged upon the attorney." *Link v. Wabash Railroad Company*, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).2/

Gass v. United States Dep't of Energy, ARB No. 03-035, ALJ No. 02-CAA-2, slip op. at 7 (Jan. 14, 2004).

2/ The Court did note, however, "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. at 634 n.10.

I find that the ARB's decision in Case 2003-CAA-7 provides clear and convincing evidence that Slavin violated MRPC 1.1 (lack of competent representation) and MRPC 1.3 (lack of diligence).

8. Blodgett v. Tennessee Dept. of Environment and Conservation

Official notice is taken pursuant to 29 C.F.R. § 18. 45 that in *Blodgett v. Tennessee Dept. of Environment and Conservation,* ARB No. 03-138, ALJ No. 2003-CAA-15 (ARB Mar. 22, 2004) [EX 20-B], the ARB dismissed the complaint based on the Complainant's failure to

prosecute and his failure to file a response to the ARB's Show Cause Order to explain his failure to file an appellate brief. During the appeal, Slavin had filed several documents with the ARB which had been returned unfiled because of his failure to conform the filings to ARB requirements. Blodgett indicated later to the Board that he intended to proceed pro se. The Board subsequently issued an order to show cause why the appeal should not be dismissed for failure to file a brief in accordance with the Board's briefing order. Blodgett did not respond, but Slavin filed a response arguing that he had, in an earlier motion for summary reversal, incorporated prior filings in another case involving Blodgett pending before the ARB and that no further briefing was necessary unless the Respondent or the ARB identified particular issues. The Board wrote:

> Even if Blodgett had not indicated his intention to appear pro se, Slavin's response to the Show Cause Order was not persuasive. Slavin's unilateral determination that no brief was necessary, communicated to the Board almost three months after the brief was due, does not excuse his failure to file a brief in compliance with the Board's briefing order

Id. at n.4.

I find that the ARB's decision in Case 2003-CAA-15 provides clear and convincing evidence that Slavin violated MRPC 1.1 (lack of competent representation) and MRPC 1.3 (lack of diligence).

9. Erickson v. United States Environmental Protection Agency

Official notice is taken pursuant to 29 C.F.R. § 18. 45 that in *Erickson v. United States Environmental Protection Agency,* ALJ No. 1999-CAA-2, 2001-CAA-8 and 13, 2002-CAA-2 and 18 (ALJ Feb. 7, 2003) [EX 8-D], the ALJ denied Complainant's request for over $197,000 in attorneys fees and expenses. The ALJ wrote:

> In this case, Complainant’s Counsel was granted two extensions allowing him to submit a properly detailed fee application from September 24, 2002 to January 17, 2003.

> Despite being given almost a four month time period for submission of a properly documented fee petition, warned that failure to timely submit such a petition would constitute a waiver of fees, and told that no further extensions beyond January 17, 2003 would be granted, Complainant's Counsel filed no detailed petition until January 22, 2003. While Complainant's Counsel would like to shift the blame to my staff, Fed Ex, and Respondent EPA's Counsel, there is no basis for doing so. He had more than adequate time to prepare and submit a properly documents fee petition. The fact that he waited until the last minute to prepare such documentation is his own fault.

Disqualifications for misconduct

1. Greene v. U.S. Environmental Protection Agency/In re Slavin

In *In re Slavin*, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003), *aff'g Greene v. U.S. Environmental Protection Agency*, 2002-SWD-1 (ALJ June 20, 2002) [EX 16-A and EX 16-B], the ARB affirmed the presiding ALJ's disqualification of Slavin under 29 C.F.R. § 18.36, and found that Slavin (a) "acted with reckless disregard for the truth when he asserted that improper contacts between DOL OALJ and the ALJ occurred and facilitated a conspiracy to deny the Complainant a full and fair hearing in her whistleblower complaint;" (b) "acted unprofessionally by making statements in pleadings that are personally offensive to the ALJ, other Federal officials and opposing counsel;" and (c) "fail[ed] to comply with the ALJ's directions regarding reasonable standards of orderly and ethical conduct, including the proper use of citations to legal authority."

a. False statement: In the *Greene* case, OALJ had contacted the Office of Personnel Management to select an administrative law judge outside the Department of Labor to preside over the *Greene* case because Judge Greene is the spouse of DOL OALJ's former Chief ALJ.[12] A judge from the Department of Housing and Urban Development was ultimately selected. Several months after the hearing had commenced, Slavin asserted that the selection process was

[12] For additional background on the reason for referring this matter to OPM to assist in finding a non-DOL judge, see *In the Matter of Slavin*, 2002-SWD-1, USDOL/OALJ Reporter at n.11 [HTML] (ALJ July 26, 2002).

improper, making factual allegations of collusion by several government agencies. In his *Order of Disqualification*, the presiding HUD ALJ held:

> Counsel [Slavin] first asserted that DOL OALJ ("Office of Administrative Law Judges") and I had engaged in improper conduct regarding my appointment in his January 2, 2002, letter to DOL's Associate Chief Judge Thomas Burke requesting reconsideration of Judge Burke's December 21, 2001, "Order Denying [Complainant's] Motion to Reconsider . . . ." In this letter Counsel stated, "DOL OALJ impermissively contacted HUD directly, instead of going through OPM and having OPM make a selection." Although Counsel indicated that he based this assertion upon documents contained in DOL OALJ's December 2001, response to his FOIA ("Freedom of Information Act") request, there was nothing in those documents to indicate such a contact had occurred, and Counsel provided no evidence in support of his assertion.
>
> Nonetheless, in a January 3, 2002, "Order Denying Motion to Reconsider Denial of Motion to Reconsider," Judge Thomas Burke, corrected Counsel's misapprehension, stating:
>
> > In fact, the factual predicate of Judge Greene's motion, that the DOL OALJ impermissibly contacted HUD directly instead of going through OPM for an ALJ to hear this case is incorrect. DOL OALJ contacted OPM who in turn contacted HUD as well as other agencies requesting the availability of an ALJ to be detailed on this case.
>
> On January 8, 2002, Counsel moved for my recusal.[3] In his motion Counsel made the following statement: "the MOU [Memorandum of Understanding between HUD and DOL regarding my appointment as trial judge] was established in secrecy, with HUD and DOL picking HUD and one of its judges to decide the case before OPM was contacted." That statement is false and Counsel had reason to know it was false at the time he made it, as demonstrated by his incorporation of evidence refuting his statement into his motion. Counsel incorporated into his motion of January 8, 2002, Judge Burke's January 3, 2002 order.

Greene v. U.S. Environmental Protection Agency, 2002-SWD-1 (ALJ June 20, 2002), USDOL/OALJ Reporter at 2.

b. Insulting, Abusive, and Unprofessional Statements. Also in the *Greene* case, the presiding ALJ from HUD disqualified Slavin for his insulting, abusive, and unprofessional statements, to wit:

> In a January 8, 2002, pleading entitled "Notice of Filing in Support of Motion for Reconsideration" and "Supplemental Citations re: *Ex Parte* HUD-OPM-DOL MOU,"

Counsel made numerous inappropriate, abusive, and uncivil statements. He asserted, for example:

- That I am an "incurious and unscholarly judge";
- That my rulings indicate a prejudgment of the issues;
- That my rulings have been "nasty, brutish, and short (and bordering dangerously on bullying)";
- That HUD will benefit financially if I stint on the time that I spend on this case; and
- That the "fact" that I seek to become the Chief Administrative Law Judge of HUD "creates a community of interests with EPA Chief Judge Biro and management of OPM, EPA, HUD, and DOL for the protection of EPA's management 'prerogatives' to harass Administrative Law Judges."[4/]

In a January 9, 2002, letter to the Secretary of Labor seeking to cancel the Memorandum of Understanding between DOL and HUD that provides for DOL's reimbursement of HUD for the time spent on this case, Counsel repeated many of the same statements. He again referred to my rulings as "nasty, brutish, and short," again stated that I have a community of interests with the EPA Chief Judge, and again asserted that I intend to benefit HUD financially by giving this case short shrift.

On January 24, 2002, Counsel filed a "Notice of Filing and Motion to Strike Improper Filings." In this document, filed in reply to EPA's response to Complainant's motion seeking my recusal, Counsel accused officials at EPA, OPM, and DOL of corruption. He charged that:

> [EPA's] improper filings impermissibly seek to contaminate the Court with . . . sworn declarations from OPM personnel whose actions require a hearing under oath, not self-serving statements elicited by Respondents, who have special 'pull' with OPM as a Federal agency and its Chief Judge . . . .

The filing of January 24, 2002, also refers to a letter of January 14, 2002, written by Judge Burke. Counsel stated that Judge Burke's letter was "at best an ill-advised unseemly attempt to influence the outcome of a pending recusal motion without troubling anyone with the need for a hearing or compliance with legal norms like due process."

Other examples of Counsel's abusive statements made in documents filed throughout the course of this proceeding include the following:

- "The undisclosed DOL-HUD-OPM selection of HUD to adjudicate this case, along with an arbitrary, unchangeable budget limit ($10,000) and a non-expert Chief Judge predetermines the outcome of this case . . . ."

- "The 'waters of justice' have been 'polluted' by DOL and HUD's premature and inappropriate dealings with OPM."

- "It is inappropriate for an Administrative Law Judge to function as a 'cat's paw' for Federal agencies."

- "The inartfully drafted MOU in this case is reminiscent of the Ohio conflict of interest cases involving judicial remuneration. . . . where judges made extra money for ruling against criminal defendants." (citations omitted).

- "The MOU [between Judges Burke and Cregar] does not pass either the 'olfactory test' or the 'snicker test.'"

- "EPA makes itself a point source of verbal pollution."

4/ While hiding behind disingenuous disclaimers, Counsel indirectly accuses me, EPA, DOL, and OPM of corruption, conspiracy, and bribery. His theory appears to be that because I desire to become chief judge at HUD, I joined with EPA, DOL, and OPM in a conspiracy designed to ensure that EPA prevails in this case. According to Counsel's theory, I would benefit from the conspiracy because he imagines that DOL and OPM have the power to control the selection of the chief judge at HUD and would use that power to reward me with the chief judgeship if I rule in EPA's favor. He argues that HUD benefits from the conspiracy because HUD will be reimbursed for my services. The benefit that he believes would accrue to EPA is clear -- EPA would win. However, Counsel does not make clear what benefit he believes that DOL and OPM would derive from this imagined conspiracy.

Greene v. U.S. Environmental Protection Agency, 2002-SWD-1 (ALJ June 20, 2002), USDOL/OALJ Reporter at 2-3.

c. Failure to Comply with Pre-Hearing Order. Finally, in the *Greene* case, the presiding ALJ from HUD disqualified Slavin for his failure to comply with the judge's pre-hearing orders. Specifically, the judge had ordered both counsel to avoid making inappropriate and uncivil statements, which Slavin's violation of is illustrated above. The judge also ordered the parties to not to use string citations unless citation of multiple cases was necessary to articulate different aspects of the contention, and to use pinpoint citations followed by a brief synopsis, in parentheses, of the proposition for which the case stands. Slavin thereafter presented filings in which he violated the judge's directions about citation. In the Order of

Disqualification, the ALJ pointed out three specific examples of where Slavin had made incorrect citations of cases, many of which had no bearing on the case before the tribunal.

Summation. I find that the ALJ and ARB decisions in Case No. 2002-SWD-1 relating to Slavin's section 18.36 disqualification provide clear and convincing evidence that Slavin violated MRPC 3.3(a)(1) (making a false statement of fact to a tribunal), MRPC 3.5(a) (seeking to influence a judge by improper means), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).[13]

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[13] Prior to March 1, 2003, the conduct of Tennessee lawyers had been governed by ethics rules patterned after the 1969 American Bar Association Model Code of Professional Responsibility (MCPR). Rule 8.3 of the new TRPC, like the MRPC and old ABA MCPR, provides that a lawyer shall not make a statement that the lawyer knows to be false or that is made with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. The Tennessee Rule in effect prior to March 1, 2003, however, only provided that a lawyer shall not make a statement that the lawyer knows to be false. In the *Greene* case, the ARB observed that:

> The ALJ found that Counsel had knowingly, or with reckless disregard for the truth, made a false statement regarding the integrity of the ALJ and other Federal officials in the January 8, 2002 motion for the ALJ's recusal that was filed with the ALJ. Ord. of Disqualif. at 2-3, 19-20, 23. Specifically, the ALJ found that Counsel's assertion that the Memorandum of Understanding (MOU) between HUD and DOL regarding the ALJ's assignment to hear the *Greene* DOL case "was established in secrecy, with HUD and DOL OALJ picking HUD and one of its judges to decide the case before OPM was contacted" was made without adequate support and also with reason to know that the statement was false. *Id.* at 3, 19-20; *see* n.1 *supra* regarding OPM assignment of ALJ pursuant to 5 C.F.R. § 930.213 (2001).

In re Slavin, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003), USDOL/OALJ Reporter at 10 [HTML]. [EX 16-B] The ARB affirmed the ALJ's finding that Slavin had acted with reckless disregard for the truth of his accusation of improper contacts and collusion in the assignment of a presiding judge, and did not reach the question of whether Slavin did so knowingly. When the ARB "has ruled on a question of law, the law of the case doctrine binds an administrative law judge acting after a remand of the case." *Stephenson v. NASA*, ARB No. 98-025, ALJ No. 1994-TSC-5 (ARB July 18, 2000). Since the ARB found that Slavin engaged in misconduct when he made accusations about the integrity of judicial offices with reckless disregard for whether such statements were true, that ruling is the law of the case for purposes of this Judicial Inquiry even though the ARB did not reach the question of whether he knew the statements were false, as found by the presiding ALJ. Moreover, even if Slavin was technically not in violation of the Tennessee Rules of Professional Responsibility in effect at the time about making false statements about judges, he clearly violated MPRC 8.3 and the clear weight of authority in other jurisdictions. See the discussion of the First Amendment rights of attorneys during in-court proceedings, *infra* in this decision. *See also* MRPC 8.5 and TRPC 85 (in applying choice of law on disciplinary conduct, where the conduct is in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits govern, unless the rules of the tribunal provide otherwise).

2. Rockefeller v. U.S. Dept. of Energy

In *Rockefeller v. U.S. Dept. of Energy*, 1998-CAA-10 and 11 (ALJ Sept. 28, 1998), *aff'd on the merits Rockefeller v. U.S. Dept. of Energy*, ARB Nos. 99-002, 99-067, 99-068 and 99-063, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6 (ARB Oct. 31, 2000), *appeal dismissed (default)*, Nos. 00-9545, 01-9529 (10th Cir. Nov. 20, 2001) [EX 6-A and EX 6-C], Slavin made abusive attacks on the presiding ALJ in court filings without reference to facts or supporting documentation, and the ALJ therefore disqualified Slavin pursuant to 29 C.F.R. §§ 18.29, 18.34(g)(3) and 18.36.[14] The ALJ found:

> On September 10, 1998 Complainant's Counsel, Edward A. Slavin, Jr., filed a document entitled Objection to ALJ's Conduct of Proceedings and Motion for Leave to File Motion for Judicial Recusal. In this document, Counsel for Complainant accuses the undersigned of "making derogatory, condescending and inappropriate remarks", and that "[t]he ALJ has made demeaning remarks about filing of a letter motion . . . and about expressing opinions." Counsel for Complainant further stated in the aforesaid document "it appears that the ALJ is not reading anything Mr. Rockefeller has filed"; that "[t]he ALJ has mocked and trivialized these rights showing extreme partisanship"; and that "[t]he ALJ has done his best to attempt to mock and marginalize every valid legal position taken by Mr. Rockefeller, while acting as the de facto defense lawyer for Westinghouse and the Department of Energy." Counsel for Complainant has further alleged that the undersigned is "ethically challenged" and is an embarrassment to the U.S. Department of Labor. Finally, Counsel for Complainant has charged that the undersigned has adjudicated this case unfairly, showing extreme bias and prejudice and lacking in judicial independence. The conclusory allegations are all without reference to fact or documents.
>
> * * *
>
> The document in question filed by Mr. Slavin is not an isolated instance. In the case at bar, in a letter dated August 3, 1998, he accused the undersigned of bias, favoritism, and a desire to "curry favor" with the national office of the Department of Labor, Office of Administrative Law Judges. In the same document, he announced his intention not to comply with the standard pretrial order of July 16, 1998 issued to all parties because "General Eisenhower did not publish his plans prior to D-Day," and requested an apology from the undersigned for issuing the standard pretrial order used for years in cases such as this to avoid trial by ambush and for requiring him by order of July 29, 1998 to comply with a directive of Chief Judge John Vittone, dated April 2, 1997, issued because of Mr. Slavin's prior abuses. Mr. Slavin, in the same document, requested

[14] The ALJ in *Rockefeller* provided Slavin the opportunity for a hearing on disqualification, but Slavin did not afford himself of this opportunity. *Rockefeller v. U.S. Dept. of Energy*, 1998-CAA-10 and 11, USDOL/OALJ Reporter at 5 [HTML] (ALJ Sept. 28, 1998)

> the undersigned to show kindness, courtesy, and consideration towards Complainant and attorneys, implying falsely that the standard pretrial order of July 16, 1998 and the order of July 29, 1998 requiring compliance with Judge Vittone's directive were somehow expressions to the contrary. All of the Orders of the undersigned issued in this case speak for themselves.

Rockefeller v. U.S. Dept. of Energy, 1998-CAA-10 and 11 (ALJ Sept. 28, 1998), USDOL/OALJ Reporter at 1, 3-4.

This order of disqualification was not appealed to the Chief ALJ as permitted by 29 C.F.R. § 18.36. On review on the merits of the underlying case, the ARB expressly found that "[t]he level of invective with which counsel describes the work of the ALJs in these cases is offensive, and the characterizations of the ALJs' actions are factually inaccurate and insulting." ARB slip op. at n.10.

I find that the ALJ and ARB decisions in Case No. 1998-CAA-10, in addition to the violations in this matter noted *supra* related to lying to a tribunal, provide clear and convincing evidence that Slavin violated MRPC 3.5(a) (seeking to influence a judge by improper means), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

3. Powers v. Pinnacle Airlines, Inc.

In *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ May 21, 2003) [EX 17-B], Slavin was disqualified from making a new entry of appearance (*i.e.*, following the Complainant's discharge of him) because of his stubborn refusal to accept the ALJ's rulings, deliberate mischaracterizations of the ALJ's holdings, and repeated *ad hominem* attacks on the ALJ.

Slavin was discharged by the Complainant after the ALJ had issued an Order to Show Cause why the complaint should not be dismissed for the Complainant's failure to cooperate in discovery, as well as her conduct in filing pleadings with the ALJ. *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ Apr. 23, 2003). [EX 17-A] The behavior prompting the Order to Show Cause was attributable in large part to Slavin, as made clear in the order barring Slavin from re-entering the case. *Powers v. Pinnacle Airlines, Inc*., 2003-AIR-12 (ALJ May 21, 2003). [EX 17-B] The ALJ's *Order Barring Edward Slavin From Appearing As Complainant's Counsel* recites Slavin's misconduct, to wit:

> Viewing the pleadings submitted by Mr. Slavin, it appears that he does not recognize the authority of the Court to make determinations and rulings in this matter. Mr. Slavin apparently believes that a denial of the motions he submits on behalf of the Complainant is merely an invitation to make these demands again. Thus, although I denied the Complainant's Motion to Compel discovery responses, as well as the first motion to reconsider that denial, Mr. Slavin, on the Complainant's behalf, filed a second motion to reconsider, stating that she did not have to respond to the Respondent's discovery requests until I changed my mind and amended my "erroneous orders." Nor did Mr. Slavin, on Complainant's behalf, take any action to respond to the Respondent's discovery requests in response to my April 23, 2003 Order to Show Cause, or proffer any reason for the failure to do so. Instead, Mr. Slavin submitted yet a third request for reconsideration of my denial of the Motion to Compel, once again, raising no new arguments or factual allegations to support this request, and repeating the arguments in the first two motions to reconsider.
>
> Mr. Slavin also stubbornly refused to recognize my ruling of March 5, 2003, which I have since referred to repeatedly, that the only Respondent in this matter is Pinnacle Airlines, Inc. The Complainant originally filed her complaint with OSHA against Pinnacle Airlines, Inc. alleging violations of the AIR 21 and Sarbanes-Oxley Acts. After OSHA dismissed her complaint, noting, *inter alia*, that the Respondent is not a publicly traded company for purposes of the Sarbanex-Oxley Act, the Complainant requested a formal hearing, this time styling her claim as "Ms. Coleen L. Powers v. Northwest Airlines & Pinnacle Airlines, Inc. d/b/a Northwest Airlink. I noted that the Complainant could not unilaterally add Northwest Airlines, Inc., which is a publicly traded company, to the caption in an attempt to bring her claim under the jurisdiction of the Sarbanes-Oxley Act.[1] I dismissed the Complainant's claim under the Sarbanes-Oxley Act, noting that Pinnacle Airlines, Inc., is not a publicly traded company, and thus is not subject to suit under that Act. I specifically instructed the Complainant to list only Pinnacle as the Respondent in any future pleadings.
>
> Instead, Mr. Slavin stubbornly continued to refer to "Pinnacle Airlines et al." as "Respondents," and to complain that Northwest Airlines has not entered an appearance or responded to discovery.[2] In a recent pleading, Mr. Slavin, on Complainant's behalf, complained that she was ordered to "censor" the title of her documents to omit Northwest

Airlines, and that this constituted an unlawful prior restraint that interfered with her First Amendment Rights.

Mr. Slavin deliberately misinterpreted my actions in another matter as a "concession" that "graciously corrects" the elimination of Northwest Airlines from the caption in this case. In this regard, the Complainant recently filed a complaint with OSHA against Northwest Airlines Corporation, NWA Inc., and Pinnacle Airlines, Inc., d/b/a/ Northwest Airlink, et al., alleging that her rights under various whistleblower acts were violated when these respondents requested monetary sanctions against her in the instant case. OSHA forwarded this complaint to me, suggesting that I consolidate it with the instant case. I responded as follows:

> Case No. 2003 AIR 12 is set for hearing on May 28, 2003. I note that Ms. Powers' March 28, 2003 complaint involves Northwest Airlines and NWA Inc., which are not parties in the case before me. In addition, Ms. Powers had indicated that she wishes her claim to be investigated by OSHA. Given all of these factors, I do not feel that it is appropriate to consolidate the March 28, 2003 complaint with the case currently pending before me.

Accordingly, I returned the complaint to OSHA for investigation and determination. I did not, as claimed by the Complainant, order OSHA to investigate, or rule that Northwest Airlines or NWA were properly named as respondents in this case, nor is such an interpretation even remotely justified by the text of my letter.

Mr. Slavin has repeatedly castigated this Court for giving "short shrift" to the Complainant's efforts to protect her rights, for failing to read her filings, and for not showing the slightest interest in learning the facts or affording a fair adjudication. I can assure Mr. Slavin and the Complainant that I have read every word of her pleadings; indeed, it has been necessary to do so several times, in order to determine exactly what it was that the Complainant was saying. As I noted in my March 19, 2003 Order, the Complainant's pleadings are a mishmash of generalizations and misleading statements, replete with string citations, paragraphs apparently copied from other pleadings, and discussions of issues that have nothing to do with the instant case. Indeed, in her most recent pleadings, the Complainant alleges that my refusal to investigate "Ms. Erickson's" discovery concerns by holding a conference call is invidiously discriminatory.

Mr. Slavin also exceeded the bounds of permissible advocacy by persistent and repeated ad hominem attacks on this Court. A sampling, by no means exhaustive, is set out below.

1. Referring to my orders as inaccurate, ill-advised, unsound, prejudicial, and pejorative, and in violation of the Complainant's rights to due process;

2. Accusing me of unfairness and lack of judicial temperament by not acceding to the Complainant's demand for a telephone conference

3. Claiming that I am a "cat's paw" and "enforcer" for large organizations that wish to be immune from criticism;

4. Claiming that I have demonized and objectified the Complainant, treated her discourteously, erroneously, and inappropriately, shown bias toward the employer, failed to treat the Complainant with dignity, respect and consideration, and demonstrated a hostile judicial disposition;[3].

5. Claiming that I am disqualified because of improper, inflammatory influences and ex parte statements by Chief Judge Vittone, Associate Chief Judge Burke, and Attorney Advisor Todd Smyth, who have an animus toward Complainant's counsel;

6. Claiming that I have violated the Code of Judicial Conduct and the DOL Standards of Conduct by oppressing a whistleblower, suggesting an appearance of impropriety, which adversely affects the confidence of the public in the integrity of the government, and that I have engaged in notoriously disgraceful conduct, or conduct prejudicial to the government. In this regard, Mr. Slavin indicated that the Complainant was considering filing a peer review complainant and a complaint with the DOL IG;

7. Suggesting that I am a "lawbreaker," who promotes disrespect for the law and anarchy.

The Complainant and her counsel have every right to make vigorous arguments in support of her positions. Neither, however, is entitled to make misleading and factually incorrect statements, to flood the Court with boilerplate and string citations that have nothing to do with the issues presented by this case, and to repeatedly ignore the directives of this Court. Nor is either entitled to attack the dignity and integrity of this Court, in the hopes that I will recuse myself and the Complainant will have another chance with a different judge.

For all of these reasons, Mr. Slavin will not be allowed to represent the Complainant further in this matter.

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[1] I also noted that any complaint against Northwest Airlines was not properly before me, as it was not investigated and considered by OSHA; moreover, it was untimely, as it was made more than ninety days after the date of the alleged violation; finally, the Complainant was not an employee of Northwest Airlines, Inc., as required by the Sarbanes-Oxley Act.

[2] Ms. Powers is also reminded that the only Respondent in this matter is Pinnacle Airlines, Inc.

[3] It is not clear why Mr. Slavin thought it was important to point out that the "hostile remarks" in my April 4, 2003 Order were made on the 35th anniversary of Dr. Martin Luther King's murder. The only logical conclusion I can draw is that, since the Complainant is African-American, I am a racist.

Powers v. Pinnacle Airlines, Inc., 2003-AIR-12 (ALJ May 21, 2003), USDOL/OALJ Reporter at 1-4. This Order of Disqualification was not appealed to the Chief ALJ as permitted under 29 C.F.R. § 18.36.

I find that the ALJ's order of disqualification in Case No. 2003-AIR-12 provides clear and convincing evidence that Slavin violated MRPC 3.3(a)(1) (making a false statement of fact to a tribunal), MRPC 3.5(a) (seeking to influence a judge by improper means), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

4. Johnson v. Oak Ridge Operations Office

In *Johnson v. Oak Ridge Operations Office*, 1995-CAA-20, 21 and 22 (ALJ Feb. 4, 1997), *aff'd*, *Johnson v. Oak Ridge Operations Office*, ARB No. 97-057, ALJ Nos.1995-CAA-20, 21 and 22 (ARB Sept. 30, 1999) [EX 3-D and EX 3-E], Slavin was disqualified for engaging in "a continuing pattern of willful misconduct, including the making of prohibited *ex parte* communications, engaging in disruptive actions, violating [the ALJ's] orders, and failing to abide by [the OALJ's] rules of practice." *Id.*, USDOL/OALJ Reporter at 1 [HTML].

In an *Order to Show Cause* issued under 29 C.F.R. §§ 18.34(g) and 18.36 on January 6, 1997, *Johnson v. Oak Ridge Operations Office*, 1995-CAA-20, 21 and 22 (ALJ Jan. 6, 1997) [EX 3-C], the presiding ALJ incorporated by reference discussion from an earlier *Order* denying motions in which she had reviewed the history of Slavin's disruptive behavior during the proceeding. The ALJ wrote:

> The individual complaints in this case were dismissed by the Wage-Hour Division of the Department of Labor in July 1995 on the grounds, *inter alia*, that the Department of Labor had no jurisdiction over certain of the causes of action and that the complaints were untimely. After the complainants appealed, the cases were consolidated and assigned to the undersigned. The respondents moved to dismiss or for summary judgment, and the complainants countered with a motion to remand to Wage-Hour for investigation. By Order of August 24, 1995, the undersigned denied complainants' motion pending disposition of the threshold issues of jurisdiction and timeliness, and stayed discovery on the merits. The only discovery permitted was as to the single issue of whether the complaints were timely filed.

By Order of October 11, 1995, the undersigned denied the complainants' motion to compel responses to their outstanding August 14, 1995 discovery because their discovery went far beyond the issue of the timely filing of their complaints. Complainants were, however, permitted to serve modified discovery *focused on the issue of timeliness*. After complainants served new discovery, much of which had no relevance to the timeliness issue, respondents moved for a protective order, which was granted in part by Order of November 20, 1995. However, in an effort to assist the complainants, the undersigned edited certain of their discovery requests to comply with the Order of August 24, 1995, and directed respondents to answer the edited discovery. The complainants were again reminded that their discovery was required to address the issue of whether their complaints were timely filed.

Nevertheless, on November 16, 1995, complainants filed new discovery on the merits which had nothing to do with the timeliness of their complaints. Respondents once again moved for a protective order, which was granted by Order of December 5, 1995. Complainants were again reminded that discovery on the merits was premature. On November 24, 1995, complainants requested, *inter alia*, an order requiring DOE to protect against possible alterations to security clearance files. By Order of March 8, 1996, the undersigned denied the motion because of their failure to demonstrate the relevance of the security clearance files to the timeliness issue.

On May 13, 1996, complainants filed a motion for an order requiring DOE ORO to vacate an "illegal gag order." This "gag order" consisted of a letter written to complainants' counsel by DOE ORO Chief Counsel Jennifer J. Fowler on September 21, 1995, advising him that all future communications with him would be in writing only, because of messages left on Mr. Boatner's personal answering machine and the Office's voice mail system which included unfounded, unprofessional, improper and insulting references, including personal attacks. These attacks included calling Ms. Fowler and Mr. Boatner "Nazis," and referring to Mr. Boatner as "a redneck peckerwood." Complainants did not dispute the truth of these assertions, which DOE offered to document.

On June 10, 1996, complainants filed a motion "to remedy incomplete searches and consider newly discovered evidence to support equitable tolling re: Hostile Working Environment and Blacklisting" which argued, notwithstanding the many prior orders emphasizing the limitation of discovery in this case to the threshold issue of timeliness, that all limitations on time periods for discovery should be removed and that discovery "should embrace all subjects."

The Order of July 17, 1996, which complainants request be reconsidered, denied the motion to vacate the "gag order" because Chief Counsel Fowler's letter did not bar communications between complainants' counsel and her office, and the complainants had failed to show any adverse impact on their discovery in this case. The complainants have shown no reason to revisit this issue. The motion to remove limitations on discovery is simply a repetition of arguments that have been previously rejected and is therefore also denied. The establishment of a final briefing schedule on DOE's dispositive motions, requiring DOE to submit a consolidated motion to dismiss and/or for summary judgment no later than August 31, 1996, complainants to submit a response by September 30, 1996, and DOE to file a reply no later than October 15, 1996 was an attempt to respond to complainants' June 14, 1996 pleading which, *inter alia*, called for proceedings to be

expedited in this case. The extension of time requested by the complainants to file a response to DOE's opening brief on its dispositive motions will continue the delay in this matter, but will be granted to assure full presentation of their position before a ruling is made.

Unfortunately, since the issuance of the July 17, 1996 Order, claimant's counsel has engaged in conduct which is disruptive and disrespectful, including leaving inappropriate voice mail messages, and on Thursday, Friday and Monday, September 26, 27 and 30, filing 8 separate submissions by fax -- five of which included cover memos demanding conference calls.

On September 13, 1996, Mr. Slavin left a message on Judge Barnett's personal voice mail at 7:34 a.m. as follows:

> This is Ed Slavin (202) 638-3089 or (954) 725-0094, calling to check on the status of a motion we filed for remand in August of 1995 and a group of motions that we filed in September or rather August 1996, in August 1995, August 1996. My clients are entitled to be treated with dignity, respect and consideration. There's only one motion pending that matters and that has to do with the remand for investigation to wage hour. We have not received a courtesy of a response or even a conference call. I would like to know why. I spent three (3) hours meeting with GAO about Department of Labor's misfeasance, nonfeasance and nonfeasance [sic] in whistle blower cases the other day and I mentioned the situation, and I'll be filing a written notice of that protected activity which specifically included discussion, some discussion as to this matter. I think my clients have been treated shabbily and this is unacceptable and that was all covered in the motion that we filed last month and we've not even received a scheduling of a conference call. As Robert Kennedy would say, this is unacceptable. Thank you.

On, Thursday, September 26, 1996 by fax, at 11:58 a.m., Mr. Slavin filed a 2 page pleading entitled: "Department of Labor desuetude and court's unacceptable failure to answer the complainants' August 4, 1996 Filing; Notice of Protected Activity Regarding the Court's delays." The pleading states, in pertinent part:

> On September 11, 1996, Sr. Special Agent Robert E. Tyndall (Retired), Mrs. Tyndall and Ms. Loria A. Tetreault, Esquire, and I met with three investigators from the General Accounting Office for three hours in Washington, D. C. During that meeting, I informed GAO of Department of Labor's strengths but its overall desuetude, misfeasance, malfeasance and nonfeasance in ERA and environmental whistleblower cases -- including putative Department of Labor "investigators" who refuse to investigate and Department of Labor "judges" who refuse to judge fairly, showing bias toward more powerful parties (with some Administrative Law Judges even refusing to hold hearings, and one refusing to hold conference calls or rule on motions.)
>
> I told the three GAO investigators of Your Honor's mishandling of this case, under advisement since August 1995 on a simple motion to

> remand for investigation ... You are hereby placed on notice of the complainants' protected activity in the GAO meeting and of your legal, moral and ethical duty not to retaliate against complainants or their counsel for these disclosures to GAO. This notice is in order because of the Court's prior harsh adverse reactions to protected activity by the Complainants and their counsel in this case, including the irregular step of requiring Complainants to get permission for further filings, which order you put down *sua sponte* after a mere inquiry about when you would decide this case.
>
> Should you feel unable to decide this case objectively as a result of any of your *personal* feelings regarding any of Complainants' protected activity, please request that this case be reassigned to another ALJ who has no such impairment or conflicts.

On September 30, 1996, at 12:27 p.m., Mr. Slavin left a message on the personal voice mail of Judge Barnett's law clerk, Ms. Julia Soininen, as follows:

> Hi, this is Ed Slavin on (954) 725-0094, just calling to check about the possibility of a conference call and calling to advise you that we are about to file a motion to postpone, postpone filing of a response to DOE motion to dismiss and a declaration under 29 CFR 18.40d. We have a number of issues that the judge really needs to address with us in a conference call and we filed paper work with her on August 4, which is a long time ago. My clients have a hundred (100) years of federal experience, their concerns can and must be heard and we have a right to a hearing and not more paper work so I would ask you to kindly ask Judge Barnett to show us the courtesy of a conference call which she has not done in this case since she has had jurisdiction since 1995, August of 1995, without a conference call, without ever treating the complainants with dignity, respect and consideration. You know, this is not a black lung case and this judge is messing this case over to a faretheewell and we want to be heard. Thank you.

Johnson v. Oak Ridge Operations Office, 1995-CAA-20, 21 and 22, USDOL/OALJ Reporter at 2-4 [HTML] (ALJ Oct. 8, 1996) [EX 3-B].

In the subsequent *Order to Show Cause*, the presiding ALJ found that Slavin's voice mails regarding the ALJ's handling of the case on the merits were unlawful *ex parte* communications. Moreover, the ALJ noted that on December 23, 1996, Slavin served on her a six-page communication to Vice President of the United States Albert Gore also regarding the her handling of the case on the merits. The ALJ noted that no certificate of service was attached, and neither the Respondents nor the ALJ were included on the list of persons receiving copies of

the communication. The ALJ found that this letter was also an unlawful *ex parte* communication. The ALJ found that the September 13 and December 23, 1996 submissions were improper because they were "plainly intended to intimidate the undersigned and to immunize the complainants from unfavorable rulings. Such action is a willful interference with the undersigned's obligation to conduct fair and impartial hearings." *Johnson v. Oak Ridge Operations Office*, 1995-CAA-20, 21 and 22, USDOL/OALJ Reporter at 3-4 [HTML] (ALJ Jan. 6, 1997).

In the *Order to Show Cause*, the presiding ALJ provided further detail about Slavin's refusal to comply with her orders limiting discovery to the preliminary issue of timeliness of the complaint. The judge listed seventeen submissions filed by Slavin which had nothing to do with the timeliness of the complaints in the matter, and which were in direct violation of the ALJ's orders. The ALJ also noted that Slavin had made repeated requests that the ALJ recuse herself, but without the affidavit required by 29 C.F.R. § 18.31(b), and without "*any* concrete evidence supporting disqualification." The ALJ observed that Slavin's "excessively familiar tone of his requests indicates that he views these charges lightly, and is further evidence of his disrespect for the tribunal." The ALJ also noted that Slavin repeatedly made requests for action by the ALJ without stating the particular grounds for the request in violation of 29 C.F.R. § 18.6(a). *Id.* at 4-8.

On January 27, 1997, Slavin filed a complaint against the presiding ALJ with the Chief ALJ, requesting that the matter be referred to a "peer review" committee. *See Procedures for Internal Handling of Complaints of Misconduct or Disability*, 46 Fed. Reg. 28050 (1981), *as amended*, 48 Fed. Reg. 30843 (1983) and 52 Fed. Reg. 32973 (1987).

In her *Order Barring Attorney Edward A. Slavin From Future Appearances*, the ALJ noted that "Mr. Slavin filed a largely incomprehensible response, combined with other pleadings, filled, as usual, with savage invective, personal attacks on the undersigned, irrelevancies, and misstatements. For example, Mr. Slavin continues to assert that his motion to remand this case has been 'under advisement since August 1995' as he says he told GAO investigators. (See Order

of October 8, 1996, at 4). The motion to remand was denied in the Order of August 24, 1995, pending resolution of DOE's dispositive motions." *Johnson v. Oak Ridge Operations Office*, 1995-CAA-20, 21 and 22, USDOL/OALJ Reporter at 1-2 [HTML] (ALJ Feb. 4, 1997). *See* [EX 3-A] (order denying the motion to remand)

This Order of Disqualification was not appealed to the Chief ALJ as permitted under 29 C.F.R. § 18.36. The Chief ALJ, however, did refer the matter to an OALJ Advisory Committee pursuant to Slavin's peer review request.[15] The Committee, rather than supporting Slavin's allegations of misconduct by the ALJ, found that the ALJ had "displayed fine judicial temperament, courage, composure, and admirable restraint in face of outrageous insolence and flagrant bullying and goading by attorney Slavin." Report of Peer Review Advisory Committee in re *Johnson* (Feb. 29, 1997), (footnote omitted) [EX 24-F]. The Committee found that "While appearing before [the presiding ALJ] as an attorney for a party, in order to effect the outcome of the case pending before her, [Slavin] threatened and attempted to bully her, mostly *ex parte*, with complaints about her qualifications and her handling of this case to officials in the executive and legislative branches." *Id*. The Committee then cited three egregious examples in which Slavin (1) left a voice mail message for the judge informing her that he met with GAO investigators and had specifically informed those investigators about his complaints about her handling of the case before her, (2) then filed a written document stating much the same, and (3) mailed to the judge a blind copy of a letter to then Vice-President Gore at the White House specifically about the case before the judge, which the Committee found appeared to be calculated to suggest to the judge that Slavin "has allies in high places, and that he is invoking their help to scrutinize the functions and funding of OALJ." *Id.*

On March 25, 1997, Slavin sent a fax to the presiding judge in *Johnson*, which included a letter Slavin wrote to the Chief ALJ claiming that reference to the ALJ's disqualification order in an OALJ research newsletter was libelous and defamatory because it did not have the context that Slavin felt was necessary. [EX 24-V] The fax cover memo states:

[15] The presiding ALJ waived confidentiality regarding the Committee's report.

TO: HONORABLE EDIT BARNETT

PLEASE ADVISE THE NAME OF YOUR INSURANCE CARRIER FOR PULLIAM V. ALLEN TYPE INSURANCE IF ANY.[16]

---

[16] As noted in the Chief ALJ's referral of unprofessional conduct to the Tennessee Board of Professional Responsibility, shortly after Judge Barnett disqualified Slavin, Slavin filed a barrage of voice mail, faxes and e-mails with the National Office of OALJ. For example, on March 27, 1997, Slavin sent the Chief ALJ a fax demanding a list of all persons to whom the research newsletter referencing Judge Barnett's order of disqualification had been sent, among other information. Slavin requested that the Chief ALJ send a copy of Slavin's response to the judge's order to show cause and opening brief to the ARB to every person who received the newsletter or "hit" the Internet posting of the newsletter, stating that "This would mitigate damages in the event of the need to file a Pulliam v. Allen type lawsuit against Judge Barnett or those responsible for writing her orders and posting them on the Internet." [EX 24-S]

The newsletter Slavin complained about is merely a report of whistleblower decisions. Casenotes from newsletters are integrated into OALJ whisteblower digests and made available to the public for research purposes. This is the text from the February/March 1997 newsletter that Slavin was complaining about, a rather bland casenote that simply states without embellishment that the ALJ had disqualified the Complainant's attorney:

> [N/E Digest IX M 2]
> ATTORNEY CONDUCT; ORDER BARRING FUTURE APPEARANCES
>
> In ***Johnson v. Oak Ridge Operations Office***, 95-CAA-20, 21 and 22 (ALJ Feb. 4, 1997), the presiding ALJ ordered Complainant's attorney permanently barred from appearing before her in this or any other matter. This order was preceded by an order to show cause issued pursuant to 29 C.F.R. §§ 18.29, 18.34 and 18.38, and was based on the ALJ's finding of "a continuing pattern of willful misconduct, including the making of prohibited *ex parte* communications, engaging in disruptive actions, violating [the ALJ's] orders, and failing to abide by [the OALJ's] rules of practice." *See* ***Johnson v. Oak Ridge Operations Office***, 95-CAA-20, 21 and 22 (ALJ Feb. 4, 1997)

Slavin continued in his letter to the Chief ALJ: "By the way, as one constructive suggestion on your predicament, if you were to invite me to speak at the OALJ training seminar in Williamsburg, Virginia, this could mitigate damages and go a long way toward reversing the chilling effects on protected activity as a result of the invidious discrimination and disinformation that have been perpetrated against me by Judge Barnett and minions. I will keep those dates open on my calendar and look forward to hearing from you." Slavin also added a postscript referencing an earlier telephone communication to the Chief ALJ requesting that Slavin be invited to attend an upcoming ALJ training conference: "P.S. I have not heard from you as to the identity of any outside speakers appearing at the ALJ conference. Why? En masse ex parte contacts could take place there with counsel for the frequent parties before OALJ (e.g., the Solicitor and corporate lawyers). If I do not hear from you soon, injunctive relief may be sought to enjoin the meeting."

Slavin also sent other communications to OALJ. For example, Slavin sent several e-mails to OALJ's computer specialist complaining about the Internet posting of the research newsletter suggesting that OALJ management was acting illegally and that the computer specialist's work on the web site contributed to that illegality.

Because of Slavin's harassment of court personnel, such as threatening OALJ staff with lawsuits, on April 2, 1997 the Chief ALJ wrote to Slavin informing him that OALJ would no longer accept filings from him except by regular mail unless Slavin obtained prior permission or unless permitted by statute or regulation. [EX 31]

Pulliam v. Allen, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (U.S. 1984) is a Supreme Court decision holding that judicial immunity is not a bar to prospective injunctive relief under 42 U.S.C. § 1983 against a judicial officer acting in a judicial capacity, and that judicial immunity is not a bar to an award of attorney fees under 42 U.S.C. § 1988. In other words, Slavin was threatening Judge Barnett with a civil rights lawsuit because she disqualified him for misconduct and OALJ later memorialized the order in its research materials.

The ARB later affirmed the ALJ's decision on the merits. *Johnson v. Oak Ridge Operations Office*, ARB No. 97-057, ALJ Nos. 1995-CAA-20, 21 and 22, USDOL/OALJ Reporter at 12 [HTML] (ARB Sept. 30, 1999) [EX 3-E]. During the appeal to the ARB, Slavin submitted an autopsy report on the presiding ALJ who had died subsequent to issuance of the recommended decision the matter. The ARB noted that Slavin ostensibly filed the autopsy report to demonstrate that the ALJ was in some way unbalanced, and therefore her rulings were tainted. In ruling on whether it would receive the autopsy report into evidence, the Board wrote:

> An administrative law judge's decisions stand or fall on their merits. We have reviewed the record in this case, and find nothing improper in any of the rulings of the presiding ALJ. Indeed, it is clear that the ALJ went to extraordinary lengths to be fair and objective to Complainants, notwithstanding the difficult behavior of their counsel.
>
> Attorneys have a professional obligation to demonstrate respect for the courts. *See ABA Model Rules of Professional Conduct* Rules 3.5 and 8.2 (1999); 29 C.F.R. §18.36. It is clear to us - as it no doubt was clear to counsel - that the autopsy report is completely irrelevant to the merits of Complainants' challenge to the ALJ's rulings. To the extent that the report is offered by counsel in an effort to sully the reputation of the ALJ posthumously, such a personal attack is contemptible. The May 22, 1998 letter and autopsy report are excluded from the record in this case.

Id. at 12-13 [HTML].

At a later trial relating to State of Tennessee disciplinary proceedings against Slavin, *In Re Edward A. Slavin, Jr.*, Docket No. 2000-1185-O-LC, one of Slavin's clients testified that the autopsy report was submitted by Slavin to the ARB against her wishes:

> Q. Did Mr. Slavin take any action with regard to Judge Barnett without your consent?

A. There were a lot of letters that went back and forth between Mr. Slavin and Judge Barnett that I thought were out of order, concerning things that weren't related to our case at all. And then Judge Barnett, unfortunately, committed suicide during our trial, before we even got to trial.

Q. Did Mr. Slavin ask you to obtain any document regarding her?

A. After her suicide, he asked me if we could get the autopsy report, because I lived in Maryland and she lived in Maryland.

Q. Did you get it?

A. Yes, ma'am.

Q. What did he do with it?

A. Well, he sent it to the ARB to the law judges with the letter.

Q. Did you specifically tell him not to file it?

A. Yeah. I didn't know he was going to do it. And when I found out, I was beside myself. That was never our intention. When we talked on the phone and he said send him a copy, I said, "You're not going to sent it, are you?" And he said, "No, I'm not going to send it." But he did send it.

Q. Did there come a time when you terminated Mr. Slavin's representation of you?

A. Yes.

Q. Why?

A. We were going to -- This hearing has dragged on since 1995. We finally had a new Judge assigned to our case, Judge Sutton. And he said that we would go to hearing in February. Mr. Slavin was not ready, by his own admission. ...

Excerpt from Transcript of February 12, 2002 Trial in Disciplinary District II of the Board of Professional Responsibility of the Supreme Court of Tennessee, *In Re Edward A. Slavin, Jr.*, Docket No. 2000-1185-O-LC, Transcript Volume II, pages 337-338 (direct examination of Virginia Johnson by Laura Chastain, Disciplinary Counsel, Tennessee Supreme Court Board of Professional Responsibility). [EX 3-F]

In fact, on January 23, 2000, Ms. Johnson and her co-Complainants wrote to Judge Sutton advising him that they had terminated their professional relationship with Slavin. [EX 3-G] In the letter to Judge Sutton they explained that Slavin had failed to prepare the cases, had been uncommunicative, had misrepresented them through his past use of caustic and inflammatory remarks to the Respondent and Judge Barnett, had repeatedly failed to meet deadlines in related cases, repeatedly failed to follow requests and instructions of the clients, repeated refusals to contact witnesses to arrange for their testimony at the hearing, and failure to communicate on whether he had submitted to Judge Sutton an amended witness and exhibit list. Attached to the letter to Judge Sutton is the Complainants' letter to Slavin terminating his services:

> Dear Ed:
>
> This is to advise you that, pursuant to our December 19, 1999, letter, we the undersigned have no choice but to terminate our professional relationship with you, effective immediately. In spite of a request in our December 1999 letter, we have never received any substantive response from you to that letter. Additionally, to date, you have not apparently contacted a single witness for our February 22, 2000, hearing. It does not appear to use that you have been prepared for our hearing on the previously scheduled dates, and it does not appear that you are prepared for the date in February as well. We believe that your lack of preparation for the upcoming hearing almost certainly dooms us to failure. This behavior can no longer be tolerated or ignored by the undersigned. ...
>
> This decision was reached after much soul searching and reluctance, and certainly not without appreciation for your past efforts. However, the legal proceedings involving the undersigned have been going nowhere for almost five years and we have too much to lose by sitting back and allowing the case to be lost because of lack of preparation. In fact, we have yet to have a Labor Department investigation as required by law. Yet, on February 22, we will be in a hearing on post complaint retaliation for which you appear to be totally unprepared. Despite our repeated requests, .we do not know what strategy you intend to pursue (if any), or even exactly what we must prove in order to prevail. We have begged and pleaded with you to move these cases forward and you have done nothing that we, the clients, have both requested and finally demanded that you do. On more than one occasion, we have sent you information and asked you to file additional complaints, but you have not complied with those requests and have never told us why you have not done so. You have been verbally abusive to DOE counsel in the past, as well as provoking the previous DOL Judge to the point that she barred you from practicing before her again. This, unfortunately, has all been to *our* detriment. We fear that you are using us as your political soapbox to "take shots" at the Department of Energy, and it seems at times that, rather than you working for *us*, we work for *you*. Our health has suffered and our situation continues to deteriorate, and it is imperative that these legal matters come to a conclusion as soon as possible. We retained you with high hopes of a positive outcome. However, this matter has dragged on for five years with no

> end in sight. This matter has taken its toll financially, emotionally and physically on all of us. We realize that we are at the point that we may have to represent ourselves in the future. We realize this may be foolish and most unproductive, but you have left us with no choice.

[EX 3-G] The Complainants ultimately did prevail before Judge Sutton using a new attorney. *McQuade v. Oak Ridge Operations Office*, 1999-CAA-7 (ALJ July 31, 2001). While on appeal to the ARB, the case settled. *McQuade v. Oak Ridge Operations Office*, ARB Nos. 01-093, 01-094; ALJ Nos. 1999-CAA-7, 1999-CAA-8, 1999-CAA-9, 1999-CAA-10 (ARB Nov. 28, 2001).[17]

I find that the ALJ and ARB orders in Case No. 1995-CAA-20 *et al.*, and the related OALJ peer review Advisory Committee report, and Slavin's threatening fax to the presiding judge asking for the name of her insurance carrier, the testimony regarding Slavin's submission of the presiding ALJ's autopsy report against the wishes of his clients, and the letter discharging Slavin provide clear and convincing evidence that Slavin violated MRPC 1.1 (lack of competent representation), MRPC 1.3 (lack of diligence), MRPC 3.5(a) (seeking to influence a judge by improper means), MRPC 3.5(b) (improper *ex parte* communication with the presiding judge), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

5. Williams v. Lockheed Martin Corp

In *Williams v. Lockheed Martin Corp.*, 1998-ERA-40 and 42, USDOL/OALJ Reporter at 9-10 [HTML] (ALJ Mar. 22, 1999) [EX 7-A], Slavin was disqualified under section 18.36(b) for the pursuit of a frivolous complaint and discovery abuse. The ALJ in his order dismissing a

[17] Interestingly, Slavin sought to be reimbursed for attorney fees for his work prior to termination. Judge Sutton denied Slavin's petition based on lack of standing. *McQuade v. Oak Ridge Operations Office, USDOE*, 1999-CAA7, 8, 9 and 10 (ALJ June 18, 2002). Slavin's appeal of the denial of his attorney fee petition was dismissed by the ARB because Slavin failed to timely file his appellate brief. *McQuade v. Oak Ridge Operations Office*, ARB No. 02-087, ALJ Nos. 1999-CAA-7 to 10 (ARB Oct. 18, 2002).

complaint that was based on the allegation that the employer surreptitiously taped an employee meeting with physicians concerning possible chemical exposure at the employer's facility, wrote:

> Complainants' factual allegations in this case are outrageous. Complainants' counsel have concocted allegations which are patently false. There is no evidence of any videotaping nor was there any taping performed in a surreptitious fashion. There is no evidence that the company made any assurances of the private nature of the March 23 meeting since the company was unaware that there was to be a private meeting. There is no evidence that the company was spying on sick workers nor is there any evidence that any video tapes were broadcast by the company to the detriment of one or more of its employees. Each of these allegations is serious in nature and certainly deserves a full and fair hearing had they been true. They are not true and the documented facts support that conclusion.

On appeal, the ARB noted that Slavin had engaged in factually inaccurate and insulting attacks on the ALJ during the appeal. *Williams v. Lockheed Martin Corp*., ARB Nos. 99-54 and 99-064, ALJ Nos. 1998-ERA-40 and 42, USDOL/OALJ Reporter at 5 (ARB Sept. 29, 2000). [EX 7-C] The ARB wrote:

> We do not even attempt to list all of the personal insults which Mr. Slavin heaps upon the ALJ. However, the following is a partial list of invective contained in Complainants' Opening Brief to this Board:
>
> - "The ALJ allowed his prejudices to run this case." Comp. Br. at 17.
> - "The ALJ created a hostile litigation environment . . . ." *Id.*
> - "The ALJ tried to make mincemeat of a hostile working environment. . . ." *Id.*
> - The Board "should reject, reverse and remand the ALJ's arbitrary, capricious, unconstitutional, arbitrary [sic], capricious [sic], insolent, hostile and irascible actions in this case." *Id.*
> - Reference to the "ALJ's kangaroo court" *Id.* at 19 n.17.
> - The ALJ is accused of "[h]olding the Prehearing Conference . . . under stressful, ungracious and unfriendly circumstances, with no water for counsel, no welcome, little or no eye contact and no handshake with Complainant or their counsel, with an uncivil demand that Complainant and their counsel identify themselves before being allowed into the OALJ courtroom, while OALJ showed greater courtesy to Lockheed's counsel. . . ." *Id.* at 19 n.17.
> - The ALJ is charged with "[i]ssuing an insulting, pejorative and half-baked Recommended Decision and Order . . . ." *Id.* at 20 n. 17.

- "The ALJ had a barely hidden agenda: narrowing the law to hurt whistleblowers." *Id*. at 21.

- "The ALJ was overtly hostile. The ALJ's one-way 'reign of error' shows partiality toward Respondents. . . ." *Id.*

- "The ALJ shows palpable, almost pathological 'prejudice' was [sic] against protected activity by [sic] the part of Complainants, wasting their time and funds and robbing them of their dignity and their day in Court." *Id.*

- "The ALJ showed no signs of an active social conscience, or appreciation for whistleblowers, or judicial independence or judicial temperament." *Id.* at 22.

- The ALJ was "[t]ilting toward the retaliators. . . ." *Id.* at 23.

- "The ALJ's refusal to allow Complainants to testify was unreasonable. It was hostile. It was utterly unprecedented." *Id.*

- "The ALJ forced Mrs. Farver and Mr. Williams both persons the Complaint make clear have disabilities to travel to Cincinnati the week before Thanksgiving, while not allowing them to testify." *Id.*

- "Refusal to let Complainants testify is one of the most mortal errors ever committed by a DOL ALJ akin to an intentional tort by the ALJ, who looks down his nose at workers." *Id.*

- "The ALJ made anger, bitterness and insults into an art form, like a judicial Don Rickles." *Id.* at 24.

- "The ALJ misrepresented, ridiculed and twisted the facts in an Oak Ridge whistleblower surveillance civil rights case marginalizing Complainants. The ALJ's bias is on display, not unlike a judicial confession." *Id.* at 27.

- "The ALJ erred with his hostile mishandling of this case. . . ." *Id.* at 29.

Williams v. Lockheed Martin Corp., ARB Nos. 99-54 and 99-064, ALJ Nos. 1998-ERA-40 and 42, USDOL/OALJ Reporter at n.6 (ARB Sept. 29, 2000).

This ALJ's *Order of Disqualification* was not appealed to the Chief ALJ as permitted under 29 C.F.R. § 18.36. The ARB did not find it necessary to rule on the disqualification because it granted Respondents' motion for summary decision and dismissed the case. The Board, however, noted its agreement with the ALJ that the complaint was frivolous. *Id.* at 5.

I find that the ALJ and ARB's decisions in Case Nos. 1998-ERA-40 and 42 provide clear and convincing evidence that Slavin violated[18] MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice). *See also Board of Professional Responsibility of the Supreme Court of Tennessee v. Slavin*, No. 154861-3 (Tenn. 2002) (finding by clear preponderance of the evidence that Slavin actions in regard to Case No. 1998-ERA-40 and 42 violated Tennessee DR 1-102(A)(5) (engaging in conduct that is prejudicial to the administration of justice) and DR 7-106(C)(6) (engaging in undignified and discourteous conduct which is degrading to a tribunal)), *appeal to Tenn. S. Ct. pending.*

Summation

It is noted that none of Slavin's 29 C.F.R. § 18.36 disqualifications, except in the *Greene* case, were appealed to the Chief ALJ as provided for by the applicable regulation. 29 C.F.R. § 18.36. As noted, in the *Greene* case the ARB affirmed the disqualification under section 18.36. Thus, I find that these disqualifications of Slavin provide clear and convincing, and unchallenged, evidence of misconduct for the various reasons cited in those orders.

Lying and making misrepresentations to tribunal

1. Somerson v. Mail Contractors of America

In *Somerson v. Mail Contractors of America*, ARB No. 03-055, ALJ No. 2002-STA-44., USDOL/OALJ Reporter at 6-7 [PDF] (ARB Nov. 25, 2003), *appeal filed* No. 03-16522 (11th Cir.) [EX 15-H] and *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No.

[18] The frivolous nature of the underlying complaint is dealt with elsewhere in this decision.

2003-STA-11, USDOL/OALJ Reporter at 4-5 [PDF] (ARB Oct. 14, 2003) [EX 15-E], Slavin lied to the ARB about the date an ARB order was received, resulting in the striking of appellate briefs. I find that the ARB's decisions in Case Nos. 2002-STA-44 and 2003-STA-11 provide clear and convincing evidence of Slavin's violation of MRPC 3.3(a)(1) (making a false statement of fact to a tribunal), MRPC 8.4(c) (engaging in conduct involving dishonesty) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

2. Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy

In *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6, USDOL/OALJ Reporter at nn.6 and 8 [HTML] (ARB Oct. 31, 2000), *appeal dismissed (default)*, Nos. 00-9545, 01-9529 (10th Cir. Nov. 20, 2001) [EX 5-C], Slavin misrepresented the holdings of several Secretary of Labor decisions and the holding of the DOE Office of Hearings and Appeals on a FOIA matter. The Board wrote:

> 6/ Rockefeller devotes a substantial portion of his opening brief to his argument that *Flor* held that government employees are covered by the STAA. Complainant's Opening Brief (*Rockefeller I* Br.) at 8-16. Among other things, Rockefeller argues that Congress endorsed *Flor* by its silence in 1994, that is, when Congress recodified the STAA in July 1994 it implicitly approved the holding in *Flor* because "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it reenacts a statute without change," *Id.* at 12, quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). However, *Flor* was decided on December 9, 19**94** (**after** the STAA's recodification) and not on December 9, 19**93**, as Rockefeller asserts. *See* United States Department of Labor, Office of Administrative Law Judges, OALJ Law Library, Whistleblower Case List on the Internet at www.oalj.dol.gov. Congress could not have endorsed a decision that had not yet been issued. We note that elsewhere in his brief Rockefeller cites to *Flor* with the correct date. *See, e.g., Rockefeller I* Br. at 5.
>
> We also note that cases cited by Rockefeller in his Opening Brief in *Rockefeller II, III, and IV* for the same proposition--that the STAA covers government employees--do not address that issue. Indeed, the STAA was not even raised in those cases. *See Tyndall v. Environmental Protection Agency*, Case Nos. 93-CAA-6, 95-CAA-5, ARB Dec. (June 14, 1996); *Jenkins v. Environmental Protection Agency,* Case No. 92-CAA-6, Sec'y Dec. (May 18, 1994).
>
> * * *

> 8/ We note that before us Rockefeller's counsel has repeatedly misstated the holding in the OHA D&O, asserting that OHA held that the search and copying fee was "illegal." *See* Rockefeller Opening Brief in *Rockefeller II, III, and IV* at pp. 3, 6, 10, 14, 21, 30. OHA actually upheld the fee and denied Rockefeller's FOIA fee waiver appeal.

Rockefeller v. U.S. Dept. of Energy, *supra* at nn.6 and 8 [HTML].

In addition, Slavin's pleadings before the ARB also included factually inaccurate characterizations of the presiding ALJ's actions. *Rockefeller v. U.S. Dept. of Energy*, *supra* at n.10 [HTML].

I find that the ARB's decision in Case No. 1998-CAA-10 *et al.* provides clear and convincing evidence of additional violations of MRPC 3.3(a)(1) (making a false statement of law and fact to a tribunal) MRPC 8.2(a) (making a false statement concerning the qualifications or integrity of a judge), MRPC 8.4(c) (engaging in conduct involving dishonesty) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

3. Varnadore v. Oak Ridge National Laboratory

In *Varnadore v. Oak Ridge National Laboratory*, ARB No. 99-121, ALJ Nos. 1992-CAA-2 and 5, 1993-CAA-1, 1994-CAA-2 and 3, 1995-CAA-1, USDOL/OALJ Reporter at 8 (ARB July 14, 2000), *appeal dismissed for lack of timeliness Varnadore v. USDOL*, No. 00-4164 (6th Cir. Nov. 8, 2000) [EX 1-G], Slavin misrespresented an ARB ruling arguing that the ARB had earlier decided that it did not have jurisdiction to rule on his request to submit certain testimony, when as the ARB observed, it "did no such thing." I find that the ARB's decision in Case No. 1992-CAA-2 *et al*. provides clear and convincing evidence of violation of MRPC 3.3(a)(1) (making a false statement of fact and law to a tribunal), MRPC 8.4(c) (engaging in conduct involving deceit and or misrepresentation) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice). This case is discussed in more detail in this decision, *infra* in the section on *Pursuit of frivolous complaints.*

4. Williams v. Lockheed Martin Corp.

In *Williams v. Lockheed Martin Corp*., ARB Nos. 99-54 and 99-064, ALJ Nos. 1998-ERA-40 and 42, slip op. at 2 (ARB Sept. 29, 2000) [EX 7-C], the ARB found that Slavin had engaged in factually inaccurate attacks on the ALJ. I find that the ARB's decision in Case No. 1998-CAA-10 *et al.* provides clear and convincing evidence of violation of MRPC 3.3(a)(1) (making a false statement of fact to a tribunal), MRPC 8.2(a) (making a false statement concerning the qualifications or integrity of a judge), MRPC 8.4(c) (engaging in conduct involving dishonesty) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

5. Somerson v. Mail Contractors of America

Official notice is taken pursuant to 29 C.F.R. § 18. that in *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 2003-STA-11 (ARB Dec. 16, 2003) [EX 15-I], Slavin misrepresented a ruling in a motion to vacate filed with the ARB, to wit:

> On October 22, 2003, Somerson filed a motion to vacate the Board's decision. Having reviewed Somerson's motion and finding no basis presented therein for vacating or otherwise modifying our decision, we **DENY** it in its entirety. Nevertheless we do find it necessary to correct a misstatement of the Board's holding included in Somerson's motion. Somerson states in the motion, "Mr. Somerson appreciates the Board striking … Judge Burke's illegal ruling that only employers are covered by STA. The Board's Order reinforces that Mr. Davis and his law firm … and those acting in concert with them may be found liable under STA for their actions directed against Mr. Somerson …." To the contrary, the Board specifically, in no uncertain terms, did not hold that the ALJ's ruling was illegal or that Mr. Davis and his law firm may be held liable under the STA. Instead, in addressing the issue whether Mr. Davis or his law firm could be considered to be employers under the STAA, the Board clearly and most unambiguously stated, "[T]o dispose of Somerson's complaint, we need not, and do not, decide here whether a 'person' as provided in 49 U.S.C.A. § 31105(a) must be an 'employer' as defined in 49 U.S.C.A. § 31101(3)(A)." Slip op. at 7.

Somerson v. Mail Contractors of America, ARB No. 03-042, ALJ No. 2003-STA-11, USDOL/OALJ Reporter at 2 [HTML] (ARB Dec. 16, 2003).

I find that the ARB's decision in Case No. 2003-STA-11 provides clear and convincing evidence of violation of MRPC 3.3(a)(1) (making a false statement of fact to a tribunal), MRPC 8.4(c) (engaging in conduct involving dishonesty) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

6. Santamaria v. U.S. Environmental Protection Agency

Official notice is taken pursuant to 29 C.F.R. § 18. 45 that in *Santamaria v. U.S. Environmental Protection Agency*, 2004-ERA-6 (ALJ Feb. 24, 2004) [EX 27-B], the complaint alleged that a Coordinator of Minority Business Enterprises and Women Business Enterprises for the EPA. was discriminated against because he was being pressured to approve "questionable, false flag Minority Business Enterprises" and because he had raised concerns regarding EPA contracting. In responding to EPA's motion to dismiss, Slavin, apparently recognizing such a complaint would fail without a link to environmental whistleblowing, misrepresented his client's testimony at a deposition. The presiding ALJ wrote:

> Further, Complainant mischaracterizes his own deposition testimony when referring to it in his response to Respondent's motion. Complainant stated in his response that he had voiced concerns about "EPA is not enforcing environmental regulations on states, counties, cities and colleges." (Compl. Resp., at 3 (citing Dep. at 7-11). However, Complainant's actual statement during his deposition regarding the concerns he had voiced was "The Environmental Protection Agency is failing to enforce on the state, on the county, on the city, on the towns, on colleges and universities, on nonprofit organization **is failing to enforce the MBE/WBE rules, regulations, and guidelines**. But really, the point is that is environmental law, and that's what the EPA is supposed to be enforcing and is not making sure that those grantees and contractors comply with that law." (Dep. at 8 (emphasis added)). Complainant's other statement in his response that he had voiced concerns regarding "EPA grantees not complying with environmental regulations before the [sic] state work" is similarly mischaracterized because in the context of the deposition, Complainant consistently referred to alleged

> violations of the MBE/WBE regulations, and not to alleged violations of environmental regulations that would implicate a safety and/or health concern.

Slip op. at 10-11 (emphasis as in original).

I find that the ALJ's decision in Case No. 2004-ERA-6 provides clear and convincing evidence of violation of MRPC 3.3(a)(1) (making a false statement of fact to a tribunal), MRPC 8.4(c) (engaging in conduct involving dishonesty) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

Summation

Thus, Slavin has engaged in a pattern of making false statements of law and fact before DOL adjudicators. In *Espinosa v. Allied Signal, Inc*., 1996-WPC-2, USDOL/OALJ Reporter at 3-4 [HTML] (ARB Aug. 18, 1998), the ARB noted that fraudulent misrepresentations by parties or their counsel are especially troubling, as they are a wrong against the institutions of justice. Moreover, such misrepresentations and lying directly injure the interests of Slavin's clients. As the ARB aptly observed in *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 03-STA-11, slip op. at 4 (ARB Oct. 14, 2003):

> Such falsehoods by attorneys appearing before the Board will not be tolerated and may subject the offending attorney to sanctions. Moreover, making such false statements to the Board undermines Attorney Slavin's ability to effectively represent his clients because the Board will be reluctant to accept at face value any statement counsel makes that is not confirmed by independent collaborating evidence.

Pursuit of frivolous complaints

1. Williams v. Lockheed Martin Corp.

In *Williams v. Lockheed Martin Corp.*, ARB Nos. 99-054 and 99-064, ALJ Nos. 1998-ERA-40 and 42 (ARB Sept. 29, 2000) [EX 7-C], the case was based on the Complainants' contentions that the Respondents violated the whistleblower acts by surreptitiously recording the private portion of a public meeting, and that the taping was part of an ongoing campaign of covert surveillance of whistleblowers. The ARB agreed with the ALJ's finding that the summary judgment dismissing the complaint should be granted. The Board wrote:

> In order to prevail in an environmental whistleblower case such as the one before us, the complainants must prove, by a preponderance of the evidence, that they engaged in protected conduct, and that the employer took some adverse action against them because of that protected conduct. *Carroll v. Bechtel Power Corp*., Case No. 91-ERA-46, Secretary's Final Decision and Order, slip op. at 11, n.9 (Feb. 15, 1995), *aff'd* 78 F.3d 352 (8th Cir. 1996). We agree with the ALJ that there are no material facts in dispute with regard to these elements of a whistleblower case, in large part because Complainants failed to come forward with **any** facts in response to Respondents' amply supported motion for summary decision. We also agree with the ALJ that Respondents are entitled to summary decision as a matter of law. We do not think that we can improve upon the ALJ's holding in this regard:
>
> > The facts demonstrate that neither was there an adverse action nor was there any action taken in reprisal for the Complainants having attended the meeting of March 23. . . . There is no evidence in this case that Lockheed Martin or any of its agents "surreptitiously" taped the March 23 meeting nor is there evidence that any representative of or agent of Lockheed Martin stated that the March 23 meeting would be private. There is no evidence in this case that the audio taping of the March 23 meeting was anything other than an attempt by the company to accommodate an employee who had fallen ill. There is no evidence whatsoever that LMES was "spying" on any sick workers. This record shows that there was no surveillance and, in fact, there was no adverse action initiated against either of the Complainants. Not only is there no discriminatory intent evidenced by the established facts but the actions initiated by the company were an accommodation to one of its employees who happened to be a member of the "affected group." I find none of the established facts, either directly or circumstantially, demonstrate a negative impact on the Complainants' work environment.

> R. D. and O. at 8. Williams and Farver made allegations against their employer, which Respondents countered in a well-supported motion for summary decision. Complainants chose, at their peril, not to reply to that motion.

Williams v. Lockheed Martin Corp., ARB Nos. 99-054 and 99-064, ALJ Nos. 1998-ERA-40 and 42, USDOL/OALJ Reporter at 4-5 [HTML] (emphasis as in original). The Board did not reach the ALJ's disqualification of Slavin for participation in the bringing of the complaint, but expressly held that it agreed with the ALJ that the complaint was frivolous. *Id.* at 5 [HTML].

I find that the ARB's decision in Case No. 1998-ERA-40 and 42 provides clear and convincing evidence that Slavin violated MRPC 3.1 (pursuit of non-meritorious claim).

2. Rockefeller v. Carlsbad Area Office, Department of Energy

Slavin has filed eleven whistleblower complaints before OALJ on behalf of Tod N. Rockefeller. Several of the complaints were consolidated, resulting in eight adjudications ("*Rockefeller I to VIII*"). The complaint in *Rockefeller I* was dismissed. In each of the subsequent adjudications in *Rockefeller II* through *VIII*, Slavin attempted to re-litigate, in whole or in part, the same issues disposed of in *Rockefeller I.*

In *Rockefeller v. U.S. Dept. of Energy*, ARB Nos. 99-002, 99-067, 99-068 and 99-063, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6 (ARB Oct. 31, 2000), *appeal dismissed (default*), Nos. 00-9545, 01-9529 (10th Cir. Nov. 20, 2001) [EX 6-C], the ARB decided *Rockefeller I* through *IV* in a consolidated decision. The Board wrote:

> 1. In *Rockefeller v. Department of Energy* (*Rockefeller I*), 98-CAA-10 and 11, Rockefeller alleged that after he raised safety concerns in his internal report and sent that report to DOE management and Westinghouse, DOE retaliated against him by giving him poor performance evaluations and then terminating him. Rockefeller asserted that his report was protected activity under the employee protection provisions of the STAA and the CAA.
>
> Respondents filed motions to dismiss, and on September 28, 1998, the ALJ issued a Recommended Decision and Order (*Rockefeller I* RD&O) recommending that

those motions be granted. The ALJ ruled that Rockefeller was not a covered employee, and DOE was not a covered employer under the STAA, and that Rockefeller's CAA complaint was untimely filed because it was filed more than 30 days after Rockefeller's termination. The ALJ rejected Rockefeller's contention that the CAA's limitations period was equitably tolled because Rockefeller had filed his environmental complaint timely but in the wrong forum.

The ALJ also issued an order finding that Rockefeller's counsel had treated the ALJ to "unwarranted, outrageous, insulting written abuse" which "constitute[d] improper professional conduct and evidence[d] a shameless refusal to adhere to reasonable standards of orderly and ethical conduct . . . ." The ALJ therefore barred Rockefeller's counsel from "appearing before the undersigned in this or any other matter . . ." pursuant to 29 C.F.R. §§18.34(g)(3) and 18.36. Order Barring Counsel from Future Appearances, Sept. 28, 1998, slip op. at 5.

2. On October 2, 1998, Rockefeller filed a complaint in *Rockefeller v. Department of Energy* (*Rockefeller II*), 99-CAA-1. He repeated his allegations from *Rockefeller I* and alleged that:

> DOE and Westinghouse wrongfully induced the ALJ to recommend dismissal of *Rockefeller I*.
>
> The Recommended Decision and Order in *Rockefeller I* was contaminated by *ex parte* contacts between Respondents, OSHA, and the ALJ.
>
> A DOE lawyer had an improper motive and gave improper legal advice to DOE's Albuquerque Regional Office personnel about Rockefeller's FOIA request, which resulted in DOE denying Rockefeller's fee waiver request and attempting to charge him $28,000 for 1200 hours of search time under FOIA.
>
> DOE's $28,000 search charge was an act of discrimination to impede and delay Rockefeller's ability to obtain evidence of environmental violations.
>
> Respondents' actions were an obstruction of Rockefeller's whistleblower rights and a continuing violation under the STAA and CAA.

A second ALJ, to whom *Rockefeller II* was assigned, issued an Order to Show Cause why the complaint should not be dismissed. Following responses by all parties,[5] on December 4, 1998, the ALJ issued a Recommended Decision and Order of Dismissal with Prejudice (*Rockefeller II* RD&O). The ALJ found that Rockefeller's response to the show cause order "contained no facts that would support the allegations of improper ex parte contacts and undue influence . . ."; and the fact "[t]hat one of the respondents wished to charge a copying fee in the first action fails to state a cause of action under the Clean Air Act." *Rockefeller II* RD&O slip op. at 3.

3. In the meantime, on November 2, 1998, Rockefeller filed his third complaint, which also concerned DOE's treatment of Rockefeller's FOIA request. *Rockefeller v. Department of Energy* (*Rockefeller III*), 99-CAA-4. Rockefeller had appealed DOE's denial of the fee waiver request to the DOE Office of Hearings and Appeals, which denied the appeal because it found that the requested material would not contribute to the general public's understanding of the subject of the materials. DOE Office of Hearings and Appeals Decision and Order (DOE D&O), Oct. 28, 1998, slip op. at 3-4. In *Rockefeller III*, Rockefeller repeated his allegations from *Rockefeller I* and *II,* and alleged that DOE's reference to Rockefeller's counsel as a "commercial requester" for purposes of a FOIA fee waiver request was improper and contrary to law. Rockefeller also alleged that a DOE lawyer had been motivated by retaliatory animus to give improper legal advice to DOE about the FOIA request which caused DOE to assess Rockefeller $28,000. *Rockefeller III*, slip op. at 4.

The ALJ issued an order to show cause why *Rockefeller III* should not be dismissed; following responses by the parties, on March 10, 1999, the ALJ issued a Recommended Decision and Order dismissing the case with prejudice. *Rockefeller III* RD&O. The ALJ ruled that the *Rockefeller III* complaint did not state a new cause of action and was barred by operation of collateral estoppel. In addition the ALJ ruled that the complaint "fails to prove the essential elements of a violation of the employee protection provision of the STAA or the CAA." *Rockefeller III* RD&O, slip op. at 8.

4. Rockefeller filed another complaint, *Rockefeller v. Department of Energy* (*Rockefeller IV*), ALJ Case No. 99-CAA-6, repeating the allegations of *Rockefeller I, II,* and *III,* and alleging that: (1) he was improperly served with the motions to dismiss in *Rockefeller II* because the motions were filed with the ALJ by Federal Express but were served on Rockefeller by regular mail; and (2) the ALJ improperly granted Respondents' motions to dismiss before the time had elapsed for the filing of Rockefeller's response to the motions. The ALJ found the only new allegations "patently absurd" and on February 19, 1999, issued a Decision and Order Recommending Dismissal with Prejudice (*Rockefeller IV* RD&O).

* * *

None of these cases have merit. As we discuss below, Rockefeller has no cause of action under the STAA because the federal government and its employees are excluded from the STAA's scope. Moreover, Rockefeller's CAA claim of unlawful termination was not filed within the CAA's 30-day limitations period and is not subject to equitable tolling. And the allegations in *Rockefeller II, III,* and *IV* to the extent that they are not mere repetitions of claims made in *Rockefeller I*--do not state claims under the CAA and are spurious.

Rockefeller, ARB Nos. 99-002, 99-067, 99-068 and 99-063, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6, *supra* at 4-6 [HTML].

In the interim, Slavin pursued two more cases on behalf of Rockefeller ("*Rockefeller V*"). On review, in *Rockfeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB No. 00-039, ALJ

No. 1999-CAA-21 and 22 (ARB May 30, 2001), *appeal dismissed (default*), Nos. 00-9545, 01-9529 (10th Cir. Nov. 20, 2001) [EX 6-D], the ARB wrote:

> In this, the fifth in a series of complaints filed by Complainant Tod Rockefeller against the same Respondents, Rockefeller alleges again the same violations of the employee protection provisions of the Clean Air Act, 42 U.S.C.A. §7622 (1995), and the Surface Transportation Assistance Act, 49 U.S.C.A. §31105 (West 1997), as he raised in the previous four complaints. In addition, Rockefeller has alleged that the Respondent Department of Energy (DOE) destroyed certain documents that were the subject of his Freedom of Information Act (FOIA) request. The Occupational Safety and Health Administration investigated Rockefeller's complaint and found it to be without merit. Rockefeller then sought a hearing before a Department of Labor Administrative Law Judge (ALJ).
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> * * *
>
> Complainant's attorney has filed a largely incomprehensible brief in support of this frivolous case. The brief includes no background, no statement of facts, no statement of issues, and no coherent argument. Instead, the brief contains an "Introduction," and a section captioned "The Judge Erred by Dismissing the Complaint." That section of the brief consists of 44 numbered paragraphs dealing with a variety of topics, including alleged destruction of evidence, laches, timeliness, conflict of interest, and collateral estoppel. Every case litigated under the environmental whistleblower provisions requires the investment of time by the parties, the investigating agency, the Office of Administrative Law Judges, and -- if there is an appeal -- this Board. The resources of the Department of Labor are finite; therefore the hearing and appeal of one case means that another case must wait. It is in large part for this reason that frivolous cases are extremely damaging to the adjudicatory process. As then Circuit Judge Breyer explained with reference to the appellate courts, "as a general matter, the more time we spend on frivolous cases, the less time we have for the problems of more serious litigants. Thus, the frivolous' appeal hurts other litigants and interferes with the courts' overall mission of securing justice." *Natasha v. Evita Marine Charters,* 763 F.2d 468, 471 (1st Cir. 1985).
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> * * *
>
> In any event, in the interim the ARB has issued a final decision in the four previous *Rockefeller* cases on October 31, 2000, dismissing them. *Rockefeller v. U.S. Dep't of Energy*, ARB Nos. 99-002, 99-067, 99-068 and 99-063, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6, *appeal docketed,* No.00-9545 (10th Cir. Dec. 28, 2000). Therefore Rockefeller is now also barred by the doctrine of issue preclusion from relitigating the issues raised in the previous cases.
>
> * * *
>
> Finally, we also agree with the ALJ that, in light of DOE's supported and uncontradicted assertion that the originals of the documents were not, in fact, destroyed as alleged by Rockefeller, his complaint is groundless.

Rockfeller, ARB No. 00-039, ALJ No. 1999-CAA-21 and 22, *supra* at 1-4 [HTML] (footnote omitted).

Slavin then filed two more cases on behalf of Rockefeller ("*Rockefeller VI*" -- 2000-CAA-4 and 5), which were again dismissed.

Slavin, not to be discouraged, again filed another case on behalf of Rockefeller ("*Rockefeller VII*"). The ALJ found that issues decided in the prior *Rockefeller* cases could not be re-litigated under the principle of issue preclusion. Although Rockefeller alleged that this was a new complaint based on a new retaliation, the ALJ found that the new complaint was dependant on prior whistleblower status, writing:

> Mr. Rockefeller was given several chances to explain how he is entitled to status as a whistleblower. He submitted materials and pleadings from other cases he has brought against the DOE. He asks me to incorporate by reference as if set forth at length briefs and arguments that he has made before other courts, including the United States Supreme Court. However, all are used in an attempt to re-litigate his status as a whistleblower stemming from the period 1995 to 1998, all of which had been previously adjudicated. He has not submitted any evidence to show entitlement to reopening the decisions of the ARB. As an ALJ, I must follow the law of the case.

Rockefeller v. U.S. Dept. of Energy, 2002-CAA-5, USDOL/OALJ Reporter at 23 (ALJ Jan. 24, 2003) (citation omitted).

Finally, Slavin filed *Rockefeller VIII*. Apparently, the gravaman of this complaint is that Complainant was not considered for a position, which was only open to the Respondent's current employees, and this was improper because he was not lawfully terminated in 1997. *Rockefeller v. U.S. Dept. of Energy*, 2003-ERA-10 (ALJ Mar. 28, 2003), *motion for recon denied* (ALJ July 3, 2003). Noting that the Complainant's claims of wrongful termination, blacklisting and discrimination had been dismissed in suits before the Merit Systems Protection Board, the Office of Special Counsel, and five final decisions before the ARB, the ALJ found that principles of claim preclusion and collateral estoppel applied

I find that the ALJ and ARB decisions in Case Nos. 1998-CAA-10 *et seq.* provide clear and convincing evidence that Slavin violated MRPC 3.1 (pursuit of non-meritorious claim), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

3. Slavin v. Office of Administrative Law Judges

In *Slavin v. Office of Administrative Law Judges*, 2003-CAA-12 (ALJ Mar. 10, 2003), *appeal dismissed for want of prosecution*, ARB No. 03-077, ALJ No. 2003-CAA-12 (ARB Aug. 22, 2003) [EX 19-A and EX 19-D], Slavin filed a frivolous complaint that failed to establish subject matter jurisdiction, that was barred by virtue of absolute judicial immunity, and that failed to plead even the essential elements of a *prima facie* case. The gravaman of this complaint, which Slavin filed on his own behalf, was that "the DOL OALJ Front Office, et al." violated a number of environmental whistleblower protection laws when the Chief Judge issued a July 26, 2002 Order of Recusal, which Slavin alleges was an abusive, extralegal judicial order. In other words, Slavin filed a whistleblower suit against the Chief Judge because he did not like rulings contained in the Chief Judge's order deciding a motion to recuse filed by Slavin while representing a whistleblower client.

I was the presiding ALJ in 2003-CAA-12 and I dismissed the case as frivolous. I find that Slavin's filing of Case No. 2003-CAA-12 provides clear and convincing evidence of a violation of MRPC 3.1 (pursuit of non-meritorious claim), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

4. High v. Lockheed Martin Energy Systems, Inc.

In *High v. Lockheed Martin Energy Systems, Inc.*, ARB No. 02-091, ALJ No. 2002-CAA-1 (ARB Nov. 24, 2003) [EX 13], Slavin filed a specious whistleblower complaint based on the ARB's apparent misplacement of an appeal file. The ARB's decision describes the issue:

> This case arises under the employee protection provision of the Clean Air Act, 42 U.S.C. § 7622 (2000) (CAA). On October 9, 2001, David Marshall High filed a complaint requesting that the Occupational Safety and Health Administration (OSHA) investigate the disappearance of the record in a previous whistleblower claim (*High v. Lockheed Martin Energy Systems, Inc*., ARB No. 98-075, ALJ No. 1996-CAA-8). The record was lost in transmission from the Administrative Review Board (the Board) to the Office of Administrative Law Judges (OALJ) after the Board remanded the case for further proceedings. High contended that the Board was responsible for the loss. On October 22, 2001, OSHA determined that it had no authority to investigate the Board. High appealed that determination to the OALJ.
>
> On May 13, 2002, an Administrative Law Judge (ALJ) issued an Order to Show Cause ordering High to state why his complaint should not be dismissed for lack of jurisdiction. High responded to the order but his response did not address the jurisdictional issue raised in the show cause order. On June 26, 2002, the ALJ issued a Recommended Decision and Order (R. D. & O.) recommending dismissal of High's complaint because he failed to allege any basis for ordering an investigation of the Board by OSHA.
>
> On July 1, 2002, High submitted to the Board a Petition for Review and Request for Expedited Appeal, requesting review of the ALJ's R. D. & O. In response, on July 24, 2002, Respondent Lockheed Martin Energy Systems submitted a document entitled "Respondent's Suggestion That Complainant's Petition for Review and Request For Expedited Appeal Be Denied."
>
> On July 16, 2002, the Board issued a Notice of Appeal and Order Establishing Briefing Schedule instructing High to file an initial brief in support of his Petition for Review on or before August 14, 2002. High has not submitted a brief to the Board, and his Petition for Review does not indicate how the ALJ erred by determining that he failed to state how OSHA could initiate an investigation of the ARB pursuant to the CAA. We therefore **AFFIRM** the R. D. & O. and **DISMISS** the complaint.

Id. (footnotes omitted).

Plainly, this lawsuit, which is based on a practically comical theory, had no purpose other than to harass the ARB. I find that Slavin's filing and pursuit of Case No. 2002-CAA-1 provides

clear and convincing evidence of a violation of MRPC 3.1 (pursuit of non-meritorious claim), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

5. In re Somerson

In *In re Somerson*, ARB No. 03-068, ALJ Nos. 2002-STA-44 and 2003-STA-11 (ARB Oct. 21, 2003) [EX 15-G], Slavin filed a specious appeal with ARB for review of "unfriendly letter" from the OALJ. This is apparently a reference to a letter written by the Chief ALJ to Slavin requesting that he correct factual misrepresentations in a letter written to the ARB, and copied on OALJ, relating to the *Somerson* appeal. [EX 15-D]

Slavin had represented to the ARB that Judge Miller was not at work the day that a series of orders were issued in the *Somerson* matter. Slavin made the allegation based on the fact that the orders were signed with a digitized signature and because Slavin's FOIA request for Judge Miller's time and attendance records and/or leave slips for the day in question had been denied. The Chief ALJ's letter to Slavin pointed out that OALJ's document management system uses digitized signatures for all ALJ orders and that the FOIA request was denied based on a balancing of Judge Miller's privacy interest in his leave records against the absence of any public interest stated by Slavin in the FOIA request, which was in no way an admission that Judge Miller was not at work on the day in question. Moreover, the Chief ALJ informed Slavin that Judge Miller was at work on the day involved and had personally invoked the electronic signature process. The Chief ALJ, therefore, requested that Slavin immediately retract his allegation that Judge Miller did not issue the orders in question. The Chief ALJ also requested that Slavin verify the source of an alleged quotation of a U.S. District Court Judge cited by Slavin to the ARB meant to imply that the District Judge was dismissive of Judge Miller's referral of Somerson's misconduct in Case No. 2002-STA-44.

The Board ordered Somerson to show cause why the appeal of this letter should not be dismissed. Reviewing Somerson's response, the ARB wrote: "Somerson has failed to cite to and the Board is unaware of any statutory provision or regulation, which invests the Board with jurisdiction to review a Department of Labor Administrative Law Judge's 'unfriendly letter.'"

I find that Slavin's filing of an appeal of the Chief ALJ's letter requesting that Slavin retract misrepresentations of fact to the ARB relating to Case No. 2002-STA-44 provides clear and convincing evidence of a violation of MRPC 3.1 (pursuit of non-meritorious claim), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

6. Lockheed Martin Energy Systems, Inc. v. Slavin

In *Lockheed Martin Energy Systems, Inc. v. Slavin*, No. 3:98-CV-613 (E.D.Tenn. Dec. 6, 1999) [EX 1-F], in which Rule 11 sanctions were imposed on Slavin for the frivolous contesting of the Respondent's collection action, the District Court judge observed that Slavin's position showed "a disregard for the legitimacy of decisions of the Court of Appeals for the Sixth Circuit and the Department of Labor Administrative Review Board." As previously found in this decision, the District Court's ruling in Case No. 3:98-CV-612 provides clear and convincing evidence of a violation of MRPC 3.1 (pursuit of non-meritorious claim or defense) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice). This case is discussed in more detail in the section of this decision entitled *Refusal to comply with lawful order* under the heading *Varnadore v. Oak Ridge National Laboratory*.

7. Moore v. U.S. Dept. of Energy

In *Moore v. U.S. Dept. of Energy*, ARB No. 00-038, ALJ No. 1999-CAA-15 (ARB Jan. 30, 2001), *appeal dismissed (default)*, *Moore v. U.S. Dept. of Labor*, Nos. 01-9511, 01-9531

(10th Cir. Dec. 19, 2001) [EX 9-A and 9-B], Slavin was found by the Administrative Review Board to have filed a "frivolous appeal of a case wholly lacking in merit." *Id*., USDOL/OALJ Reporter at 3 [HTML]. The ARB wrote

> Moore is a Special Agent of the Transportation Safeguards Division (TSD) of DOE's Albuquerque Operations Office. Special Agents transport nuclear weapons, components and materials between various sites around the country. . . .
>
> In response to a report on the management and operation of TSD, TSD manager Debbie Miller established a Professionalism Team made up of eleven volunteers, including six Special Agents. The Team was to review the operations of TSD and make recommendations on ways to enhance professionalism within the organization. On January 25, 1999, the Professionalism Team circulated to all TSD employees draft recommended TSD Standards for Conduct, Dress and Grooming. The Team solicited the comments and suggestions of all employees, explaining that the draft was "by no means final" and was intended to elicit comments from employees. Many employees did provide comments criticizing the draft standards, and the standards were never implemented because no consensus could be reached within TSD on their content. However, immediately following the circulation of the draft, Moore filed a whistleblower complaint, alleging that the draft standards were issued to retaliate against him for filing his first two whistleblower complaints and had a chilling effect on TSD employees' exercise of their whistleblower rights.
>
> * * *
>
> This case turns on the fact that DOE engaged in no action which, by any stretch of the imagination could be characterized as "adverse." Indeed, we conclude that this is a frivolous appeal of a case wholly lacking in merit.
>
> Of critical importance here is that the complained-of action was that the Professionalism Team issued a draft set of standards of conduct on which they expressly requested comment from TSD employees, including Moore. Comments were received. In fact, the comments were sufficiently negative that the draft standards were never finalized. As a result, Moore cannot rationally maintain that he was "adversely" affected by them.

Id. (footnotes omitted).

I find that the ARB's decision in Case No. 1999-CAA-15 provides clear and convincing evidence of a violation of MRPC 3.1 (pursuit of non-meritorious claim).

8. Vest v. Goswitz

In *Vest v. Goswitz*, 2002 WL 31895401, 2003 Tenn. LEXIS 398 (Tenn. Ct. App. Dec. 30, 2002), *application for permission to appeal denied by Tenn. S. Ct.* (May 5, 2003) [EX 23-B], sanctions imposed by a Tennessee trial court against Slavin for a motion filed in violation of Tennessee Rule of Civil Procedure 11 were affirmed by the Tennessee Court of Appeals. Specifically, Slavin violated a Tennessee rule when he filed a motion to reconsider the trial court's action in dismissing the case after the plaintiffs had already filed an appeal. The trial court found that the motion was "presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," and ordered Slavin to pay $2,125.75 in fees and expenses to the defendant's law firm. I find that the Tennessee Court of Appeal's decision in *Vest v. Goswitz* provides clear and convincing evidence of a violation of MRPC 3.1 (pursuit of non-meritorious claim).

9. Erickson v. U.S. Environmental Protection Agency

In *Erickson v. U.S. Environmental Protection Agency*, 2001-CAA-8 and 9, 2002-CAA-3 and 18 (ALJ Oct. 15, 2002), *appeal of denial of motion to consolidate denied as moot, Erickson v. U.S. Environmental Protection Agency*, ARB No. 03-011, ALJ No. 1999-CAA-2 (ARB Jan. 29, 2004) [EX 8-B and EX8-C], Slavin filed a frivolous motion to consolidate cases pending before different ALJs. The motion had been referred to the undersigned after being orally denied by the presiding ALJ in *Erickson* on the ground that only the National office of OALJ could order consolidation in such circumstances.

I found that Slavin's motion was merely a renewed attempt to have the assigned judge in one of the cases requested to be consolidated removed as the presiding judge, and was blatant judge shopping. Specifically, I wrote:

> On September 30, 2002, Complainant Jeanne F. Greene and Complainant Sharyn Erickson filed a motion, via attorney Edward A. Slavin, Jr., renewing a request that the

Chief Administrative Law Judge grant their motion to consolidate their cases for hearing before Administrative Law Judge Clement J. Kennington (but not Administrative Law Judge William C. Cregar).1/ Although requesting a ruling on a pending motion is a matter well within the rights of a litigant, this motion is not as innocuous as it might first appear.

First, Mr. Slavin has been disqualified as counsel by Judge Cregar in the *Greene* matter, *Greene v. U.S. Environmental Protection Agency*, 2002-SWD-1 (ALJ June 20, 2002). Thus, any motion purportedly filed on behalf of Judge Greene by Mr. Slavin is unauthorized. Although an appeal of the disqualification order is pending, under the regulation at 29 C.F.R. § 18.36, the disqualification is not stayed pending the appeal. *See In the Matter of Slavin*, 2002-SWD-1 (ALJ July 2, 2002) (Chief ALJ's order denying motion for stay of attorney disqualification). Thus, even though the issue of Mr. Slavin's disqualification is currently pending before the ARB, unless and until the disqualification is reversed by the ARB, Mr. Slavin is not permitted to continue representation of Judge Greene before OALJ, and the underlying proceeding is not permitted under the regulations to be delayed or stayed pending an appeal of an attorney disqualification.

Second, even if the motion was properly filed, it is clearly a renewed attempt by Judge Greene to have Judge Cregar removed as the presiding judge in her case. In *Greene v. U.S. Environmental Protection Agency*, 2002-SWD-1 (ALJ Jan. 3, 2002), I informed Complainant that the undersigned would not entertain any further motions attacking the appointment of Judge Cregar, as she had already perfected a record for appeal on whether that appointment was improper. The instant motion, although couched weakly in terms purportedly promoting judicial efficiency, is merely a different tactic for attempting to have Judge Cregar removed as the presiding judge in the *Greene* matter.

Third, in addition to acting contrary to Judge Cregar's order of disqualification and my order denying any further motions seeking Judge Cregar's removal, there are other troubling aspects to this motion. Specifically, it is not obvious what possible benefit Ms. Erickson could achieve by consolidation of her case with Judge Greene's case, while the potential disadvantages are obvious and significant. Assuming *arguendo* that the motion to consolidate was granted, Ms. Erickson would be in the position of possibly having the recommended decision in her favor vacated, giving EPA the chance to present additional evidence and argument before the ALJ, and possibly leading to a different, less favorable result. Moreover, Ms. Erickson's case, including her right to immediate reinstatement, would be delayed for however long it takes to adjudicate the consolidated case. Thus, the potential consequences of consolidation to Ms. Erickson are immediate, material and significant.

Also, Judge Greene and her counsel, have, with reckless disregard for the truth, attacked the integrity of almost every government official involved in the adjudication of her case. It seems inconceivable that if Ms. Erickson had been informed of the procedural posture of, and tactics employed in the *Greene* matter, that she would now choose to abandon her favorable position and join with a party whose case has, thus far, been mired in attacks on the institutions that will rule on her case.

Finally, the renewal of the motion to consolidate was filed only a few days after Judge Kennington issued his recommended decision in favor of Ms. Erickson. The timing of the motion could be interpreted as blatant judge shopping by Judge Greene. It is likely,

> however, that attorney Slavin and Judge Greene knew before even filing this renewed motion that it would not succeed given the fact that OALJ had already unambiguously decided that Judge Greene's case could not be heard by a DOL ALJ. *See Greene v. U.S. Environmental Protection Agency*, 2002-SWD-1 (ALJ Oct. 19, 2001); *Greene v. U.S. Environmental Protection Agency*, 2002-SWD-1 (ALJ Dec. 21, 2001); *Greene v. U.S. Environmental Protection* Agency, 2002-SWD-1 (ALJ Jan. 3, 2002); *In the Matter of Slavin*, 2002-SWD-1 (ALJ July 26, 2002) (especially n. 11, and surrounding text). Thus, it appears that the filing of the motion at this time was merely a vehicle to voice continued dissent about the appointment of Judge Cregar to hear Judge Greene's case. Even if Mr. Slavin and Judge Greene knew that the motion was frivolous, would stand no chance of being granted, and therefore there was no real risk to Ms. Erickson's case, it is a form of gamesmanship with the rights of a third party that is totally unacceptable.
>
> ---
>
> 1/ Judge Kennington orally denied the motion to consolidate, finding that where two different ALJs had been assigned to different cases, only the headquarters of the Office of Administrative Law Judges is in a position to order consolidation. Shortly thereafter, Judge Greene filed an interlocutory appeal with the Administrative Review Board of Judge Cregar's Order denying recusal. Recently, however, the ARB denied the interlocutory appeal, and Judge Greene's case is now ready for continued adjudication at the ALJ level. *See Greene v. United States Environmental Protection Agency*, ARB No. 02-050, ALJ No. 2002-SWD-1 (ARB Sept. 18, 2002) (denying interlocutory appeal of Judge Cregar's order denying recusal).

I find that Slavin's motion to consolidate filed in Case Nos. 2001-CAA-8 *et al.* provides clear and convincing evidence of a violation of MRPC 1.1 (lack of competent representation), MRPC 3.1 (pursuit of non-meritorious claim), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).[19]

[19] Pursuant to my duty to determine whether an attorney should be disqualified for a conflict of interest, *Duncan v. United States Secretary of Labor*, 69 Fed. Appx. 822, 823 (9th Cir. May 30, 2003) (case below ARB No. 99-011, ALJ No. 1997-CAA-12) and *Smiley v. Director*, OWCP, 984 F.2d 278, 282 (9th Cir. 1993), I subsequently ordered Slavin to clarify whether he had obtained the prior, informed consent of both clients to the dual representation. Slavin filed a response alleging that he had done so prior to filing the motion to consolidate. I took no further action based on Slavin's representation; however, as the ARB noted in *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 03-STA-11, slip op. at 4 (ARB Oct. 14, 2003), misrepresentations by Slavin make it difficult to take his word at face value.

10. Varnadore v. Oak Ridge National Laboratory

In *Varnadore v. Oak Ridge National Laboratory*, ARB No. 99-121, ALJ Nos. 1992-CAA-2 and 5, 1993-CAA-1, 1994-CAA-2 and 3, 1995-CAA-1, USDOL/OALJ Reporter at 8 (ARB July 14, 2000), *appeal dismissed for lack of timeliness Varnadore v. USDOL*, No. 00-4164 (6th Cir. Nov. 8, 2000) [EX 1-G] , the ARB found that Slavin engaged in a frivolous and duplicative attempt to have testimony introduced into the record before the ARB. The ARB wrote:

> Varnadore seeks to supplement the record and to gain rehearing by this Board in cases which were dismissed by the Court of Appeals for the Sixth Circuit. His motion flies in the face of some of the most fundamental principles of our judicial system, including the constitutional limits on federal courts, separation of powers, *res judicata*, and finality. We reject this meritless attempt to relitigate a case which has been decided once and for all.
>
> * * *
>
> First, the vast majority of Varnadore's argument relates to his attempts to admit the Shelton testimony, which could only be admitted under Rule 60(b) if it were "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 60(b)(2). To prevail on a Rule 60(b)(2) motion, the Sixth Circuit has held that the moving party must show: (1) that it exercised due diligence in obtaining the information, and (2) the evidence is material and controlling and clearly would have produced a different result. *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998). As we have described in great detail, Varnadore previously moved to have the Board admit and consider this testimony. In our May 14, 1998 Order we denied that motion on its merits in no uncertain terms. In his current filings, Varnadore disingenuously asserts that in the May 14, 1998 Order the Board decided it did not have jurisdiction to rule on his request to submit the Shelton testimony. *See, e.g.,* Varnadore's Opening Brief on Rule 60(b) at 11, ¶ 29. As the text of that order demonstrates, we did no such thing. However, for the reasons stated in that Order, we once again reject Varnadore's frivolous and duplicative effort to have the Shelton testimony admitted in the record.
>
> _____
>
> 6/ Moreover, as we have noted, Varnadore renewed his motion to supplement the record with the Shelton testimony in the Court of Appeals following our denial, and the Court of Appeals also denied it.

Id. at 5, 7-8 [HTML].

I find that the ARB's decision in Case No. 1992-CAA-2 *et al.* provides clear and convincing evidence of a violation of MRPC 3.1 (pursuit of non-meritorious claim).

11. Howick v. Campbell-Ewald Co.

Official notice is taken pursuant to 29 C.F.R. § 18. 45 that in *Howick v. Campbell-Ewald Co.*, 2004-STA-7, Slavin pursued a suit based on an employer's filing of a motion before an ALJ lacking an essential element of a whistleblower law suit, despite recently losing a similar suit on this very ground.

Specifically, in *Somerson v. Mail Contractors of America*, ARB No. 03-042, ALJ No. 2003-STA-11 (ARB Oct. 14, 2003) [EX 15-E], Slavin pursued a whistleblower complaint on behalf of his client premised on the ground that the Respondent's filing of a motion for a protective order seeking the ALJ's assistance in preventing Slavin's client from harassing the Respondent's witnesses and counsel was unlawful retaliation under the STAA employee protection provision. The ARB held that "[a]fter reviewing the record and the facts in the light most favorable to Somerson, we agree that Somerson has failed to rebut the Respondents' motion to dismiss with a demonstration of a dispute in material fact and that he has failed to allege and to adduce evidence in support of an essential element of his complaint, i.e., that the filing of the request for a protective order constituted 'discipline or discriminat[ion] against an employee regarding pay, terms, or privileges of employment.'"

Days later, on November 5, 2003, Slavin filed a request for a hearing on behalf of a different client on a complaint alleging that Respondent had requested an illegal "gag order" when it filed a motion objecting to *ex parte* communications by Slavin and his client in that case. That case was docketed as *Howick v. Campbell-Ewald Co.*, 2004-STA-7.

On December 16, 2003, the ARB denied a motion to vacate its Decision and Order in *Somerson*, ARB No. 03-042, *supra*. [EX 15-I]

The presiding ALJ in *Howick* issued, on February 5, 2004, an Order to Show Cause why the complaint should not be dismissed for failure to state a claim upon which relief can be granted or why a summary decision denying the complaint should not be issued. The Order to Show Cause was based largely on the ruling in *Somerson*, *supra*, that the filing of a protective order by a Respondent before an ALJ was not shown in that case to include an essential element of a whistleblower complaint, *i.e.*, discipline or discrimination against an employee regarding pay, terms, or privileges of employment. *Howick v. Campbell-Ewald Co.*, 2004-STA-7 (ALJ Feb. 5, 2004). [EX 28-A] On February 27, 2004, the ALJ in *Howick* issued a Recommended Order Granting Respondent's Request for Summary Dismissal, writing "[t]he available relief for inappropriate action by legal counsel in a legal proceeding is to request sanctioning of counsel by the court, not an independent cause of action under the STAA." *Howick v. Campbell-Ewald Co.*, 2004-STA-7 (ALJ Feb. 27, 2004) [EX 28-B]

Thus, Slavin pursued the complaint in *Howick* despite undeniable knowledge that the ARB had just ruled in *Somerson* that failure to plead or otherwise demonstrate that the a Respondent's filing of a motion for a protective order before an ALJ constitutes an adverse employment action is fatal to the cause of action.[20] Slavin's willingness to pursue the *Howick* complaint even after the adverse ruling in *Somerson* provides clear and convincing evidence that Slavin pursued the complaint in full knowledge that it was non-meritorious in violation of MRPC 3.1.

I find that the ALJ's decision in Case No. 2004-STA-7 provides clear and convincing evidence of a violation of MRPC 3.1 (pursuit of non-meritorious claim).

[20] It is not credible to believe that Slavin was unaware of the lack of merit in the *Howick* complaint given the recent ruling in *Somerson*. Assuming arguendo that he was oblivious to the import of the ARB ruling, the failure to plead an essential element of a whistleblower complaint is per se evidence of lack of competence, even for a novice attorney, much less an experienced attorney such as Slavin. Failure to amend the complaint to plead the missing element after the presiding ALJ issues an Order to Show Cause why the complaint should not be dismissed on that ground is gross incompetence. Such incompetence in the *Howick* matter provides clear and convincing evidence of a violation of MRPC 1.1.

12. *In re Slavin*, Civ. No. 3:00-CV-519

In *In re Slavin*, Civ. No. 3:00-CV-519 (E.D. Tenn. 2000) [EX 30], the Chief United States District Judge denied Slavin's motion for *pro hac vice* admission, noting that Slavin had previously been denied admission to practice in the United States District Court for the Eastern District of Tennessee, that questions about his professional character remained in questions, and that Slavin could renew his application after all state disciplinary proceedings have been concluded and all sanctionable conduct before the Eastern District Court remedied. In the motion Slavin had also moved for recusal of all judges in the Eastern District of Tennessee because the former General Counsel of Lockheed Martin Energy Systems, Inc. was now the Clerk of Court. The court denied the motion, finding that Slavin had not shown that the Clerk of Court would play a role in any judicial decision involving Mr. Slavin. The court stated "for this and other reasons, his request for recusal is groundless."

I find that the District Court's decision in Civ. No. 3:00-CV-519 provides clear and convincing evidence of a violation of MRPC 3.1 (pursuit of non-meritorious claim).

Summation: These judicial rulings provide overwhelming proof that Slavin routinely filed complaints and presented legal argument that were frivolous and without support in the law. The pattern of such actions provides clear and convincing evidence that Slavin is either incompetent or is willfully abusing legal process.

Refusal to comply with lawful order

1. Varnadore v. Oak Ridge National Laboratory

In *Varnadore v. Oak Ridge National Laboratory*, 1994-CAA-2 and 3, Slavin engaged in a long, frivolous and vexatious refusal to repay attorney fees to which he was no longer entitled. Specifically, in *Varnadore v. Oak Ridge National Laboratory*, 1994-CAA-2 and 3 (ARB Sept. 6, 1996), *aff'd Varnadore v. Secretary of Labor*, 141 F.3d 625 (6th Cir. 1998), *rehearing and suggestion for rehearing en banc denied* (June 19, 1998), *motion to reopen denied* (ALJ Dec. 28, 1998) [EX 1-B], the ARB directed Slavin to repay a preliminary attorney's fee award. Slavin did not repay, and the Respondent to which the attorney's fees should have been repaid filed a collection action in federal district court. Summary judgment was granted to Respondent on the collection action. *Lockheed Martin Energy Systems, Inc. v. Slavin*, No. 3:98-CV-613 (E.D.Tenn. June 18, 1999). In ruling on Slavin's motion for reconsideration, the District Court observed "From the various roadblocks and stalling techniques Mr. Slavin has instituted not only in this action but in previous litigation on this same issue, it is apparent Mr. Slavin is doing any and everything to avoid having to repay the attorney fees to which he is no longer entitled. Mr. Slavin has presented no valid basis for overturning the Court's previous decision on this issue." *Lockheed Martin Energy Systems, Inc. v. Slavin*, No. 3:98-CV-613 (E.D.Tenn. Aug. 17, 1999). [EX 1-E] In *Lockheed Martin Energy Systems, Inc. v. Slavin*, No. 3:98-CV-613 (E.D.Tenn. Dec. 6, 1999) [EX 1-F], the District Court imposed Rule 11 sanctions for Slavin's frivolous contesting of the collection action. The District Court judge observed that Slavin's position showed "a disregard for the legitimacy of decisions of the Court of Appeals for the Sixth Circuit and the Department of Labor Administrative Review Board." The court imposed a number of sanctions, including the payment of $10,000.00 to the Clerk of Court, which was suspended conditioned upon Slavin's compliance with all past and present orders from the District Court and upon Slavin not engaging in any further conduct violative of Rule 11 before any court or administrative body. An appeal of this ruling was dismissed for want of prosecution, No. 99-6698 (6th Cir. June 20, 2000). Later, in *Lockheed Martin Energy Systems, Inc. v. Slavin*, No.

3:98-CV-613 (E.D.Tenn. Apr. 27, 2001), the District Court found that Slavin had violated the Court's December 6, 1999 order and therefore executed the $10,000.00 monetary sanction against Slavin. The appeal of this ruling was also dismissed for want of prosecution, No. 01-5700 (6th Cir. Apr. 3, 2002).[21]

I find that Slavin's conduct in Case No. 1994-CAA-2 and 3 relating to his refusal to repay attorney fees to which he was no longer entitled provides clear and convincing evidence that Slavin violated MRPC 3.1 (pursuit of non-meritorious claim or defense) and MRPC 8.4(d) (conduct prejudicial to the administration of justice).

2. Gass v. U.S. Dept. of Energy, Slavin v. Office of Administrative Law Judges, Steffenhagen v. Securitas Sverige, AR, Blodgett v. Tennessee Dept. of Environment & Conservation, Somerson v. Mail Contractors of America and Erickson v. United States Envtl. Prot. Agency

In a series of cases before the ARB, Slavin has refused to comply with ARB requirements to file requests for Board action in the form of a motion with an appropriate caption. *Gass v. U.S. Dept. of Energy*, ARB No. 03-093, ALJ Nos. 2000-CAA-22 and 2002-CAA-2 (ARB July 11, 2003) [EX 11-A and EX 11-B]; *Slavin v. Office of Administrative Law Judges*, ARB No. 03-077, ALJ No. 2003-CAA-12 (ARB July 11, 2003) [EX 19 A and EX 19-B]; *Slavin v. Office of Administrative Law Judges*, ARB No. 03-077, ALJ No. 2003-CAA-12 (ARB Aug. 22, 2003) [EX 19-D]; *Steffenhagen v. Securitas Sverige, AR*, ARB No. 03-139, ALJ No. 2003-SOX-24 (ARB Sept. 30, 2003) [EX 21-B]; *Blodgett v. Tennessee Dept. of Environment & Conservation*, ARB No. 03-138, ALJ No. 2003-CAA-15 (ARB Oct. 14, 2003); *Somerson v. Mail Contractors of America*, ARB No. 03-055, ALJ No. 2002-STA-44 (ARB Nov. 25, 2003), *appeal filed* No. 03-16522 (11th Cir.) [EX 15-H]; *Erickson v. United States Envtl. Prot. Agency,* ARB Nos. 03-02, 03, 04, ALJ Nos. 1999-CAA-2, 2001-CAA-8, 13, 2002-CAA-3, 18 (ARB Oct.17, 2002). His

[21] Slavin has been denied admission to practice before the U.S. District Court for the Eastern District of Tennessee. *See Turpin v. Barker*, No. 01-CV-484 (Oct. 18, 2001) (order by Hon. Curtis L. Collier); *Selvidge v. Hopkins*, No. 00-CV-519 (Oct. 9, 2004) (order by Hon. Leon Jordan); *In re Slavin*, No. 3:00-CV-519 (Oct. 24, 2000) (denial of motion for Pro Hac Vice admission) (order by Hon. R. Allan Edgar).

refusal has directly and adversely impacted on his clients' appeals. I find that Slavin's conduct in refusing to comply with ARB pleading requirements provides clear and convincing evidence that Slavin violated MRPC 1.1 (lack of competent representation), MRPC 3.5(d) (conduct intended to disrupt a tribunal), and MRPC 8.4(d) (conduct prejudicial to the administration of justice). I also find that Slavin's refusal to comply with ARB filing requirements was unconscionable given that the ARB's filing requirements were not onerous or unreasonable, whereas Slavin's refusal to comply resulted in great harm to his client's interests. These episodes clearly establish that Slavin's defiant attitude and contempt for DOL adjudicators has so clouded his judgment that he is willing to compromise his clients' cases rather than accede to simple filing instructions.

3. Kesterson v. Y-12 Nuclear Weapons Plant

In *Kesterson v. Y-12 Nuclear Weapons Plant,* 1995-CAA-12, USDOL/OALJ Reporter at 6 [HTML] (ARB Apr. 8, 1997), *appeal dismissed for want of prosecution*, No. 97-3579 (6th Cir. May 6, 1998) [EX 2-A and EX 2-B], Slavin's filing of discovery ten months after the ALJ's order closing discovery was found by the ARB to be a "cavalier attitude toward the proper exercise of the ALJ's authority which cannot be condoned." I find that the ARB's decision in 1995-CAA-12 provides clear and convincing evidence that Slavin violated MRPC 3.5(d) (conduct intended to disrupt a tribunal) and MRPC 8.4(d) (conduct prejudicial to the administration of justice).

4. Other cases

Elsewhere in this decision, Slavin's actions in defiance of lawful orders of ALJs are discussed more fully. For example, as discussed in the section of this decision entitled "*Client's case or appeal dismissed because of Slavin's actions,*" in *Puckett v. Tennessee Valley Authority*, 2002-ERA-15, USDOL/OALJ Reporter at 6 [HTML] (ALJ Nov. 21, 2002) [EX 14], Slavin delivered discovery documents to the District Chief Judge in arrogant defiance of the presiding

ALJ's express order to turn the documents over to the Respondent. I find in that section of this decision that the ALJ's decision in Case No. 1994-CAA-2 and 3 provides clear and convincing evidence that Slavin violated MRPC 3.5(d) (conduct intended to disrupt a tribunal) and MRPC 8.4(d) (conduct prejudicial to the administration of justice).

Admonishments

1. Cox v. Lockheed Martin Energy Systems, Inc.

In *Cox v. Lockheed Martin Energy Systems, Inc.*, ARB No. 99-040, ALJ No. 1997-ERA-17, USDOL/OALJ Reporter at n.6 [HTML] (ARB Mar. 30, 2001) [EX 5], the ARB admonished Slavin concerning vitriolic attacks on an administrative law judge. The Board wrote:

> At trial, the Coxes filed a motion that LMES be compelled to produce certain documents; the ALJ denied the motion. Although the Coxes clearly express disagreement with the ALJ's ruling in their brief to this Board, they simply do not offer any argument in support of their position, but instead merely shower invective on the ALJ.6/ Absent a clearly-articulated argument as to why the Coxes were entitled to the particular documents in question and why the ALJ's decision was erroneous, we see no basis upon which to conclude that the ALJ abused his discretion by denying the motion. For this reason alone, we would leave the ALJ's ruling undisturbed.

6/ In an Order striking an attorney's brief in *Pickett v. TVA*, ARB No. 00-076, ALJ Nos. 99-CAA-25, 00-CAA-9 (ARB Nov. 2, 2000), we noted our concern that vitriolic attacks on administrative law judges are inconsistent with a lawyer's ethical obligations, and in any event cannot substitute for sound legal argument:

> > While counsel . . . has the right to criticize rulings of the ALJ with which his client disagrees, he has no right to engage in disrespectful and offensive personal attacks upon the ability and integrity of the ALJ; such attacks violate counsel's "professional obligation to demonstrate respect for the courts." [*Williams v. Lockheed Martin Corp.*, ARB Nos. 99-054/064, ALJ Nos. 98-ERA-40/42, (ARB Sept. 29, 2000)] at 6. *Accord* ABA Model Rules of Professional Conduct, Preamble, Rules 3.5 and 8.2 (1999).

> The requirement that counsel refrain from immaterial, offensive excoriation of the ALJs before whom he appears, does not conflict with the counsel's ethical duty to represent his clients "with zeal and fidelity within the rules." Rhesa Hawkins Barkdale, *The Role of Civility in Appellate Advocacy*, 50 South Carolina Law Review, 573, 577 (1999). Quite to the contrary, "the use of odiums, sarcasm, and vituperative remarks have no place in a brief and are wholly unwarranted. Frankly, resort to the use of such statements is an indication of a lack of confidence in the law and the facts to support the position of the one using them." *State ex rel. Dyer v. Union Electric Co.*, 312 S.W.2d 151, 154 (Mo. Ct. App. 1958). A brief containing such invective ordinarily should be stricken. *Accord Dranow v. United States*, 307 F.2d 545, 549 (8th Cir. 1962).

I find that the ARB's decision in Case No. 1997-ERA-17 provides clear and convincing evidence that Slavin was admonished for conduct that is improper under MRPC 3.5(a) (seeking to influence a judge by improper means), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

2. Pickett v. Tennessee Valley Authority

In *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ Nos. 1999-CAA-25 and 2000-CAA-9, USDOL/OALJ Reporter at 2-3 [HTML] (ARB Nov. 2, 2000) [EX 10-A], the ARB issued an order admonishing Slavin for violation of various filing procedures, and striking a brief filed by Slavin containing "personal and vitriolic attacks on a Department of Labor Administrative Law Judge." Specifically, Slavin was ordered in the future to attach a Certificate of Service on all filings with the ARB. The Board found that although Slavin had not technically complied with margin requirements for briefs it did not appear that he was attempting to circumvent the length restrictions because other margins were larger than they needed to be. The Board cautioned, however, that "the format requirements are by no means onerous and by refusing to comply with them, Pickett's counsel runs the risk that the Board will return non-conforming pleadings." I observe that Slavin later did have filings rejected by the ARB for failure to conform to ARB pleading requirements. See the section of this decision entitled "*Refusal to comply with lawful order*." In regard to the attacks on the ALJ, the Board wrote:

> Finally, we concur with TVA that counsel for Pickett has "engaged in personal and vitriolic attacks on a Department of Labor Administrative Law Judge," *Williams v. Lockheed Martin Corporation*, ALJ Case Nos. 98-ERA-40, 98-ERA-42; ARB Nos. 99-054, 99-064; Final Decision and Order, slip op. at 5 (Sept. 29, 2000). While counsel for Pickett has the right to criticize rulings of the ALJ with which his client disagrees, he has no right to engage in disrespectful and offensive personal attacks upon the ability and integrity of the ALJ; such attacks violate counsel's "professional obligation to demonstrate respect for the courts." *Id.* at 6. *Accord* ABA Model Rules of Professional Conduct, Preamble, Rules 3.5 and 8.2 (1999).
>
> The requirement that counsel refrain from immaterial, offensive excoriation of the ALJs before whom he appears, does not conflict with the counsel's ethical duty to represent his clients "with zeal and fidelity within the rules." Rhesa Hawkins Barkdale, *The Role of Civility in Appellate Advocacy*, 50 South Carolina Law Review, 573, 577 (1999). Quite to the contrary, "the use of odiums, sarcasm, and vituperative remarks have no place in a brief and are wholly unwarranted. Frankly, resort to the use of such statements is an indication of a lack of confidence in the law and the facts to support the position of the one using them." *State ex rel. Dyer v. Union Electric Co.*, 312 S.W.2d 151,154 (Mo. Ct. App. 1958). A brief containing such invective ordinarily should be stricken. *Accord Dranow v. United States*, 307 F.2d 545, 549 (8th Cir. 1962). We find no reason to depart from the general rule in this case and accordingly, we **GRANT** TVA's Motion to Strike Pickett's opening brief. However, in this one instance, so that Pickett will not pay the price of his counsel's inappropriate statements, we will permit counsel to correct his professional lapse by deleting all personally disparaging remarks from his opening brief and resubmitting the brief to us, otherwise unedited and with the addition of no new argument or other material, by **November 16, 2000.** (If the brief is sent through the U.S. Mail or similar service, it **must** be postmarked no later than November 16, 2000). Nonetheless, the parties and their counsel are hereby given notice that, in the future, the ARB may strike, without a similar opportunity to refile, briefs or other filings containing professionally inappropriate content.

The ARB denied a motion for reconsideration, rejecting therein Slavin's argument that his attacks on the ALJ were protected by his *client's* right to free expression. Rather, the ARB pointed out that their ruling was directed to Slavin's professional obligations rather than to his client's rights to free expression. *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ Nos. 1999-CAA-25 and 2000-CAA-9 (ARB Nov. 16, 2000) [EX 10-B].

I find that the ARB's decisions in Case Nos. 1999-CAA-25 and 2000-CAA-9 provide clear and convincing evidence that Slavin was admonished for conduct that is improper under MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice). See also the discussion

fo *Pickett* in the "*Other Conduct*" section of this *Order Denying Authority to Appear*, *infra* (motion to disqualify entire ARB panel).

3. Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy

As noted elsewhere in this decision, in *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6), USDOL/OALJ Reporter at n.10 [HTML] (ARB Oct. 31, 2000), *appeal dismissed (default)*, Nos. 00-9545, 01-9529 (10th Cir. Nov. 20, 2001) [EX 6-C], the ARB described Slavin's attacks on the presiding judge as factually inaccurate and insulting, and in disregard of ABA Model Rules of Professional Conduct, Preamble, Rules 3.5 and 8.2 (1999). I find that the ARB's decision in Case Nos. 1998-CAA-10 *et al.* provides clear and convincing evidence that Slavin was admonished for conduct that is improper under MRPC 3.5(a) (seeking to influence a judge by improper means), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

4. Williams v. Lockheed Martin Corp.

As noted elsewhere in this decision, in *Williams v. Lockheed Martin Corp.*, ARB Nos. 99-054 and 99-064, ALJ Nos. 1998-ERA-40 and 42, USDOL/OALJ Reporter at 9-10 [HTML] (ARB Sept. 29, 2000) [EX 7-C], the ARB found that Slavin had pursed a frivolous complaint, had made "personal and vitriolic attacks" on the presiding administrative law judge, and that his characterizations of the ALJ's actions were factually inaccurate and insulting. I find that the ARB's decision in Case Nos. 1998-ERA-40 and 42 provides clear and convincing evidence that Slavin was admonished for conduct that is improper under MRPC 3.5(a) (seeking to influence a judge by improper means), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal),

MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

5. Seater v. Southern California Edison Co.

In *Seater v. Southern California Edison Co*., 1995-ERA-13, USDOL/OALJ Reporter at 3 [HTML] (ARB Sept. 27, 1996) [EX 4], the ARB cautioned counsel for both parties – one of whom was Slavin -- that "denigrating statements regarding opposing counsel and overtly hostile exchanges . . . , as well as introduction of extraneous issues [*e.g.*] (comment 'for the record,' that certain exhibits had been provided to Congressional investigators) serve only to cloud the issues at hand and to delay the completion of the adjudication by the Department of Labor." I find that the ARB's decision in Case Nos. 1995-CAA-20-22 provides clear and convincing evidence that Slavin was admonished for conduct that is improper under MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

6. Erickson v. U.S. Environmental Protection Agency

In *Erickson v. U.S. Environmental Protection Agency*, 1999-CAA-2, USDOL/OALJ Reporter at 3 [HTML] (ALJ Jan. 24, 2002 [EX 8-A]), the ALJ declined to disqualify Slavin, but warned that systematic personal attacks, name calling and obtuse behavior could make a section 18.36 motion appropriate in the future. I find that the ALJ's decision in Case Nos. 1999-CAA-2 provides clear and convincing evidence that Slavin was admonished for conduct that is improper under MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

7. Campbell v. Travelers Insurance Co.

In *Campbell v. Travelers Insurance Co*., 2002 WL 215663 *6-8, 2002 Tenn. LEXIS 43 (Tenn.Workers Comp.Panel Feb 7, 2002) [EX 23-A], Slavin was admonished by the Supreme Court of Tennessee, Special Workers' Compensation Appeals Panel, for an offensive and personal attack on the trial judge, to wit:

> CONDUCT OF COUNSEL FOR MS. CAMPBELL
>
> Having discussed the issues raised on this appeal, we cannot avoid the unpleasant task of addressing the conduct of Edward A. Slavin**,** attorney for Ms. Campbell in this case. We find certain conduct constituting a personal attack on the trial judge by Mr. Slavin to be offensive and improper, such as the following:
>
> (a) In a pleading styled "Plaintiff's Corrected Motion for New Trial" counsel made statements critical of the trial judge without providing any support thereof, including the following:
>
> (1) "The Trial Court rushed his consideration of this case on a day when he appeared preoccupied. The Trial Judge took a two-hour lunch for personal business. He then unfairly restricted the amount of time for cross examination of the Defendant's medical expert and refused to allow a rebuttal witness to be called on another day. He then took an inadequate amount of time for a rushed reading of the transcript and exhibits to the depositions of the Plaintiff's treating physician and medical expert, Dr. Alan Lieberman."
>
> **7* (2) "The Trial Court erred by mocking and trivializing the treatment provided by Dr. Alan Lieberman, who is a published, Board-certified expert on toxic materials, their effect on the human body, and treatment."
>
> (3) "The Trial Court showed bias and prejudice by making pejorative remarks about 'press releases' that appear to indicate that Judge Workman may recall and resent a prior interaction with Plaintiff's counsel in 1990, when Judge Workman was Knox County Law Director, regarding a controversial proposal to build a $175 million incinerator."
>
> (4) "The Trial Court rudely interrupted Ms. Campbell in the midst of her testimony, abruptly taking an early lunch and depriving Ms. Campbell of an orderly presentation of her direct testimony about her injury and illness."

(5) "The Trial Court in effect 'shot from the hip' on an occupational disease case."

(6) "(T)he Trial Court made erroneous conclusions, revealing his prejudice and bias, and improperly making himself a witness to the contents of confidential communications."

(7) "It appears that the Trial Court may have permitted his own tolerance for tobacco smoke to color his judicial response to the effect of chemicals upon Mrs. Campbell's health, career and employability. The Trial Courts' lifestyle choice and personal opinions (e.g., about the risks and benefits of ingesting toxic materials) should not be permitted to deny Mrs. Campbell a fair trial."

(b) In the Brief of Appellant Mary Jane Campbell filed in this Court, Mr. Slavin made statements critical of the trial judge unsupported by the record such as the following:

(1) "The Trial Judge based his decision on prejudice: he drove under the inference. The Trial Judge unreasonably based his decision on information he did not know: this is the judicial equivalent of building a skyscraper upon a House of Cards."

(2) The Trial Judge's deeply insensitive statements about Ms. Campbell's note taking..."

(3) "Here, the Trial Judge's cabined view led him far astray ..."

(4) "Here, however, the Trial Judge made no intent to hide his intent: to be a 'cat's paw' for Defendant, denying Ms. Campbell a fair trial, even attempting to have her counsel disciplined for filing a Motion for New Trial."

(5) "The Trial Court scorned First Amendment Rights."

(6) "The Trial Judge dispensed 'injustice' though it appears in this case that this was possibly not from a mere 'mischance."

These allegations contradict Mr. Slavin's acknowledgment that this was his first worker's compensation case, and his statement that he appreciated the trial judge's "patience in cross examination and everything else." It appears that Mr. Slavin may not be a seasoned trial attorney familiar with all the nuances of trial practice when he erroneously states in both his Appellant's Brief and Reply Brief filed in this Court that a motion for new trial was a procedural prerequisite for appeal. A motion for new trial is not necessary in non-jury cases, such as worker's compensation claims. Rule 3(e), Tennessee Rules of Appellate Procedure. In addition, Mr. Slavin filed a series of "citations" of supplemental authority in this Court that added nothing new and failed to address the key element of

> his client's case, i.e. proof that his client was exposed to Diazinon in her workplace. ***8***
>
> Seasoned or not, all attorneys practicing in the Court of this State must abide by Tennessee's Code of Responsibility which provides: "In appearing in a professional capacity before a tribunal, a lawyer shall not:
>
> .....
>
> (6) Engage in undignified or discourteous conduct which is degrading to a tribunal."
>
> .....
>
> Rule 8, Rules of the Supreme Court, Canon 7, DR 7-106(C).
>
> We find that Mr. Slavin's conduct in this case violates the word and spirit of Canon 7. Mr. Slavin has previously been the subject of sanctions for misconduct, such as a personal attack maligning adversary counsel's character, by the United States District Court for the Eastern District of Tennessee. See *Lockheed Martin Energy Systems, Inc. v Slavin,* 190 F.R.D. 449 (U.S.Dist.Ct., E.D.Tenn., 1999). The District Court judge noted that Mr. Slavin had been barred from appearing before two different Administrative Law Judges for engaging in abusive personal attacks on the judges. This type of repetitive misconduct can neither be tolerated nor ignored. The Clerk of this Court shall furnish a copy of this opinion, and make available the court file in this cause, to the Board of Professional Responsibility of the Supreme Court of Tennessee for appropriate action.

I find that the Tennesee Workers Compensation Panel's decision in *Campbell* provides clear and convincing evidence that Slavin was admonished for conduct that is improper under MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice). *See also Board of Professional Responsibility of the Supreme Court of Tennessee v. Slavin*, No. 154861-3, slip op. at 4 (Tenn. 2002) (finding that Slavin's undignified and discourteous conduct violated Tennessee DR 7-106(B)(6)), *appeal to Tenn. S. Ct. pending*. Although this conduct did not occur in relation to a U.S. Department of Labor, Office of Administrative Law Judge proceeding, it provides clear evidence that Slavin's allegations that the Department of Labor is singling him out for retaliation for his criticism of DOL administration of whistleblower programs is not credible. Rather, it is Slavin's own conduct that is the proximate cause of his being sanctioned.

8. Santamaria v. U.S. Environmental Protection Agency

Official notice is taken pursuant to 29 C.F.R. § 18. 45 that in *Santamaria v. U.S. Environmental Protection Agency*, 2004-ERA-6 (ALJ Jan. 28, 2004) [EX 27-A], the Respondent had filed a motion for summary decision with the ALJ, attaching thereto a copy of the Complainant's deposition. The Complainant objected on a number of grounds, and the ALJ ruled in Complainant's favor that the deposition, having been offered as an exhibit to the motion, should have been sent to Complainant's counsel, who was Slavin. The ALJ, however, also admonished Slavin:

> All other objections and requests made in the Complainant's motion are rejected. This includes the frivolous request that the Respondent not refer to its exhibits as "Government Exhibits." Counsel for Complainant is cautioned that wasting time with frivolous motions may be grounds for sanctions.

Id., slip op. at 2. In his subsequent recommended decision granting summary decision to the Respondent, the ALJ observed:

> Within a footnote of Complainant's Response, Complainant again objects to Respondent referring to itself as "the Government." (Compl. Resp., at 14 fn.14). Complainant previously made a similar objection in his motion filed January 24, 2004. That motion was ruled upon in an order issued January 28, 2004, at which time I rejected Complainant's request that Respondent not refer to its exhibits as "Government Exhibits." In that order, counsel for Complainant was cautioned as to making frivolous motions. In his current response, Complainant makes additional arguments on this point and requests that this Court "reconsider his ruling in light of the revelations." (Compl. Resp., at 14 fn.14). Complainant's request remains frivolous and his arguments without basis, and therefore, I again reject his request.

Santamaria v. U.S. Environmental Protection Agency, 2004-ERA-6, slip op. at 12 (ALJ Feb. 24, 2004). [EX 27-B]

I find that the ALJ's decision in Case No. 2004-ERA-6 provides clear and convincing evidence that Slavin was admonished for a violation of MRPC 3.1 (pursuit of non-meritorious claim).

Other conduct

1. Erickson v. U.S. Environmental Protection Agency

In *Erickson v. U.S. Environmental Protection Agency*, 2003-CAA-11, USDOL/OALJ Reporter at n.2 [HTML] (ALJ Apr. 14, 2003) [EX 18], the ALJ found that Slavin had engaged in dilatory tactics in pre-hearing pleadings. I find that the ALJ's decision in Case No. 2003-CAA-11 provides clear and convincing evidence that Slavin violated MRPC 8.4(d) (conduct prejudicial to the administration of justice).

2. Varnadore v. Oak Ridge Laboratory

In *Varnadore v. Oak Ridge Laboratory*, 1994-CAA-2, USDOL/OALJ Reporter at 2-3 [HTML] (ALJ June 23, 1995) [EX 1-A], the ALJ imposed a 25% reduction in the attorney fee award because Slavin "'papered' [the ALJ], the record, and opposing counsel with pleadings, letters, and even newspaper articles, many of which were unnecessary and/or irrelevant." I find that the ALJ's decision on attorney's fees in Case No. 1994-CAA-2 provides clear and convincing evidence that Slavin violated MRPC 1.1 (lack of competent representation) and MRPC 8.4(d) (conduct prejudicial to the administration of justice).

3. Peer Review Requests

Slavin has filed a number of unsubstantiated peer review requests, not for a proper purpose, but for the purpose of harassing and intimidating judges:

- Metairie Office's procedure for assignment of whistleblower complaints on September 9, 1994 and September 21, 1994.

- Administrative Law Judge Mahony on November 12, 1994.
- Administrative Law Judge Quentin McColgin on September 9, 1994, as renewed on November 14, 1994.
- Administrative Law Judge Jeffrey Tureck on April 3, 1997
- Administrative Law Judge Barnett on January 27, 1997.
- Administrative Law Judge Henry B. Lasky on October 1, 1998.
- Administrative Law Judge Larry Price on October 7, 2002.

[EX 24]

I find that Slavin's pattern and practice of filing peer review complaints against ALJs based on frivolous charges of misconduct provides clear and convincing evidence of violations of MPRC 3.1 (pursuing a non-meritorious claim), MRPC 3.5(a) (seeking to influence a judge by improper means), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice). *See also Board of Professional Responsibility of the Supreme Court of Tennessee v. Slavin*, No. 154861-3, slip op. at 3 (Tenn. 2002) (finding that Slavin's use of the peer review system was for the purpose of systematically harassing and attempting to intimidate judges, and violated Tennessee DR 1-102(A)(5), engaging in conduct that is prejudicial to the administration of justice), appeal to Tenn. S. Ct. pending.

4. Williams v. Lockheed Martin Corp.

In *Williams v. Lockheed Martin Corp.*, ARB Nos. 99-054 and 99-064, ALJ Nos. 1998-ERA-40 and 42 (ARB July 13, 1999) [EX 7-B], Slavin made the baseless allegation that an ARB member had engaged in an improper *ex parte* communication. The Board wrote:

> Complainants' allegation of an appearance of impropriety is based on a Memorandum from Richard Fairfax, OSHA's Director of the Directorate of Compliance Programs, to John B. Miles, Jr., Regional Director, Occupational Safety and Health Administration, dated February 19, 1999. Fairfax's Memorandum apparently was written in response to correspondence that OSHA received from Complainants' counsel raising concerns about whistleblower investigations the OSHA Region VI office was performing. Fairfax states in his Memorandum that Complainants' counsel previously corresponded with the Secretary about these concerns, and raised similar complaints about investigative work in other OSHA regional offices. Fairfax also states in his Memorandum that Complainants' counsel "has also asked for the recusal of all Administrative Law Judges who have presided over hearings for his clients, and made charges against Chief Administrative Law Judge John Vittone and Administrative Review Board Member Cynthia Atwood [sic]."
>
> Complainants contend that the Fairfax Memorandum's reference to ARB Member Attwood "raises a clear question as to whether there was any an [sic] *ex parte* communication between Mr. Fairfax and a member of the ARB or its staff on matters being litigated before them." Lockheed responds that the Memorandum "conveys none of the facts, implications, or arguments contained in the complainants' objection."
>
> The Board, of course, must consider carefully the allegation that a Board Member's participation in a case would raise an appearance of impropriety. However, we strongly disagree with Complainants' assertion that Fairfax's Memorandum raises a "clear" question as to the existence of any *ex parte* communication, whether direct or indirect, between Board Member Attwood and Fairfax. Member Attwood does not know Richard D. Fairfax, and to her knowledge has never had any direct or indirect communication with him. No Board Member has communicated with Fairfax, and we are not aware that any member of the Administrative Review Board's staff has communicated with Fairfax. We therefore conclude that Member Attwood's consideration of Complainant's case would not create an appearance of impropriety because Complainants' allegation that Member Attwood possibly engaged in *ex parte* communication with Richard Fairfax is baseless. Accordingly, Complainants' objection to Member Attwood's consideration of these cases is **DENIED.**

I find that the ARB's decision in Case Nos. 1998-ERA-40 and 42 provides clear and convincing evidence that Slavin violated MPRC 3.1 (pursuing a non-meritorious claim), MRPC 3.5(a) (seeking to influence a judge by improper means), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

5. Pickett v. Tennessee Valley Authority

In *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ No. 2000-CAA-9 (ARB May 14, 2003) [EX 10-C], Slavin filed a motion to disqualify the entire ARB panel following the ARB's decision affirming the ALJ's dismissal of his client's whistleblower complaint. The ARB found that the motion to disqualify was unsupported by the facts and the applicable law, and summarily denied the recusal motion. I find that the ARB's decision in Case No. 1998-ERA-40 and 42 provides clear and convincing evidence that Slavin violated MPRC 3.1 (pursuing a non-meritorious claim), MRPC 3.5(a) (seeking to influence a judge by improper means), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

6. Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy

In *Rockefeller v. Carlsbad Area Office, U.S. Dept. of Energy*, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6, USDOL/OALJ Reporter at 13 [HTML] (ARB Oct. 31, 2000), *appeal dismissed (default)*, Nos. 00-9545, 01-9529 (10th Cir. Nov. 20, 2001) [EX 6-C], Slavin's request for recusal of an ARB member was found to be wholly without foundation. The ARB wrote:

> In a July 5, 1999 cover letter to his Rebuttal Brief in Rockefeller II, III, and IV, Rockefeller's counsel "object[ed] to Ms. Cynthia Attwood deciding this case by reason of her involvement in OSHA Compliance Director Richard D. Fairfax's enclosed defamatory memorandum . . . ." The referenced Memorandum is from Richard Fairfax, the Occupational Safety and Health Administration's Director of the Directorate of Compliance Programs, to John B. Miles, Jr., Regional Director, OSHA, dated February 19, 1999. Fairfax's Memorandum apparently was written in response to correspondence from Complainant's counsel raising concerns about whistleblower investigations being performed by the OSHA Region VI office. Fairfax, in his Memorandum, stated that Complainant's counsel previously had corresponded with the Secretary about these concerns, and that Complainant's counsel had raised similar complaints about investigative work in other OSHA regional offices. Fairfax also stated in his Memorandum that Complainant's counsel "has also asked for the recusal of all Administrative Law Judges who have presided over hearings for his clients, and made

> charges against Chief Administrative Law Judge John Vittone and Administrative Review Board Member Cynthia Atwood [sic]." Attached to the Rebuttal Brief is a July 4, 1999 letter from Rockefeller's counsel to Tom Buckley, Director, OSHA Office of Investigative Assistance entitled "Rockefeller V Complaint and Request for Recusals." Among many other things, the letter states "any involvement by ARB Member Ms. Cynthia Attwood in this case at any stage of the proceedings would be an appearance of impropriety." There is no further explanation in the Rebuttal Brief or any of the attachments of the basis for the charge that ARB Member Attwood was "involved" in the Fairfax memorandum.
>
> The Board, of course, must consider carefully the allegation that a Board Member's participation in a case would raise an appearance of impropriety. However, we strongly disagree with Rockefeller's assertion that Fairfax's Memorandum raises a "clear" question as to the existence of any ex parte communication, whether direct or indirect, between Board Member Attwood and Fairfax. Member Attwood does not know Richard D. Fairfax, and to her knowledge has never had any direct or indirect communication with him. No Board Member has communicated with Fairfax, and we are not aware that any member of the Administrative Review Board's staff has communicated with Fairfax. We therefore conclude that Member Attwood's consideration of these cases would not create an appearance of impropriety because Rockefeller's allegation that Member Attwood possibly engaged in ex parte communication with Richard Fairfax is baseless. We DENY the request for recusal as wholly without foundation.

I find that the ARB's decision in Case No. 1998-CAA 10 *et al.* provides clear and convincing evidence that Slavin violated MPRC 3.1 (pursuing a non-meritorious claim), MRPC 3.5(a) (seeking to influence a judge by improper means), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice). [22]

[22] I also observe that shortly after the ARB issued a decision in *Smith v. EBASCO Constructors*, 1993-ERA-16 (ARB Aug. 27, 1998), Slavin wrote to Ms. Attwood and the then Chair of the ARB, complaining that the Board had issued an insulting decision slashing the ALJ's compensatory damage award. [EX 24-B] Slavin wrote: "Why? Who are your? What is your purpose for taking your job at the ARB? Why did you become a lawyer?... American workers will now be killed in unsafe workplaces because of the chilling effects of this dangerous deeply insensitive, offensive decision, which fails to compensate Mr. Smith for what was done to his life. ARB's decision ranks with the Dred Scott decision among the injustices in American history...." The letter goes on to allege that the decision lacked compassion and intellectual integrity and was a "disgrace to the human race." Slavin stated that the decision was "mean-spirited, penny-pitching, hamhanded, and highhanded" and read like the ARB "did not read the briefs, did not read the record, and decided to 'tilt' toward Corporate America...." Slavin wrote that the decision "reads as if it were written by some effete snob with limited life or work experience, who looks down their [sic] nose at working people and their suffering." The decision, Slavin wrote, was "cruel, indecent and totally outside the pale of civility, mocking Mr. Smith for asking for damages consistent with those awarded in federal state courts." This letter was copied on a wide variety of persons.

7. *Seater v. Southern California Edison Co.*

In *Seater v. Southern California Edison Co.*, 1995-ERA-13 (ALJ Oct. 17, 1995), a case in which Slavin represented Complainant Seater, District Chief Administrative Law Judge Robert Kaplan had recommended dismissal of the complaint. Upon review, the ARB accepted in part Judge Kaplan's recommendation, but found that he had erred in some of his evidentiary rulings, and remanded for additional proceedings on whether Seater had established a hostile work environment claim. *Seater v. Southern California Edison Co.*, 1995-ERA-13 (ARB Sept. 27, 1996). [EX 4-A]

During the remand proceedings, Slavin filed on behalf of his client a January 29, 1997 filing "Motion to Vacate Post-Remand Orders and Pre-Hearing Exchange." [EX 24-P] In the cover letter attached to the Motion, Slavin indicated that an associate would be filing a Motion for Judicial Recusal later that week. At the conclusion of the letter, he implied that Judge Kaplan's rulings had been illegitimately motivated, to wit:

> The purpose of the ARB order is to provide a fair hearing and fair weighing of the evidence, both of which ARB found the Court denied. It is wrong for a judge to punish Complainant for dislike of his lawyer or anger at being reversed. See Code of Judicial Conduct. As President Clinton said in his Second Inaugural, "nothing big ever came from being small."

In the Motion itself, Slavin accused Judge Kaplan of "many highly prejudicial statements, accompanying prejudicial rulings" and of dealing with the case in an "at best cavalier" manner. Slavin wrote:

> An outsider might suspect that the Court might be unconsciously showing favoritism toward Morgan, Lewis & Bockius (a Philadelphia-based law firm) and to the Nation's second largest electric power company. The December 24, 1996 decision is more empty proceduralism based perhaps on the desire of the Court to avoid work, e.g., the Court's backward-bending labor supply curve.

Slavin also implied that Judge Kaplan had improperly influenced a fellow Administrative Law Judge's interpretation of the law ("...where another Judge in the Camden office had a similar

misperception of the law, perhaps acquired from Judge Kaplan.") A copy of the cover letter and enclosures were copied to the GAO and Attorney General Janet Reno, amongst others.

On February 4, 1997, Judge Kaplan issued Post-Remand Order No. 7. [EX 4-B] In that Order, the Judge addressed grounds stated in a February 3, 1997 motion to recuse. Judge Kaplan found that several of remarks Slavin alleged exhibited bias or misunderstanding of the case by Judge Kaplan were taken out of context. The motion was also based on Slavin's assertion that Judge Kaplan may have been angered by him, that he may dislike Slavin, and that he was prejudiced against Slavin because of Slavin's zealous advocacy. Judge Kaplan noted that he had cautioned Slavin in an earlier order about "ad hominem remarks and hyperbole" directed at the Respondent, but observed that his concern was not about vigorous advocacy. Judge Kaplan stated that he had not prejudged the case, and that he was not biased or prejudiced. He summed up by noting that "the wheels of any judicial proceeding would grind to a halt if that vehicle could be obstructed simply because the court made several rulings that favored one side against the other, or because the court expressed impatience or annoyance with an attorney representing a litigant."

On Friday, February 7, 1997, Slavin telephoned the OALJ office at which Judge Kaplan is the District Chief Judge to determine the name of the union steward for the employees of that office. Several days after this inquiry, a union representative telephoned the office to inquire into the status of the office environment. [EX 24-Q]

On February 10, 1997, Slavin telephoned Judge Kaplan's legal technician to complain that Judge Kaplan had issued "rubber stamp" denials of the several motions. The legal technician reported that:

> Mr. Slavin said he doesn't understand JK's irrational behavior lately. That when JK worked for NLRB and SSA he did not behave like this, he was fair to workers in similar situations like this.
>
> Mr. Slavin stated he has seen other judges' behavior change and it has been due to illness. He suggested JK may have had a mid-line stroke or may have a brain

tumor which may have affected him. I should watch his behavior and take note of his health. I should maybe call his wife and discuss JK's health with her. If he has a health problem it could affect the Camden office.

[EX 24-Q]

In a subsequent telephone conference call, Judge Kaplan admonished Slavin for making *ex parte* communications, and asked Slavin to inform counsel for the Respondent about his telephone calls, to wit:

ADMINISTRATIVE LAW JUDGE:
* * *
The next item is a number of occasions in which Mr. Slavin has communicated with me or my office without making Mr. Schmutz or any other attorney for the Respondent aware of the submission. And I kind of shrugged it off, but it's happening frequently; and I think upon reflection, it's important to get this resolved. There should be no ex parte communications. And I want to get this out in the open right now.

[EX 4-C] The transcript indicates that Judge Kaplan, Slavin and counsel for the Respondent discussed several written communications and determined that they were not, in fact, *ex parte*. Judge Kaplan, however, then turned to Slavin's telephone calls.

ADMINISTRATIVE LAW JUDGE:
Okay, fine. Then there was a telephone call from Mr. Slavin to my office this past Friday, the 7th of February. And do you want to fill Mr. Schmutz in on that telephone call, Mr. Slavin?

MR. SLAVIN:
I am not sure what Your Honor is referring to.

ADMINISTRATIVE LAW JUDGE:
You called my office and spoke to one of the legal technicians here on Friday.

MR. SLAVIN:
I asked an informational question, and I requested some information. It was not case-related information, and the information was provided, I think, by a law clerk.

ADMINISTRATIVE LAW JUDGE:
Well, what was the -- it was not related to the case that we are dealing with today?

MR. SLAVIN:

It was not related to any facts involving Southern California Edison. I asked for the name of the union steward who represents the rank-and-file employees in Your Honor's office.

ADMINISTRATIVE LAW JUDGE:
Right. And that was not related to the case that we are dealing with?

MR. SLAVIN:
I was not asking that union steward for any information relating to Southern California Edison if that's what you mean.

ADMINISTRATIVE LAW JUDGE:
What were you asking -- you told the legal technician that you wanted to know the person that an employee in my office would contact at the union to file a grievance or complaint against an Administrative Law Judge in the office,- is that correct?

MR. SLAVIN:
That's correct.

ADMINISTRATIVE LAW JUDGE:
Okay, and then yesterday morning after receiving my orders denying two of your motions, you called and spoke to my legal technician, Constance Murphy. Do you want to tell Mr. Schmutz about that conversation?

MR. SLAVIN:
Yes, I will, Your Honor. We were planning to tell Mr. Edgar in a conference call on this Thursday at 9:00 a.m. about that conversation, but I would be happy to tell Mr. Schmutz now on the record.

ADMINISTRATIVE LAW JUDGE:
Let's go.

MR. SLAVIN:
I expressed concern to Ms. Murphy about Your Honor's health. And I asked her -- I didn't ask her any questions about Your Honor's health, but I asked her to be watchful and I pointed out that it seemed that Your Honor was behaving differently since the remand, and that in light of the fact that men of a certain age are reluctant to go to a doctor if they have a health problem and that certain health problems such as a brain tumor or mid-line stroke are concealed and not known for some time, that I was concerned that Your Honor's actions, in particular, denying motions without the other party being heard and acting in an extremely prejudicial fashion toward Mr. Seater.

ADMINISTRATIVE LAW JUDGE:
"Irrational behavior" is the language you used.

MR. SLAVIN:
I think I used the word irascible. I don't know if I used the word irrational. I may have. I didn't take notes on the conversation, but I did use indeed the word irascible, i-r-a-s-c-i-b-l-e. And I suggested that she might want to speak to your wife and be watchful because I was aware, for instance, in OALJ in the Washington office we had a couple of judges who became abusive toward parties and toward staff members, and it turned out

> that both of them had undiagnosed health problems that were life threatening. And I told her that I respected Your Honor, that you had worked 14 years for the NLRB, that you had worked in private practice representing Labor, that I thought that you were fair prior to the remand. And that since the remand, you have been angry at Mr. Seater and his counsel and you have been acting most unfairly. And I thought it was out of character.
>
> * * *

[EX 4-C]

It is not improper, in itself, to file a motion to recuse based on a belief that a trial judge is possibly biased or prejudiced. In the *Seater* matter, however, Slavin used the filing of such a motion as a means to present unwarranted innuendo about Judge Kaplan's integrity and character. Furthermore, Slavin's ex parte contacts with Judge Kaplan's staff to learn the name of the union steward and to suggest that Judge Kaplan may have health related problems close on heels of rulings adverse to Slavin's clients were clearly an effort to disrupt operations in that OALJ office. Thus, I find that the above noted ARB and ALJ decisions and orders in Case No. 1995-ERA-13, together with the report of conduct and transcript of the telephone conference call provide clear and convincing evidence that Slavin violated MRPC 3.5(a) (seeking to influence a judge by improper means), MRPC 3.5(b) (improper *ex parte* communication with the presiding judge), MRPC 3.5(d) (engaging in conduct intended to disrupt a tribunal), MRPC 8.2 (false statements about the qualifications or integrity of a judge) and MRPC 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

FIRST AMENDMENT DEFENSE

Slavin's essential defense is that his actions were protected First Amendment speech. Slavin attempts to characterize all of the various sanctions and admonishments and the instant Judicial Inquiry as seeking to punish him for criticizing DOL administration of whistleblower laws. The fatal flaw with Slavin's position, however, is that he has never been cited for his out of court speech. Rather, each and every sanction and admonishment has been for actions or inactions taken in court proceedings, such as making *ex parte* communications with judges,

ignoring or defiantly refusing to comply with lawful orders, failing to cooperate in discovery, failing to make filings in a timely manner, and pursuit of non-meritorious and vexatious claims or defenses. Moreover, much of Slavin's misconduct, such as neglecting appellate briefing requirements and deadlines, is not even arguably protected First Amendment speech.

As Administrative Law Judge Henry B. Lasky stated in his Order Barring Counsel from Future Appearances in *Rockefeller v. U.S. Department of Energy*, 1998-CAA-10 and 11 (ALJ Sept. 28, 1998):

> There is no First Amendment protection, as claimed by Mr. Slavin, for abusive remarks critical of the judiciary, where those statements are false and prejudicial to the administration of justice. *Ramsey v. Board of Professional Responsibility of the Supreme Court of Tennessee*, 771 S.W. 2d 116 (Sup. Ct. Tenn. 1989). The Seventh Circuit has found that "[e]ven a statement cast in the form of an opinion ("I think that Judge X is dishonest") implies a factual basis, and the lack of support for that implied factual assertion may be a proper basis for a penalty." *Matter of Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995). *See, In the Matter of Harlan E. Grimes*, 364 F.2d 654, 656 (10th Cir. 1966) (court affirmed attorney disbarment because attorney made no attempt to substantiate his charges against the judiciary and has not demonstrated in any manner that he had any grounds or probable cause for making such assertions); *cf. Standing Committee on Discipline of U.S. Dist. Court for Cent. Distr. of California v. Yagman*, 55 F.3d 1430 (9th Cir. 1995) (although court granted broad First Amendment protection to attorney criticizing judiciary, the attorney did not make such remarks directly to the presiding judge in court documents).
>
> Even if Mr. Slavin is afforded a First Amendment protection in his remarks and criticisms of the undersigned, his abusive attacks directed to the undersigned in court documents and improper professional conduct throughout the matter herein, have demonstrated a failure to meet the standard of conduct as set forth in 29 C.F.R. §§ 18.34(g)(3), 18.36. A distinction must be made between out of court criticism, opinions, and remarks about a judge which may be protected by the First Amendment and in court speech or court documents of the same nature directed to the judge which are contemptuous and constitute improper professional conduct or violate standards of conduct. The failure to make such distinction would render the concept of improper attorney conduct a nullity.

The great weight of recent authority in American jurisprudence consistently holds that the First Amendment does not protect attorneys who make harassing or threatening remarks about the judiciary or opposing counsel in court filings. *See, e.g., Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 793 N.E.2d 425, 2003-Ohio 4048 (Ohio 2003), *recon. denied*, 100 Ohio St.3d 1426, 797 N.E.2d 93, 2003-Ohio-5232 (Ohio 2003), *cert. denied, Gardner v. Office of*

Disciplinary Counsel, ___ S.Ct. ___, 2004 WL 77768, 72 USLW 3465, 72 USLW 3547 (2004); *In re Petition for Disciplinary Action Against Nathan*, 671 N.W.2d 578 (2003); *In re Arnold*, 274 Kan. 761, 56 P.3d 259 (Kan.2002); *Burton v. Statewide Grievance Committee*, 830 A.2d 1205 (Conn.Super. 2002), *aff'd*, 79 Conn.App. 364, 829 A.2d 927 (Conn.App. 2003), *cert. denied*, 267 Conn. 903, 838 A.2d 209 (Conn. 2003); *The Florida Bar v. Ray*, 797 So.2d 556 (Fla. 2001), *reh'g denied* (Oct 01, 2001), *cert. denied, Ray v. Florida Bar*, 535 U.S. 930, 122 S.Ct. 1302, 152 L.Ed.2d 214 (2002); *In re Gershater*, 17 P.3d 929 (Kan. 2001); *In re Shearin*, 765 A.2d 930 (Del. 2000), *cert. denied, Shearin v. Board on Professional Responsibility of Supreme Court of Delaware*, 534 U.S. 961, 122 S.Ct. 368, 151 L.Ed.2d 279, 70 USLW 3268 (2001); *In re Green*, 11 P.3d 1078 (Colo. 2000), *reh'g denied* (Oct. 10, 2000) (where attorney's comment implies an objective fact that can be proven as false); *The Florida Bar v. Sayler*, 721 So.2d 1152 (Fla. 1998), reh'g denied (Dec. 15, 1998), *cert. denied, Sayler v. Florida Bar*, 528 U.S. 890, 120 S.Ct. 213, 145 L.Ed.2d 179 (1999); *In re Wisehart*, 721 N.Y.S.2d 356 (N.Y.A.D. 1 Dept. 2001), appeal dismissed, leave to appeal denied, 96 N.Y.2d 935, 759 N.E.2d 369, 733 N.Y.S.2d 370 (N.Y. 2001). *See also Attorney's Criticism of Judicial Acts as Ground for Disciplinary Action*, 12 A.L.R.3d 1408, § 6 (2004); *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ Nos. 1999-CAA-25, 2000-CAA-9 (ARB Nov. 2, 2000) (while Slavin has the right to criticize rulings of an ALJ with which his client disagrees, "he has no right to engage in disrespectful and offensive personal attacks upon the ability and integrity of the ALJ; such attacks violate counsel's professional obligation to demonstrate respect for the courts"). *Compare Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Visser*, 629 N.W.2d 376 (Iowa 2001) (Lawyers' out-of-court statements regarding matters in litigation are entitled to First Amendment protection).

Thus, although Slavin would like to promote the claim that he is being sanctioned for First Amendment protected speech as an outspoken critic of the Department of Labor, such a claim is a misrepresentation. Rather, Slavin is being sanctioned for his disruptive actions and malfeasance during in-court proceedings where his First Amendment's rights are subject to his ethical obligations as an attorney.

ASSESSMENT OF SANCTION

In consideration of whether a global disqualification of Slavin is appropriate, OALJ will apply the AMERICAN BAR ASSOCIATION'S STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (1992) ("ABA-SLD"). These standards assist tribunals in consideration of all relevant factors relevant to imposing the appropriate level of sanctions in an individual case, consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline, and providing consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions. ABA-SLD 1.3. The following ABA-SLD standards are applicable:

ABA-SLD 4.4 LACK OF DILIGENCE

Under ABA-SLD 4.41 disbarment is generally appropriate when a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client or when a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client. I find clear and convincing evidence that Slavin filed documents before the ARB knowing that they were not in compliance with ARB pleading standards and that he was thereby jeopardizing his clients' cases. I find clear and convincing evidence that Slavin neglected several appeals before the ARB resulting in those appeals being dismissed for want of prosecution. These findings merit disqualification under 29 C.F.R. § 18.34(g).

ABA-SLD 4.5 LACK OF COMPETENCE

Under ABA-SLD 4.5, disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client. I find clear

and convincing evidence that Slavin has on a number of occasions failed to plead essential elements of a whistleblower complaint, such that either the complaint should never have been brought in the first place or that Slavin exhibited gross incompetence in failing to amend the complaint to remedy the defect. Moreover, Slavin's inability or unwillingness to file pleadings in compliance with straightforward ARB pleading requirements illustrates gross incompetence. These findings merit disqualification under 29 C.F.R. § 18.34(g).

ABA SLD 6.1 FALSE STATEMENTS, FRAUD, AND MISREPRESENTATION

Under ABA SLD 6.11, disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding. I find clear and convincing evidence that Slavin has repeatedly made factual and legal misrepresentations and presented outright untruths to DOL tribunals. These false statements and misrepresentations merit disqualification under 29 C.F.R. § 18.34(g).

ABA-SLD 6.2 ABUSE OF THE LEGAL PROCESS

Under ABA-SLD 6.21 disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding. I find clear and convincing evidence that Slavin has habitually and knowingly violated court orders or rules both to the detriment of his clients and in interference with DOL whistleblower adjudicatory proceedings. He has also habitually abused the legal process by proffering non-meritorious claims or defenses, often with intent to use legal process to harass or intimidate. This abuse of the legal process merits disqualification under 29 C.F.R. § 18.34(g).

ABA-SLD 6.3 IMPROPER COMMUNICATIONS WITH INDIVIDUALS IN THE LEGAL SYSTEM

Under ABA-SLD 6.31 disbarment is generally appropriate when a lawyer:(a) intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or (b) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or (c) improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes significant or potentially significant interference with the outcome of the legal. I find by clear and convincing evidence that Slavin has habitually and intentionally made communications with DOL ALJs, some of which were *ex parte*, in an attempt to harass and intimidate the judge and thereby gain advantage in the legal proceeding. Such communications merit disqualification under 29 C.F.R. § 18.34(g).

Aggravating factors

Under the ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS "aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed." ABA-SLD 9.21. Aggravating factors include:

> (a) prior disciplinary offenses; provided that after 7 or more years in which no disciplinary sanction has been imposed, a finding of minor misconduct shall not be considered as an aggravating factor;
>
> (b) dishonest or selfish motive;
>
> (c) a pattern of misconduct;

(d) multiple offenses;

(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;

(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(g) refusal to acknowledge wrongful nature of conduct;

(h) vulnerability of victim;

(i) substantial experience in the practice of law;

(j) indifference to making restitution;

(k) obstruction of fee arbitration awards by refusing or intentionally failing to comply with a final award.

ABA-SLD 9.22.

I find clear and convincing evidence that Slavin has previously been sanctioned and/or admonished for disciplinary offenses by the District Court for the Eastern District of Tennessee, Tennessee State Courts,[23] the ARB and various ALJs. I find clear and convincing evidence that Slavin's motive in some filings was to follow a personal agenda to show contempt for DOL administration of whistleblower laws rather than the best interests of his clients. I find clear and convincing evidence that Slavin has engaged in a pattern of such misconduct involving multiple offenses, and that prior admonishments and sanctions have been unavailing to produce moderation in his behavior, but rather seem to have emboldened him toward misconduct of greater frequency and brashness. I find clear and convincing evidence that Slavin has intentionally, and in bad faith, refused to comply with simple and unambiguous directives in the

[23] In *Board of Professional Responsibility of the Supreme Court of Tennessee v. Slavin*, No. 154861-3 (Tenn. 2002), a Tennessee court imposed on Slavin a three year suspension from the practice of law for a variety of violations, such as obtaining a continuance under false pretenses, not returning clients' files timely, and severely damaging his clients by following a personal agenda. [EX 29] An appeal of this holding is on appeal to the Tennessee Supreme Court.

instant Judicial Inquiry proceedings not to file documents by fax[24] and to properly file documents with the undersigned rather than with the Chief ALJ, thereby exhibiting contempt for the authority of this tribunal. Slavin also attempted to intimidate this tribunal by requesting a Secretarial and OIG investigation into the legality of this Judicial Inquiry.[25] I find clear and convincing evidence that Slavin engaged in deceptive practices during this Judicial Inquiry. Specifically, in his filings with the ARB seeking a writ of mandamus for OALJ to schedule a hearing on the merits of Somerson's case, Slavin failed to disclose to the ARB the most essential fact -- that the reason for the delay in scheduling Somerson's hearing is the instant Judicial Inquiry into Slavin's qualifications.[26] Slavin's responses to the *Notice of Judical Inquiry* exhibit by clear and convincing evidence that he does not acknowledge the wrongful nature of his conduct, but rather wears it as a badge of honor. I find by clear and convincing evidence that Slavin took advantage of his clients' lack of knowledge about administrative judicial process to promote a private agenda. I find by clear and convincing evidence that Slavin has well over ten

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[24] In the *Notice of Judicial Inquiry* Slavin was expressly directed not to fax or e-mail his response. Slavin, however, apparently cannot conceive of why he should be required to comply with such a directive. Thus, in evidently purposeful defiance of that directive, Slavin has faxed all filings related to this matter without seeking prior permission. OALJ rules of practice do not permit filings by fax unless permitted by statute or regulation or with prior permission of the presiding ALJ. 29 C.F.R. § 18.3(f).

[25] For example, in *In the Matter of Daniel Friedland*, 416 N.E.2d 433 (Ind. 1981)), *cert. denied*, *Friedland v. Disciplinary Com'n of Indiana Supreme Court*, 454 U.S. 857, 102 S.Ct. 308, 70 L.Ed.2d 153 (1981), the lawyer filed charges against members of the Disciplinary Committee and witnesses in the lawyer disciplinary hearing. The lawyer attempted to use the lawsuit to intimidate and discredit those who administered and prosecuted grievances against him. In holding that the lawyer was not protected by the First Amendment, the court recognized the harm to judicial integrity. The court held "It is the Constitutional duty of this Court, on behalf of sovereign interest, to preserve, manage, and safeguard the adjudicatory system of this State. The adjudicatory process cannot function when its officers misconstrue the purpose of litigation. The respondent attempted to influence the process through the use of threats and intimidation against the participants involved. This type of conduct must be enjoined to preserve the integrity of the system. The adjudicatory process, including disciplinary proceedings, must permit the orderly resolution of issues; Respondent's conduct impeded the order of this process" (416 N.E.2d at 438). *See also Admonition Regarding A.M.E.*, 533 N.W.2d 849 (Minn. 1995) (conduct designed to chill ethics complaint, which thereby interferes with disciplinary process, is prejudicial to the administration of justice).

[26] Not until a February 23, 2004 filing with the ARB does Slavin even make any reference to the reason for the delay in scheduling a hearing on Somerson's complaint, to wit: "Fully 85 days after Mr. Somerson requested a hearing, none has been scheduled and OALJ is harassing his attorney and trying to deny Mr. Somerson the right to counsel of his choice." [EX 32-N] Even this reference is oblique, at best.

Likewise, Slavin recently filed a letter with the ARB in *Anderson v. Environmental Protection Agency*, 2004-ERA-15, complaining about delay in OALJ scheduling of a hearing for Ms. Anderson, a copy of which was faxed to this office. The letter, however, fails to disclose to the ARB the reason for the delay -- that the *Anderson* case was stayed pending resolution of this section 18.34(g)(3) proceeding. Such lack of candor is an aggravating factor supporting disqualification of Slavin to appear before DOL OALJ.

years of experience in the practice of law, the bulk of which involved practice before DOL OALJ. I find that factors (j) and (k) are not applicable.

Plainly, the aggravating factors in this matter overwhelming support disqualification.

Mitigating factors

Under the ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS "mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." ABA-SLD 9.31. Mitigating factors include:

> (a) absence of a prior disciplinary record;
>
> (b) absence of a dishonest or selfish motive;
>
> (c) personal or emotional problems;
>
> (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
>
> (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
>
> (f) inexperience in the practice of law;
>
> (g) character or reputation;
>
> (h) physical or mental disability or impairment;
>
> (i) unreasonable delay in disciplinary proceeding provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from that delay;
>
> (j) interim rehabilitation;
>
> (k) imposition of other penalties or sanctions;
>
> (l) remorse;

(m) remoteness of prior offenses;

(n) prompt compliance with a fee arbitration award.

ABA-SLD 9.31.

I find that there is no evidence to support mitigation based on factors (a), (b), (c), (d), (e), (f), (h), (i), (j), or (l). I find that factor (n) is not applicable.

In regard to factor (g), in his response to the *Notice of Judicial Inquiry*, Slavin appears to argue that he has a good reputation because he purportedly has been successful in representing clients against federal agencies, and obtaining punitive damages in that regard. The only case which Slavin identified in this regard, however, was *Erickson v. Environmental Protection Agency*, 2003-CAA-11 (ALJ Nov. 13, 2003). In an earlier proceeding involving the same parties and the same presiding ALJ, Slavin had to be admonished against systematic personal attacks, name calling and obtuse behavior, *Erickson v. U.S. Environmental Protection Agency*, 1999-CAA-2, USDOL/OALJ Reporter at 3 [HTML] (ALJ Jan. 24, 2002) [EX 8-A] and failed to timely file a petition for fees and costs, *Erickson v. U.S. Environmental Protection Agency*, 1999-CAA-2 (ALJ Feb. 7, 2003) [EX 8-D]. The circumstance that Slavin's clients sometimes have meritorious claims does not, standing alone, provide character or reputation evidence about Slavin sufficient to provide a mitigating factor in a disciplinary proceedings.

In regard to factor (k), in many of the proceedings cited in the Appendix to the *Notice of Judicial Inquiry*, Slavin was sanctioned or admonished. The instant proceeding, however, is an inquiry into whether the cumulative effect of all those prior sanctions and admonishments indicate that Slavin should be globally disqualified from appearing before DOL's OALJ. Accordingly, imposition of other penalties or sanctions is not a significant mitigating factor.

In regard to factor (m), a few of the judicial findings cited in the matters over which administrative notice was taken in this Judicial Inquiry occurred in the mid-1990s. However, these instances were the subject of a referral by the DOL Chief Administrative Law Judge to the

Board of Professional Responsibility of the Tennessee Supreme Court in December of 1998. The Tennessee Supreme Court only recently heard oral argument from an appeal by Slavin of a three year suspension imposed by a Tennessee state court judge, which is partly based on the Chief ALJ's complaint. *See Board of Professional Responsibility of the Supreme Court of Tennessee v. Slavin*, No. 154861-3 (Dec. 2002). [EX 29] Accordingly, any mitigation based on the remoteness of prior offenses is only a slight factor in the instant proceeding. Moreover, the instant Judicial Inquiry was prompted in large part by the cumulative effect of Slavin's conduct over time, although the proximate event was Slavin's conduct in his representation of Somerson. By its nature, this type of inquiry will involve a review of conduct over time.

In sum, the only mitigating factor is the remoteness of some of Slavin's offenses. However, for the reasons stated above, this is an inconsequential element of mitigation.

Appropriate sanction

Under the criteria stated in the AMERICAN BAR ASSOCIATION'S STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS, there is an overwhelming basis for global disqualification of Slavin in OALJ proceedings. Slavin has been sanctioned and admonished many times already, and it is now clear than lesser disciplinary action than global disqualification will not suffice. Accordingly, I find that Slavin must be globally disqualified from the privilege of appearing before DOL OALJ in a representative capacity pursuant to 29 C.F.R. § 18.34(g)(3).

SUMMATION

An order denying an attorney the authority to appear before DOL OALJ is a serious matter as it may serve to deprive that attorney of part of his livelihood and negatively impact on his or her professional reputation. Accordingly, this tribunal has carefully considered Slavin's

conduct and his arguments in defense. Nonetheless, the point should be made that this is not a close case. Nor does it present difficult legal issues. Slavin's conduct clearly has been improper and he clearly has no intention of changing his behavior based on prior sanctions and admonishments. His contempt for administrative process has so clouded his judgment that his refusal to comply with simple court procedures is causing some of his clients' cases or appeals to be dismissed without a hearing on the merits. The cumulative experience of this office leaves no doubt that Slavin uses legal process for improper purposes, such as to harass or to cause unnecessary delay or needless increases in the cost of litigation. Moreover, in the past year he has exhibited with increasing frequency negligence in meeting deadlines and a pigheaded refusal to comply with straightforward procedural rules directly resulting in great harm to his clients' cases.

The Department of Labor has been measured in its response to Slavin's conduct in whistleblower adjudications. However, after years of sanctions and admonishments, five disqualifications by judges for misconduct, a $10,000.00 Rule 11 sanction imposed by a Federal district court relating to DOL whistleblower proceedings, and in the past several months procedural dismissals of several of his clients' cases based principally or entirely on Slavin's obstreperous conduct or gross negligence, Slavin still has not reformed his conduct. Thus, Slavin must be globally disqualified from entering appearances in a representative capacity before OALJ to prevent further harm to his clients, opposing parties, and the judicial system.

ORDER

Based on the foregoing, **IT IS ORDERED** that attorney Edward A. Slavin, Jr. is hereby **IMMEDIATELY DISQUALIFIED** from appearing in a representative capacity before the United States Department of Labor, Office of Administrative Law Judges. The disqualification applies not only to Case No. 2004-STA-12, but to all cases which are currently before OALJ and which may be filed or returned on remand to OALJ in the future. The Department's administrative law judges will be informed of this *Order Denying Authority to Appear* with

directions to take appropriate steps to protect the interests of any litigant currently being represented by Slavin, such as providing time for the litigant to obtain new counsel. A presiding judge will be assigned for consideration of Somerson's case on the merits in Case No. 2004-STA-12 forthwith. Somerson may address the question of whether he will proceed *pro se* or with new counsel with that judge, when he or she is assigned.

By its terms, section 18.34(g)(3) only applies to proceedings before OALJ. A copy of this Order, however, will be transmitted to the Administrative Review Board, the Solicitor of Labor, and the Directorate of Enforcement Programs, Occupational Safety and Health Administration, for their consideration of whether the disqualification should extend beyond OALJ.

Slavin may apply for readmission to practice before OALJ in five years from the date of this *Order Denying Authority to Appear*. *See* ABA-SLD 2.10. If he reapplies, he must show by clear and convincing evidence that he has completed a program of rehabilitation, that he has complied with all applicable disciplinary order or rules, and that he is fit to practice law. *Id.* OALJ may at that time consider whether readmission, if granted, will be conditioned on probationary requirements or completion of other remedies. *See* ABA-SLD 2.10 (incorporating by reference ABA-SLD 2.7 and 2.8).

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THOMAS M. BURKE
Associate Chief Administrative Law Judge