In The Matter Of:

C. D. VARNADORE,

COMPLAINANT,

v.

OAK RIDGE NATIONAL LABORATORY AND LOCKHEED MARTIN ENERGY SYSTEMS, INC.,[1/]

RESPONDENTS.

CASE NOS. 92-CAA-2
92-CAA-5
93-CAA-1

(*VARNADORE I*)

DATE: June 14, 1996

IN THE MATTER OF

C. D. VARNADORE,

COMPLAINANT,

v.

OAK RIDGE NATIONAL LABORATORY, LOCKHEED MARTIN ENERGY SYSTEMS, INC., AND LOCKHEED MARTIN CORPORATION,

RESPONDENTS.

CASE NOS. 94-CAA-2
94-CAA-3

(*VARNADORE II)*

IN THE MATTER OF

C. D. VARNADORE,

v.

CASE NO. 95-ERA-1

(*VARNADORE III)*

[1/] Effective May 19, 1995, the name of Respondent Martin Marietta Energy Systems, Inc., was changed to Lockheed Martin Energy Systems, Inc. Respondent Martin Marietta Corporation's name was changed to Lockheed Martin Corporation. The case captions have been changed accordingly.

OAK RIDGE NATIONAL LABORATORY;
LOCKHEED MARTIN ENERGY
SYSTEMS, INC.; LOCKHEED MARTIN CORP.;
LOCKHEED MARTIN TECHNOLOGIES;
ORNL AND LOCKHEED MARTIN ENERGY SYSTEMS
MEDICAL, HEALTH, HEALTH PHYSICS, OCCURRENCE
REPORTING, ENVIRONMENTAL
MONITORING, AND INDUSTRIAL HYGIENE DEPARTMENTS;
M. ELIZABETH CULBRETH, ESQ.;
WILBUR DOTREY SHULTS, PH.D.;
SECRETARY OF ENERGY HAZEL O'LEARY AND
DEPARTMENT OF ENERGY; OAK RIDGE OPERATIONS,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[2/]

FINAL CONSOLIDATED DECISION AND ORDER

This is a final decision in three cases brought by Complainant C. D. Varnadore (Varnadore) against his employer, Lockheed Martin Energy Systems (Energy Systems), Oak Ridge National Laboratory (ORNL), and various other individuals and entities.[3/] This decision resolves the issues remaining in *Varnadore I* and all issues presented in *Varnadore v. Oak Ridge*

[2/] These matters were filed with the Secretary of Labor pursuant to 29 C.F.R. § 24.6 (1995). On January 26, 1996, the Secretary issued a Decision in *Varnadore I*. On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under the statutes at issue here to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996) (copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization is also attached.

[3/] The first case, *Varnadore v. Lockheed Martin Energy Systems, Inc.*, Case Nos. 92-CAA-2, 92-CAA-5, and 93-CAA-1 (*Varnadore I*), resulted in a Secretarial Decision and Order (*Varnadore I* D. and O.), which resolved most of the issues presented, but retained jurisdiction of the case so that two allegations of post-complaint retaliation could be considered in light of the other *Varnadore* cases. *Varnadore I* D. and O., Jan. 26, 1996, slip op. at 84. The Board has reviewed the decision issued by the Secretary and the entire record in these cases in rendering this Final Consolidated Decision and Order.

National Laboratory, et al., Case Nos. 94-CAA-2 and 94-CAA-3 (*Varnadore II*), and in *Varnadore v. Oak Ridge National Laboratory, Lockheed Martin Energy Systems, Inc.*, et al., Case No. 95-ERA-1 (*Varnadore III*). Certain facts and legal principles are common to more than one of the *Varnadore* cases. Moreover, an understanding of the facts in *Varnadore I* will enlighten the discussion in this decision.

BACKGROUND

A. *Varnadore I*

Beginning in November 1991, Complainant C. D. Varnadore, an employee of Respondent Energy Systems at ORNL,[4/] alleged in a series of complaints that he had engaged in activity protected by the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C. § 7622 (1988); the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 (1988); the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(I) (1988); the Water Pollution Control Act (WPCA), 33 U.S.C. § 1367 (1988); and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 (1988) (sometimes collectively referred to as the environmental whistleblower provisions). Varnadore asserted that as a result he had been subjected to a series of retaliatory acts commencing in 1989 and continuing through and after the first hearing in that case. On June 7, 1993, the ALJ issued a Recommended Decision and Order (*Varnadore I* R. D. and O.), recommending that Energy Systems be found to have retaliated against Varnadore, and that relief be granted.

On review the Secretary of Labor issued a Decision and Order on January 26, 1996 (*Varnadore I* D. and O.), which concluded that Varnadore's November 1991 complaint had not been timely filed. *Varnadore I* D. and O. at 59-67. Therefore those portions of the Varnadore *I* complaints relating to retaliation which was alleged to have occurred prior to the applicable 30 day statutory limitations period were dismissed. *Id.* at 84. Further, the Secretary held that Varnadore failed to prove that his performance evaluation for FY-91 was retaliatory. *Id.* at 73-75. Finally, the Secretary concluded that allegations of two acts of retaliation occurring after the filing of the November 1991 complaint were timely, and that it would be prudent to evaluate those two incidents in conjunction with *Varnadore II* and possibly *Varnadore III* in order to determine if Varnadore was subjected to a hostile work environment as a result of his filing of the November 1991 complaint. *Id.* at 68, 82-84. The Secretary therefore retained jurisdiction over *Varnadore I*. *Id.* at 84.

B. *Varnadore II*.

[4/] Energy Systems operates ORNL under contract with DOE. *See Varnadore I* D. and O. at 5 n.6.

In the meantime, by mutual agreement, in February 1993 Varnadore transferred to another division of ORNL at an equivalent salary.[5/] However, on June 9, 1993, two days after the ALJ issued his R. D. and O. in *Varnadore I*, Varnadore filed the first complaint contained in *Varnadore II* (93-CAA-02). Varnadore alleged that Energy Systems had continued to retaliate against him in violation of the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988 and Supp. V 1993).[6/] Varnadore alleged the following acts of retaliation:

> * On January 19, 1993, Varnadore's supervisor, Darrell Wright, gave him a performance evaluation for FY-92 which contained negative statements about Varnadore's performance.
>
> * Although Varnadore received a 3.7 percent salary increase as a result of his FY-92 performance appraisal, Varnadore challenged Energy Systems' failure to have awarded him increases in previous years.
>
> * On April 28, 1993, several months after Varnadore had transferred out of the Analytical Chemistry Division (ACD), Division Director W. D. Shults held a staff meeting to discuss topics of interest to the Division. In response to a question from an ACD employee about the status of *Varnadore I*, Shults stated that briefs had been submitted to the ALJ, and that a decision was expected in approximately a month.
>
> * After the R. D. and O. in *Varnadore I* was issued, Energy Systems released a statement to the news media which stated Energy Systems' intention to seek review of the decision, but characterized the R. D. and O.'s monetary award ($30,000.00) as "modest."[7/]

On July 29, 1993, Varnadore filed a complaint with the Wage and Hour Division in Docket Number 94-CAA-3, in which he alleged that Charles R. Levenhagen, an Energy Systems

---

[5/] On August 20, 1993, Varnadore wrote to one of his new supervisors, informing him that since transferring he had "been very fortunate to have had the help and support of everyone [he had] come in contact with." *Varnadore II*, Respondent's Exhibit (RX) 15.

[6/] Unlike *Varnadore I*, which was brought under the CAA, TSCA, SDWA, WPCA, and CERCLA, the first complaint in *Varnadore II* explicitly was brought solely under the ERA. Complaint to DOL Wage and Hour Division, dated June 9, 1993. Therefore the "CAA" docket identification is erroneous. However, no purpose would be served by altering the docket designation at this late date.

[7/] Varnadore had sought $11 million in compensatory and exemplary relief in *Varnadore I*.

labor management specialist, had made a derogatory remark about Varnadore to another Energy Systems employee during a training course for Energy Systems security personnel.[8/]

On April 6, 1994, the ALJ issued an order granting partial summary judgment in *Varnadore II* (*Varnadore II* O. S. J.). He ruled that there were material facts in dispute with regard to the FY-92 performance evaluation and the 3.7 percent salary increase Varnadore was given as a result of that performance appraisal.[9/] However, the ALJ granted summary judgment with regard to the Shults statement, the Energy Systems press release, and the Levenhagen incident. O. S. J. at 6-7, 9-12. Pursuant to the O. S. J. the ALJ dismissed 94-CAA-3. Recommended Order of Dismissal of Case Number 94-CAA-3 (*Varnadore II* R. O. D.), April 29, 1994.

On May 17-18 a hearing was held on the two issues remaining in *Varnadore II*, and on October 17, 1994, the ALJ issued a Recommended Decision and Order (*Varnadore II* R. D. and O.). With regard to the 3.7 percent raise, the ALJ found that the raise was in the normal range for raises granted to employees in Varnadore's position during FY-92, was not retaliatory, and that Varnadore had not contested it in any event. *Varnadore II* R. D. and O. at 10. The ALJ also reaffirmed the granting of summary judgment regarding the Levenhagen incident.[10/] However, the ALJ found that the narrative in Varnadore's FY-92 performance appraisal was "suspect" and its retention in Varnadore's file was "unfair and prejudicial. *Varnadore II* R. D. and O. at 4-10.

> The ALJ concluded that an award of damages was not warranted:
> It was not established that Complainant suffered a monetary loss during fiscal year 1992 as a result of the performance appraisal and Respondent's conduct has not been such that exemplary damages are warranted.

Varnadore II R. D. and O. at 11. The ALJ recommended that Energy Systems be ordered to expunge Varnadore's FY-92 appraisal from its records and "not take any adverse actions against Mr. Varnadore without good cause shown." *Id.*[11/]

[8/] Levenhagen was alleged to have said that Varnadore was not "worth a damn, never has been, never will be, and they ought to take a gun and shoot him." Mincey Affidavit at 1.

[9/] On May 5, 1994, the ALJ issued a Clarifying Order of Summary Judgment (C. O. S. J.) explicitly limiting the salary increase issue to the March 1, 1993 salary increase, and clarifying that questions pertaining to Varnadore's salary level based upon prior performance appraisals were *res judicata* as a result of *Varnadore I*.

[10/] Although the ALJ had granted summary judgment regarding the Levenhagen incident, he permitted testimony on that issue at the evidentiary hearing.

[11/] On June 23, 1995, the ALJ issued a Recommended Order Awarding Attorney's Fee and Cost [sic] in this case. On September 11, 1995, the Secretary of Labor pursuant to 29 U.S.C. § 5851(b)(2)(A) and (B) (1988 and Supp. V 1993), issued a Preliminary Order that Energy

(continued...)

C. *Varnadore III.*

In the meantime, Varnadore filed his complaint in *Varnadore III* on August 2, 1994, asserting jurisdiction under the whistleblower provisions of the CAA, TSCA, Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6971 (1988), CERCLA, the Solid Waste Disposal Act (SWDA) (which is another name for RCRA), and the ERA. *Varnadore III* Complaint at 11. He asserted that he had engaged in protected activity by bringing *Varnadore I*, and had engaged in other protected activity which he did not wish to specify "[f]or reasons that are obvious in a workplace so hostile to protected activity . . . ." *Id.* Varnadore made the following allegations:

> * Respondent Department of Energy (DOE) retaliated against Varnadore by reimbursing Energy Systems for its legal expenses incurred in defending *Varnadore II*. Complaint, ¶¶ 3-11, 61.
>
> * Respondent Energy Systems retaliatorily hired M. Elizabeth Culbreth, the former Director of the Department of Labor Office of Administrative Appeals, to assist it in the Varnadore cases "less than a year after she left her position on January 20, 1993 . . . ." *Id.,* ¶¶ 11-14, 62A.
>
> * At a public "stakeholders' meeting" at Oak Ridge on April 29, 1994, Respondent DOE Secretary Hazel O'Leary made a negative private remark to Varnadore "expressing contempt for Mr. Varnadore with her facial expressions and tone of voice."[12/] *Id.*, ¶¶ 15-18.
>
> * When Varnadore asked a question at the stakeholders' meeting Secretary O'Leary claimed that she had to leave. Varnadore asserted that "[a]irline and personal schedules of Respondent Secretary O'Leary should be verified, as there are apparently later flights that could have taken Secretary O'Leary back to Washington D.C." *Id.*, ¶ 20.
>
> * "Both Senator [James] Sasser and Representative [Marilyn] Lloyd avoided Mr. Varnadore as if he were a pariah after the Oak Ridge stakeholder meeting." *Id.*, ¶ 21.
>
> * When Varnadore was introduced at the stakeholders' meeting "[t]here were multiple, audible murmurs expressing disdain and ridicule, including but not

---

[11/] (...continued)
Systems expunge Varnadore's FY-92 performance appraisal from his personnel file and pay counsel for Vamadore $27,174.83 in attorney's fees and costs.

[12/] Elsewhere in the complaint Varnadore asserted that Secretary O'Leary's comment to Varnadore was "redolent with the smell of blacklisting communications . . . ." Complaint, ¶ 35.

limited to grunts and groans" from members of the audience, which was made up of ORNL personnel and other people. *Id.*, ¶ 23.

* Varnadore was introduced by Oak Ridge's Vice Mayor at the meeting in a "stigmatizing fashion." *Id.*, ¶ 24.

* Energy Systems improperly used Varnadore's confidential medical files in *Varnadore I*. *Id.*, ¶¶ 37-45.

* Energy Systems failed properly to post the Energy Reorganization Act at its facilities. *Id.*, ¶ 47-53.

* Energy Systems distributed and relied upon an "inadequate and inept" report prepared under the direction of Judge William Webster by the law firm of Milbank, Tweed, Hadley and McCloy "in resisting change that would end the hostile working environment" at ORNL. *Id.*, ¶ 35.

* DOE "demonstrated continuing unfitness to protect whistleblower rights." *Id.*, ¶ 91.

* Respondents Lockheed Martin Corporation and Lockheed Martin Technologies engaged in a pattern and practice of discrimination against whistleblowers. *Id.*, ¶¶ 93-98.

Varnadore requested wide-ranging relief, including:

* "[R]einstatement to a suitable position in a non-hostile working environment free of discrimination against employee protected speech" (*Id.*, ¶ 114A);

* Compensatory damages;

* Punitive damages;

* "[R]easonable attorney fees and other litigation costs, including interim attorney fees and litigation costs between the time of the ALJ's order and the final decision of the Secretary of Labor" (*Id.*, ¶ 114D);

* "[F]rontpay in the event that reinstatement is held not feasible" (*Id.*, ¶ 114E);

* "[N]on-discriminatory terms and conditions of employment including but not limited to purging of all derogatory information from all files regarding Mr. Varnadore as part of the final order in Varnadore I, Varnadore II, and Varnadore III" (*Id.*,¶ 114F);

* "[A]n order for each Respondent to cease and desist violating employees' civil and constitutional rights to engage freely and without coercion in protected activity under whistleblower laws, the First Amendment to the U.S. Constitution" [sic] (*Id.*, ¶ 114G);

* An order granting injunctive relief and affirmative action to prevent any further discrimination against other ORNL and Lockheed Martin employees and ordering the posting of a notice to all employees (*Id.*, ¶ 114H);

* An order that Secretary O'Leary continue her 'prematurely concluded April 26, 1994 "stakeholders" meeting in Oak Ridge . . . this time answering Mr. Varnadore's questions . . .' (*Id.*, ¶ 114I);

* An order that the heads of Lockheed Martin, and DOE conduct "mandatory meetings of all DOE, [Energy Systems] and contractor employees during normal working hours of each shift to apologize for the discrimination against [Varnadore], and that this meeting be shown live on any management television systems . . ." (*Id.*, ¶ 114J);

* Mandatory sensitivity training for ORNL managers (*Id.*, ¶ 114K);

* An order requiring all Respondents to "reprimand each and every management agent or other employee responsible for discrimination against Mr. Varnadore and others, and that [Energy Systems] employees responsible for discrimination be terminated, including Respondent Dr. Wilbur Dotrey Shults . . ." (*Id.*, ¶ 114L);

* An order to "Respondent M. Elizabeth Culbreth to cease work on Mr. Varnadore's case or on any DOL cases filed before January 20, 1993, or on any case involving any Varnadore I witnesses who allege retaliation . . ." (*Id.*, ¶ 114N);

* Injunctive relief against DOE prohibiting DOE from reimbursing Energy Systems for legal defense against whistleblower actions, ordering DOE to cease and desist misinforming employees about their whistleblower rights; compensatory and exemplary damages; payment of attorneys fees; an order that DOE, Secretary O'Leary, and DOE ORO "divest from the routine operations of the operating contractor(s) in Oak Ridge, Tennessee and elsewhere -- and from those other DOE, DOD, CIA, NSA, JRO and NASA contractors and sites currently operated by [Energy Systems, Lockheed Martin, Lockheed Martin Technologies and other Lockheed Martin subsidiaries] -- in perpetuity, the functions of:

a. environmental protection monitoring,
b. analysis of environmental samples,

c. health physics,
d. industrial hygiene,
e. occurrence reporting,
f. occupational safety and health,
g. occupational medicine,
h. security,
i. any other function involving an organizational conflict of interest affecting protected activity or occurrence reporting regarding safety, health and environmental matters under the energy and environmental whistleblower laws, or section 11(c) of the Occupational Safety & Health Act and DOE orders and regulations"

(*Id.*, ¶ 115D.1);

* An order requiring DOE to "enter into contracts with fiercely independent providers of such services lacking any organizational, personal or financial motivation for providing inaccurate data and untrue or misleading assurances about employee health in the face of radiation and toxic substances" (*Id.*, ¶ 115D.2).

The Respondents all moved to dismiss the complaint on several grounds, including that it was untimely filed and failed to state a claim upon which relief could be granted. Following briefing on those motions, on September 20, 1995, the ALJ issued a Recommended Order of Dismissal (*Varnadore III* R. O. D.). The ALJ concluded that each charge made in the complaint should be dismissed for a variety of reasons. The case is now before the Board for review, and the parties have all filed briefs.

DISCUSSION

In *Varnadore I* the Secretary resolved all aspects of Varnadore's original complaints with the exception of two acts of post-complaint retaliation: the "Murphy incident," and the "posting incident." The decision stated:

> In the interests of fairness and adjudicatory economy I retain jurisdiction of this case so that instances of retaliation which occurred after Varnadore filed his November 20, 1991 complaint can be considered in light of the history of this case and in conjunction with the allegations contained in [*Varnadore II*].[13/]

Varnadore I D. and O. at 84.

[13/] The Secretary also stated that if he deemed it prudent he would consider *Varnadore III* in conjunction with the issues remaining in *Varnadore I* and those raised in *Varnadore II*. *Varnadore I* D. and O. at 84.

As the Secretary indicated in *Varnadore I*, the two instances of post-complaint retaliation, which did not involve "tangible job detriment," are appropriately analyzed within the "hostile work environment" construct articulated by the Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and refined in *Harris v. Forklift Systems*, Inc., 114 S.Ct. 367 (1993). *See Varnadore I* D. and O. at 77-83. One of the critical factors in a hostile work environment case is whether the discrimination was "pervasive and regular." *Varnadore I* D. and O. at 79, *citing West v. Philadelphia Electric Co.*, 45 F.3d 744 (3d Cir. 1995). The goal in electing to evaluate the Murphy and posting incidents together with any subsequent incidents of retaliation was to allow an analysis of the "overall, composite effect on [Varnadore's] terms, conditions, and privileges of employment . . . ." *Varnadore I* D. and O. at 83-84, *quoting King v. Hillen*, 21 F.3d 1572, 1581 (Fed. Cir. 1994). *See also Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) (discrimination analysis must concentrate on the "overall scenario"). These principles first require a determination whether the claims in *Varnadore II* and *Varnadore III* are sustainable, and then an evaluation of the *Varnadore I* post- complaint acts of retaliation together with the conclusions reached in *Varnadore II* and *Varnadore III*.

For the reasons discussed in detail below, we conclude that the ALJ correctly recommended granting partial summary judgment in *Varnadore II*, but that he erred in finding that Varnadore's FY-92 performance evaluation was retaliatory. We also conclude that the allegations contained in the *Varnadore III* complaint should be dismissed on various grounds. Finally, because there are no retaliatory acts remaining after an appropriate analysis of *Varnadore II* and *Varnadore III*, we analyze the Murphy and posting incidents alone. We conclude that these two incidents, when considered in conjunction with each other, did not result in Varnadore being subjected to a hostile work environment.

I. *Varnadore II.*

A. Whether the ALJ Correctly Recommended Partial Summary Judgment.

The ALJ recommended summary judgment regarding Shults' statement, Energy Systems' press release, and the Levenhagen incident. For the reason's discussed below we conclude that summary judgment is appropriate with regard to the Shults and press release claims. The Levenhagen incident is treated separately.

A motion for summary decision in an environmental whistleblower case is governed by 29 C.F.R. §§ 18.40 and 18.41 (1995). *See, e.g., Webb v. Carolina Power & Light Company*, Case No. 93-ERA-42, Sec. Dec. and Ord., July 17, 1995, slip op. at 4-5. A party opposing such a motion "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 18 C.F.R. § 18.40(c) (1995).

Under the analogous Rule 56(e), Fed. R. Civ. P., the non-moving party "may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial . . . . [T]he [party opposing summary judgment] must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby*, 477 U.S. 242, 256-257 (1986). *See also, Celotex Corp. v. Catrett*,

477 U.S. 317 (1986).[14/] If the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," there is no genuine issue of material fact, and the movant is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. at 322-323.

Application of these standards to this case leads to the conclusion that the ALJ appropriately recommended that summary decision be granted to Energy Systems regarding the Shults statement and the Energy Systems press release issues.

1. Shults' Statement.

The ALJ correctly ruled that summary judgment should be ordered against Varnadore regarding his allegation that Shults engaged in retaliatory adverse action when he discussed the status of *Varnadore I* at an ACD staff meeting. In an affidavit accompanying Energy Systems' Brief in support of its Motion for Summary Judgment (Res. S. J. Br., 94-CAA-2), Dr. Shults described the meeting at which he made the allegedly retaliatory comments about *Varnadore I*:

> We conducted a regular quarterly meeting of employees in ACD that was held on April 28, 1993 . . . . I had not scheduled any remarks concerning the Varnadore matter. At the start of the meeting I spoke briefly on several items of interest to the Division . . . . At the close of my remarks and before introducing the principal speaker at the meeting, I asked, as is my custom, if there were any questions. One question asked of the status of the Varnadore case. My response was that briefs had been submitted and that a decision was expected in approximately a month. I made no statement as to the anticipated nature of the decision. I did not say that paper work would be completed within thirty days of the decision or that the case would then be over. I did not say anything regarding "old culture" or that "nothing would change." I deny that I spoke in a mocking or condescending tone in any sense or that I made any "blacklisting commentary". Other than to say that briefs had been filed and that a decision was expected in approximately a month, my only other remark in response to the question was that the decision would be ultimately made upon review by the Secretary of Labor.

Id., Appendix (APX) at 25.

In his Response to Energy Systems' Motions for Summary Judgment (Comp. Resp.), Varnadore presented several arguments regarding Shults' statement:

> In [the ACD meeting] Dr. Shults violated Mr. Varnadore's rights yet again by giving a speech about this action in which he commented that the Administrative Law Judge's decision was due any day, that after the ALJ's decision was received, paperwork would be completed within thirty days and everything regarding this

---

[14/] However, "[t]he evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby*, 477 U.S. at 255.

> case would be over. The implication of his remarks was that the "old culture" would survive the scrutiny of the Administrative Law Judge and the Secretary of Labor in this action, and that nothing would change.
>
> Dr. Shults' affidavit makes clear that Dr. Shults invaded Mr. Varnadore's privacy by his comments, discussing Varnadore I with a roomful of potential witnesses in future potential whistleblower action [sic] in Mr. Varnadore's absence. Dr. Shults did not apologize to Mr. Varnadore at that meeting, or any other meeting held in ACD since the filing of the complaint. Instead, Dr. Shults had a mocking and condescending tone toward Mr. Varnadore, whom the Wage-Hour Division and the Administrative Law Judge both hold [sic] has been subjected to a hostile working environment. It appears that Dr. Shults' purpose in making the hostile remarks was to further isolate Mr. Varnadore and ACD employees who testified truthfully at the trial in this action in July and December 1992.

Comp. Res. at 43-44. However, Varnadore did not support his allegations about Shults' statement with any affidavits or other evidentiary support.

The ALJ correctly rejected this claim. First, Varnadore failed to support his allegation with facts. The non-moving party may not defend against a motion for summary judgment with "mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256. Here, Varnadore has presented no *facts* whatsoever regarding Shults' statement at the ACD meeting. Varnadore was not present at the meeting and heard second hand that Shults had made reference to *Varnadore I*.[15/] O. S. J. at 6. Varnadore made no attempt to present any *evidence* regarding what Dr. Shults said.

In any event, it would be preposterous to conclude that a reference by Dr. Shults to the status of *Varnadore I* constitutes retaliatory adverse action. As the ALJ held:

> Mr. Varnadore contends that the import of this statement was to blacklist or isolate him.
>
> * * * *
>
> Mr. Varnadore was not working in Dr. Shults' division and did not attend the meeting. Further, nothing in the statement suggests that the remarks impacted upon or in any ma[nn]er affected Mr. Varnadore's employment status or work environment. Therefore, I find that the record taken as a whole would not lead a rational trier of fact to find for Mr. Varnadore on this issue.

[15/] Varnadore did not attend the ACD staff meeting because he had transferred to another division.

Varnadore II O. S. J. at 6-7. This recommended conclusion is correct.

2. Energy Systems' Press Release.

Varnadore's claim regarding Energy Systems' press release following the issuance of the R. D. and O. in *Varnadore I* is equally without merit. There is no disagreement as to the content of the press release, which was quoted by the *Knoxville News-Sentinel*:

> While the recommended award is modest, we disagree with any conclusion that Martin Marietta Energy Systems retaliated against Mr. Varnadore. It is our intent to address this issue with the Secretary of Labor, who has the responsibility for issuing a final order that can accept, reject or modify the recommendation by the Administrative Law Judge.

O. S. J. at 9. Varnadore asserted that:

> Energy Systems was callous and remorseless, releasing the RD&O to the news media on June 8, 1993 with a retaliatory and condescending statement that the award was "modest." . . . The statement evidences their contempt for the DOL process and the need to set higher damages upon review . . . .

Comp. Res. at 44-45.

The ALJ correctly concluded that reference to the $30,000 award recommended in *Varnadore I* as "modest" was neither discriminatory nor an adverse employment action, "especially in light of the fact that Mr. Varnadore sought over eleven million dollars in damages." *Varnadore II* O. S. J. at 9. The ALJ stated that:

> Nothing in the record suggests that Martin Marietta's press release impacted in any ma[nn]er upon Mr. Varnadore's employment. Further, I can find no precedent to support the contention that "callous and remorseless" language, (Cl. June 9, 1993 Letter at 5), amounts to an adverse employment action. Martin Marietta's press release was not physically threatening, humiliating, or even an offensive utterance. Further, it did not interfere with Mr. Varnadore's work performance. Therefore the statement did not create a hostile or abusive work environment . . . . Moreover, there is no evidence that the statement reflects a pattern of improper actions.

Id. at 9.

The ALJ's conclusions are amply supported both as to facts and to the law. First, it is indisputable that there could be nothing retaliatory about characterizing as "modest" a $30,000 award in a case in which $11 million was sought. Thirty thousand dollars is less than three tenths of one percent of the amount originally sought.

More importantly, nothing in Energy Systems' press release could possibly be considered to have an adverse impact on Varnadore's employment. It did not cause Varnadore "tangible job detriment." *See Varnadore I* D. and O. at 77 and n.93. And no evidence was presented which could support a conclusion that it could have contributed to the creation of a hostile work environment. *Id.* Thus, the press release did not cause any adverse impact upon Varnadore.

B. Whether the ALJ Correctly Ruled that the Levenhagen Remark was not Actionable.

Varnadore alleged that Charles Levenhagen, a labor relations specialist who provided training to Energy Systems managers, made a derogatory remark about Varnadore during a management training session for Energy Systems security personnel. In response to Energy Systems' motion for summary judgment, Varnadore submitted the affidavit of Captain Mincey, a security officer who attended the training. Mincey stated that during a break he engaged in conversation with Levenhagen. It was during this conversation that, according to Mincey, Levenhagen stated that Varnadore "isn't worth a damn, never has been, never will be, and they ought to take a gun and shoot him."[16/] Mincey Affidavit at 1.

In his O. S. J. the ALJ ruled that, assuming for purposes of summary judgment that Levenhagen made the remark:[17/] 1) it was made during a class break to Mincey; 2) no one else heard the remark; 3) although Levenhagen allegedly made the remark in early March 1993, Varnadore did not hear about it until Mincey told Varnadore's lawyer about it in August 1993, and Varnadore did not know of any other persons who had heard of the remark from sources other than the publicity given this case in the news media; and 4) once Energy Systems managers became aware of the alleged remark as a result of the filing of the complaint, the Director of Human Resources at the Y-12 plant counseled Levenhagen, "informing him that such a remark would be inappropriate and an indication of poor judgment." O. S. J. at 10-12. The ALJ granted Energy Systems' motion for summary judgment on this issue:

> Assuming for the purposes of summary judgment that Mr. Levenhagen made the remark, I find no evidence that the remark would have impacted upon Mr. Varnadore's work environment or affected the terms and conditions of his employment, especially in light of the geographical separation between Mr. Varnadore and Mr. Levenhagen. Further, the comment was not of the severity required to create an objectively hostile work environment.

O. S. J. at 12.

Although the ALJ granted summary decision regarding the Levenhagen incident, he allowed testimony by both Mincey and Levenhagen at the subsequent evidentiary hearing.

[16/] At the hearing, Mincey testified that Levenhagen had said, "Varnadore -- I ought to get a gun and take him out and shoot him." T. 177 (Mincey).

[17/] By affidavit Levenhagen denied making any such statement. Res. Br. in Support of S.J., Case No. 94-CAA-3, APX 11 at 2.

Mincey testified that: Levenhagen made the remark during a break in a training session in March 1993 (T. 177); Mincey told no one about the remark until he read in the newspaper about the filing of the first complaint in *Varnadore II* (T. 188); and Mincey told Varnadore's attorney about the remark two days after Mincey learned that he might be included in a massive layoff of Energy Systems employees. T. 189.

On the other hand, Levenhagen flatly denied that he had made the remark attributed to him by Mincey. T. 347-348, 353 (Levenhagen). Moreover, in response to a question by Varnadore's counsel about Mincey's possible motive to lie about him, Levenhagen testified that he had been involved in an investigation which resulted in Mincey's wife being terminated by Energy Systems for stealing.[18/] T. 353-354 (Levenhagen).

In his decision on the merits, the ALJ expressly credited Levenhagen's version of events:

> Despite the granting of summary judgment, Mr. S[la]vin was permitted to present evidence on this issue at the hearing . . . . Mr. Levenhag[e]n denied having made the statement and stated further that Mr. Mincey's motive for making the allegation could have been Mr. Levenhag[e]n's prior involvement in a company investigation of Mr. Mincey's wife for stealing . . . and her subsequent discharge from employment and Mr. Mincey's job demotion . . . .
>
> Having observed Mr. Levenhag[e]n and Mr. Mincey testify and having considered their testimony, I credit Mr. Levenhag[e]n's testimony over that of Mr. Mincey and reaffirm the granting of summary judgment on this issue.

Varnadore II R. D. and O. at 3 n.2. The ALJ's credibility determinations based upon demeanor are entitled to substantial weight. *Bartlik v. Tennessee Valley Authority*, Case No. 88-ERA-15, Sec. Dec. and Ord., Apr. 7, 1993, slip op. at 5 n.2, *citing NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983). In any event, Levenhagen's unrebutted testimony that Mincey had a motive to lie about Levenhagen, together with the evidence that Mincey thought he might be slated for layoff at the time he chose to tell Varnadore's attorney about the alleged remark, creates significant doubt about Mincey's credibility. We conclude that the ALJ correctly credited Levenhagen's testimony that he did not make a derogatory remark about Varnadore to Mincey and affirm the dismissal of this allegation.

C. Whether the FY-92 Performance Evaluation Constituted Retaliatory Adverse Action.

[18/] Mincey himself was demoted as a result of another aspect of that investigation. T. 353 (Levenhagen).

Varnadore was given a rating of EA ("Extended Absence") for FY-92.[19/] Varnadore has not alleged that rating was retaliatory. *Varnadore II* R. D. and O. at 2. However, Varnadore felt that the narrative in "the appraisal was derogatory and inaccurate . . . ." *Id.* at 7.

The ALJ did not explicitly find that the narrative was retaliatory or discriminatory. Rather, he deemed it to be "suspect" and stated that its retention in Varnadore's personnel file would be "unfair and prejudicial." *Varnadore II* R. D. and O. at 8. Elsewhere in his opinion the ALJ noted that "the validity of the . . . appraisal and the motives of Dr. Shults and Mr. Wright in recommending a needs improvement rating are subject to question." *Id.* at 9. Finally, the ALJ concluded that:

> It appears that the spectre of unfairness that hung over the appraisal was recognized by senior management. Its members met and decided to give an EA rating and a pay raise to complainant despite Mr. Wright's and Dr. Shults' recommendation of an NI rating and no pay raise.

Id. at 10. The ALJ recommended that Energy Systems be ordered to expunge the evaluation from Varnadore's personnel record, and not take adverse action against Vamadore without good cause shown. *Id.*

The ALJ's analysis of Varnadore's evaluation is internally inconsistent and logically flawed in significant ways. Moreover, his findings regarding the evaluation do not support his apparent conclusion that the evaluation was retaliatory. An appropriate analysis of the facts leads to the conclusion that the FY-92 evaluation accurately described Varnadore's job performance, and therefore cannot be found to have been retaliatory. In order to adequately address this issue it is necessary to discuss the evaluation and the ALJ's analysis of it in some detail.

Energy Systems has a detailed annual Performance Planning and Review System, which is documented for each employee on a lengthy form. The first part of the form consists of the Employee's Performance Review Input. Respondents' Exhibit (RX) 1-A at 1-2. This part is to "be completed by the employee before the performance review--optional." RX 1-A at 1.

On page 3 of the form an employee's supervisor, in conjunction with the employee, is to list the employee's "plans and goals for the next review period" and the means to accomplish

---

[19/] Darrell Wright initially rated Varnadore as NI--needs improvement. Shults approved of that rating but sought review from his superiors in light of the pending *Varnadore I* litigation. Higher level Energy Systems management, in consultation with Shults, decided to rate Varnadore as EA, even though Varnadore had not missed enough work to qualify for that rating under its literal terms. T. 377 (Rosenthal); T. 461 (Bryson). The EA rating enabled Varnadore to receive the same salary increase as he would have received if he had been rated as CM--"Consistently Meets." Varnadore would not have received any pay raise in FY-93 if he had received the NI rating for FY-92. *See Varnadore II* R. D. and O. at 7; T. 462 (Bryson).

them. RX 1-A at 3, 8. These are commonly referred to as "measures of performance," or "MOPs" at Energy Systems.[20/]

[20/] At the time Varnadore's MOPs and other assignments were given to him for FY-92 he made no objection to any of them. Consistent with Energy Systems' practice, Varnadore was given the opportunity to review his MOPs and sign them. Supervisor Wright noted on the form that Varnadore "[r]efused to sign at date of interview. SDW 2-5-92." RX 1-A at 8. Varnadore also did not object to any of the assignments which were added to his MOPs in a May 14, 1992 memorandum. RX 1-A at 9-11; *Varnadore II* R. D. and O. at 5. The May 14 memorandum was partially in response to a note which Varnadore wrote to Wright on May 7:

> Even though I have been instructed by management not to leave my home base unless directed to do so and group leaders do not trust my work, any work you might have available I would be more than willing and happy to do. Please let me know if you have anything available.

RX 1-A at 12. Wright clarified Varnadore's misunderstanding about the necessity to remain in his home base:

> To clarify and correct your "Home Base" assignment interpretation you should refer to item 5 on the attached copy of your Performance Plan, dated 3-6-91, it states that you should use your assigned space as your "home base" when not out working on other assignments. This in no way implies that you are confined to that room at any time. The intent of this MOP is clearly defined. This is not different from "home base" assignments given to other ACD personnel.

Id. at 9.

The third part of the evaluation is the Annual Performance Review. That review is divided into several subparts: Significant Accomplishments, in which the supervisor evaluates the employee's performance relative to his or her MOPs; Primary Performance Factors, in which the employee is evaluated on such factors as quality, job knowledge, initiative, etc.;[21/] Employee Development, in which the supervisor describes the employee's primary strengths and areas for improvement and suggests ways in which the employee can improve current performance; and a Performance Summary. RX 1-A. These subparts of the appraisal are not mutually exclusive. Thus, an employee's performance on a MOP may be reflected in more than one section of the Performance Review.

Darrell Wright gave Varnadore the employee input pages of the Performance Review form to fill out shortly after the end of the 1992 fiscal year. T. 208-209 (Wright). Varnadore returned the form to Wright in blank. He had underlined the word "optional" on the form, and Wright noted on it that "Mr. Varnadore declined to complete or sign the Employee's Performance Review Input form when given the opportunity."[22/] *Id.* at 209. When Wright gave Varnadore his performance appraisal on February 5, 1992, Varnadore declined either to sign it or to discuss its contents. T. 284, 309-313 (Varnadore); RX 1-A at 8. Rather, Varnadore told Wright that he "would have to take the appraisal and have [his] lawyer see it." T. 284 (Varnadore).

[21/] In this section the employee is rated on a three-adjective scale: E, "consistently exceeds job expectations;" M, "meets job expectations;" and B, "is below job expectations." *Id.* In addition the supervisor may include comments explaining his or her rating on a given factor.

[22/] When asked to explain why he had not filled out this portion of the appraisal, Varnadore indicated that he felt that his input would have had little influence in the appraisal process. T. 240-241 (Varnadore). The R. D. and O. erroneously notes that Varnadore's assumption was correct, "because Mr. Wright testified that employee input is rarely considered in the appraisal process." *Varnadore II* R. D. and O. at 6. The ALJ misunderstood Wright's testimony. Counsel was asking Wright about the voluntary aspect of the employee input section:

> Q. Employees at Martin Marietta Energy Systems are under no obligation to fill out the input form on the performance evaluation, is that not correct?
>
> A. Prior to this past year, it was listed as optional. It's no longer.
>
> Q. Employees often leave it blank because their views are not taken into consideration, is that not true?
>
> A. I don't think often, no. Very rarely, as a matter of fact.

T. 223 (Wright). It is evident from the context of his statement that Wright was saying that it was rare for employees *to fail to fill out their section of the appraisal*, even though it was optional.

The ALJ analyzed Varnadore's performance and his performance appraisal in detail and concluded that, "[b]ased on the testimony of witness[es] and the record before me, I believe that Complainant's performance appraisal for fiscal year 1992 was a reasonable, although not entirely accurate representation of his job performance."[23/] *Varnadore II* R. D. and O. at 8. The ALJ also found that:

> Mr. Wright and Dr. Shults are honorable men, who tried to prepare an objective appraisal of complainant's performance for fiscal year 1992. I believe that Dr. Shults is a caring supervisor who is concerned about the employees under his supervision. His concern for employees is demonstrated by his willingness to hire Complainant in 1985, when complainant was about to los[e] his job with another division due to a lay-off, knowing that complainant lacked a chemistry background; by his agreement to the EA performance rating that complainant ultimately received and by his cooperation and efforts to relocate complainant to another job in another division in 1993.

Id. at 8-9.

In spite of these facts, however, the ALJ found that:

> [W]hatever one thinks of the appraisal, the circumstances that existed in the ACD between Mr. Varnadore and other ACD personnel, and in particular Mr. Wright and Dr. Shults, make the validity of the appraisal suspect and the continuation of it in complainant's personnel file unfair and prejudicial.

Id. at 8. In other words, the ALJ concluded that the atmosphere in the ACD was "so emotionally charged" as a result of the *Varnadore I* litigation that it was impossible for Shults and Wright to give Varnadore a non-retaliatory appraisal. *Id.* at 9. Thus, the ALJ concluded:

> [T]he atmosphere that existed in ACD and the attitudes of the Complainant, Mr. Wright, Dr. Shults, and others in the company were such during fiscal year 1992 that the validity of the resulting appraisal and the motives of Dr. Shults and Mr. Wright in recommending a needs improvement rating are subject to question.
>
> * * * *
>
> Despite his testimony, I do not believe that Dr. Shults had neutral feelings toward complainant and de[s]pite his best efforts, could impartially participate in and review complainant's performance appraisal. [sic]
>
> * * * *

[23/] The ALJ does not point out any inaccuracies in the appraisal. As discussed below, we do not find that there are any of significance.

> I do not believe under the circumstances, that Mr. Wright's attitude toward Complainant was one of impartiality or that he could be totally impartial in supervising and rating Complainant's job performance.

Id. at 9.

In so ruling, the ALJ focused upon the wrong concern. Whether it was possible for Shults and Wright to have neutral or impartial feelings toward Varnadore is irrelevant. The relevant question is whether retaliatory animus *in fact* infected the performance evaluation Wright and Shults gave to Varnadore for FY-92. If it did not, then Varnadore was not retaliated against by being given the evaluation, no matter what Shults and Wright may have felt about him.[24/] The ALJ erroneously applied a strict liability standard to his review of the appraisal after finding that the atmosphere in ACD was emotionally charged.

The appropriate analysis to be applied to this issue has been articulated repeatedly. Complainants in environmental whistleblower cases must prove, by a preponderance of the evidence, that they were retaliated against for engaging in protected activity. Thus, they must prove that they engaged in protected activity; the employer knew about it; and the employer then took adverse action against them, which was motivated at least in part by the employee's protected activity. *Dartey v. Zack Company of Chicago*, Case No. 82-ERA-2, Sec. Dec., Apr. 25, 1983, slip op. at 7-8. *See also McCuistion v. TVA*, Case No. 89-ERA-6, Sec. Dec., Nov. 13, 1991, slip op. at 5-6; *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984). In so-called dual motive cases, once the complainant has proven by a preponderance of the evidence that unlawful motive played a part in the employer's decision to take adverse action, the employer then has the burden of proving that it would have taken adverse action for legitimate reasons in any event. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Carroll v. U.S. Dept of Labor*, 78 F.3d 352, 357 (8th Cir. 1996).

There is no dispute here that Varnadore engaged in protected activity and that Energy Systems was aware of it -- Varnadore filed his environmental whistleblower complaints in *Varnadore I*.[25/] The ALJ also correctly ruled that the narrative contained in a performance

---

[24/] It is possible to read this portion of the R. D. and O. as finding Shults' and Wright's claims to impartiality incredible. We reject this conclusion, because it is not based upon evidence, but apparently upon the ALJ's assessment that it would not have been humanly possible for Shults and Wright to give Varnadore an impartial evaluation given the "atmosphere" in ACD. Varnadore's counsel attempted to pursue this line when he tried to question Shults and Wright about their "brain chemistry." *See* T. 138 (Shults), T. 204-206 (Wright). The judge appropriately terminated this inquiry. Both Shults and Wright testified that they evaluated Varnadore impartially. The best test of those statements is the performance evaluation itself, which, as we conclude below, was both accurate and fair.

[25/] In the *Varnadore I* D. and O. the Secretary did not decide whether the hot cells incident in 1985 or Varnadore's complaints about David Jenkins in 1989 were protected activities. *See*

(continued...)

appraisal may constitute adverse action, even if the ultimate rating does not. *Bassett v. Niagra Mohawk Power Corp.*, Case No. 85-ERA-34, Sec. Dec. and Ord., Sept. 28, 1993, slip op. at 4. Here, it is safe to conclude that the narrative, which found that Varnadore had failed to complete -- or in some instances even to begin -- half of his MOPs, and which rated him as "below expectations" on seven of eleven performance factors, was "adverse action." Therefore, analysis of the performance evaluation hinges upon causation: did Energy Systems give Varnadore a negative performance evaluation, at least in part because of his protected activity? If so, it would have been incumbent upon Energy Systems to prove that it would have given Varnadore that evaluation even if he had not engaged in protected activity. For the reasons discussed below, we conclude that Varnadore failed to prove that illegitimate motives played a part in Wright's drafting and Shults' approval of Varnadore's FY-92 performance appraisal. Therefore the appraisal did not constitute retaliatory adverse action.

The most useful measure of whether a performance appraisal was given out of retaliatory motive is whether it is a fair and accurate description of an employee's job performance.[26/] *See, e.g.*, *Abu-Hjeli v. Potomac Electric Power Co.*, Case No. 89-WPC-1, Sec. Dec. and Ord., Sept. 24, 1993, slip op. at 14-15; *Jain v. Sacramento Municipal Utility Dist.*, Case No. 89-ERA-39, Sec. Dec. and Ord., Nov. 21, 1991, slip op. at 9; *Boytin v. Pennsylvania Power and Light Co.*, Case No. 94-ERA-32, Sec. Dec. and Ord. of Remand, Oct. 20, 1995, slip op. at 9-10; *Blake v. Hatfield Electric Co.*, Case No. 87-ERA-4, Dep. Sec. Dec. and Ord. of Remand, Jan. 22, 1992, slip op. at 5-12. We conclude that Varnadore's testimony about his performance, the uncontroverted testimony of Wright and Shults, and the ALJ's findings, demonstrate that the narrative in Varnadore's performance appraisal was fair and accurate, and was not motivated by retaliatory animus.

Wright evaluated Varnadore on his performance of each of the MOPs listed in the performance plan.[27/] Each of the MOPs will be discussed in turn.

1. MOP 1, Generator Certification Official Training.

[25/] (...continued)
Varnadore I D. and O. at 12-16, 33-35. These issues need not be decided here either, because the filing of the *Varnadore I* complaints themselves clearly constituted protected activity.

[26/] Of course, the fact that an evaluation is *not* fair or accurate does not automatically mean that it was motivated by animus, but it would be evidence from which such animus appropriately could be inferred: "The fact that a court may think that the employer misjudged the qualifications of the [employee] does not in itself expose [the employer] to . . . liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

[27/] Varnadore's plan for FY-92 listed five MOPs. The plan was amended by the May 14, 1992 Wright memorandum. RX 1-A at 9-11. The first section of the Annual Performance Review in turn was keyed to the MOPs as amended. *Id.* at 4.

In order to become a Generator Certification Official it was necessary for Varnadore to pass at least three training courses.[28] The general format of the courses was to have several hours of training followed by a written examination. Wright noted on Varnadore's review that Varnadore had failed two of three training courses during the appraisal period.[29] RX 1-A at 4. This MOP was central to Varnadore's performance because Energy Systems management intended to use Varnadore as a Generator Certification Official, which would have become a major portion of Varnadore's responsibilities.[30] T. 149-150 (Shults).

Varnadore did not dispute the accuracy of Wright's evaluation of this MOP. Rather, he attempted to explain away his failure to complete it. As the ALJ noted:

> As to why [Varnadore] failed training courses, he stated that a majority of the students in the training classes were already in those jobs . . .; that he did not have a chemical background and was unfamiliar with many of the terms and chemicals identified on the exams . . .; that some of the students opened their books during the exams . . . ; that on one exam he thought he had used an incorrect answer sheet; that he felt it was unfair to expect him to train for waste generation certification when he had no background in chemistry.

Varnadore II R. D. and O. at 7. The ALJ correctly rejected these excuses for Varnadore's failure to complete the certification training:

> I do not accept Complainant's reasons for failing the training exams. His contention that he used the wrong answer sheet was contradicted by Mr. D. Allen White, who is responsible for the administrating of [sic] training programs and examinations, and the exams themselves . . . . Mr. Allen [sic] testified that there were no separate answer sheets; that the answers were written on the exams. Also, the fact that other students were already working in the jobs for which certification was sought or that some students used open books during the exams have not been shown to have had an adverse impact on Complainant, who simply did not correctly answer a sufficient number of questions to pass the exams.

Id. at 8.

---

[28] Varnadore's MOPs for two years running had contained this particular requirement. T. 150 (Shults).

[29] Wright also noted that Varnadore retook one of these courses after the close of the FY-92 appraisal period and passed it. RX 1-A at 4.

[30] The position of Generator Certification Official for which Varnadore was to be trained involved preparing the paperwork that accompanies waste to certify that the waste has been properly packaged for disposal. T. 150 (Shults). The position which Shults and Wright planned to put Varnadore in evidently did not involve dealing with medium or high levels of radioactive waste. T. 221 (Wright).

The bottom line was that during the appraisal period Varnadore had failed two out of three tests necessary to become a Generator Certification Official, and had passed the third. As noted by Wright in the appraisal, after the appraisal period Varnadore retook one of the exams he had previously failed and passed it. Thus, Wright's evaluation of this MOP was accurate in all respects.

2. MOP 2, Work with ACD supervisors in order to clean out and organize attic storage cages as well as building 7041.

MOP 2 had also applied to Varnadore for two years. In his May 14 memorandum, Wright gave Varnadore detailed instructions for carrying out this assignment:

> Contact supervisors or persons responsible for idle equipment stored in ACD storage cages 4500-S and ACD area of 7041. Tell them we are getting rid of all items which are not reasonably calculated to be put into service within the next 24 months. Anything that has been in storage for over 36 months will require a strong written justification for continuation of storage signed by their section head. This is the only way we can rid ourselves of pack-ratitus.

RX 1-A at 10. In the written performance review, Wright stated that Varnadore, "[d]id not make any progress on cleaning out storage areas." *Id.* at 4.

Varnadore did not contest the accuracy of this statement. Instead he tried to shift the responsibility for his failure to perform this MOP to ACD supervisors and to Wright:

> Q. Did you make any progress in cleaning out the waste storage areas in Analytical Chemistry Division at Oak Ridge National Laboratory?
>
> A. No, sir, I was not contacted by any of the people to ask for any assistance in it.
>
> * * * *
>
> JUDGE CLARKE: Now, cleaning out the storage areas, what were you told to do, if anything, about cleaning out the storage areas by Mr. Wright?
>
> THE WITNESS: Now, are we relating to the -- which assignment are we talking about? Are we talking about the attic storage areas:
>
> JUDGE CLARKE: The second MOP. It says, "Did not make any progress on cleaning out storage areas."
>
> THE WITNESS: That is the one that the memo was put out that they were supposed to mark what they wanted to keep, and then that I would get rid of whatever they had not marked. And that hadn't been done before I relocated to my other job.

JUDGE CLARKE: So they never marked the memo pages that were required?

THE WITNESS: No. No, sir.

T. 245-247 (Varnadore).

On cross examination Varnadore was asked specifically about the instruction in the May 14 memorandum that Varnadore was to contact supervisors:

Q. And look at the next section entitled, "Clean out storage areas."

A. Yes, sir.

Q. Where it says, "Contact supervisors or persons responsible for idle equipment." I take it you did not contact the supervisors, and you were not contacted by them?

A. Mr. Wright informed me that he would issue a memo to that effect, because he had an awful lot of trouble having them respond to him when he asked them.

Q. But in the meantime he was asking you to check with them periodically, was he not?

A. At the same time. This was along when he told me about the memo that he was going to put out the first time.[31/]

T. 301 (Varnadore); *see also* T. 321 (Varnadore). The ALJ accurately distilled this testimony:

> [Varnadore] testified that he did not clean waste storage areas in ACD because he "was not contacted by any of the people to ask for any assistance in it." . . . He further stated that he had not cleaned the storage areas because no one had marked the items to be removed.

R. D. and O. at 7. However, the fact that Varnadore was not contacted by any personnel regarding disposal of items in the attic cages is largely irrelevant for purposes of evaluating

---

31/ Wright's memorandum stated:

> I will send a memo to all supervisors making them aware of your assignments prior to the start of each. This will save you some grief and arguments, which is what I get every time I do similar assignments. So let me know when you are starting a particular assignment.

RX 1-A at 10. Varnadore evidently did not notify Wright when he was starting a particular assignment. It is not clear whether Wright issued any memos to staff outlining Varnadore's responsibilities. *See* T. 246 (Varnadore).

Varnadore's performance of this MOP: Varnadore was instructed to initiate contacts with ACD personnel regarding equipment in the cages, and he acknowledged that he had not done so. Thus, Wright's assessment that Varnadore "did not make any progress" on this MOP was accurate. RX 1-A at 4.

3. MOP 3: Continue to provide waste disposal service to ACD labs.

Wright's May 14 memorandum elaborated on this assignment:

> Please routinely check with supervisors to see if they have any waste which they need assistance in filling out or following up on the paperwork.

Id. at 10. Wright wrote in Varnadore's performance appraisal that Varnadore, "[t]ook no actions to aid ACD personnel with waste disposal." *Id.* at 4. Again, Varnadore did not quibble with the accuracy of this statement. Instead, he testified that supervisors had not contacted him:

> Q. Did you take actions to help ACD personnel with waste disposal?
>
> A. In the position that I was in, I was rather cautious to approach most ACD personnel.
>
> JUDGE CLARKE: Well, were you instructed to approach them and do that job?
>
> THE WITNESS: I was instructed that I was to help the section, yes, with those problems when they needed it.
>
> JUDGE CLARKE: Well, did you wait for them to come to you? Or did you go to them and tell them you were available?
>
> THE WITNESS: Well, I waited for them to come to me. There was a memo sent that that was one of my responsibilities.
>
> JUDGE CLARKE: Was to wait?
>
> THE WITNESS: No, sir. I assumed by them being told by Mr. Wright, that they were aware that I was available.
>
> * * * *
>
> Q. And then did [Wright] tell you, also, that you should periodically check with the supervisors to see if there was any waste which they needed assistance in filling out? Waste documents and that sort of thing? Did he tell you that?
>
> A. I think probably, as I said earlier, that he had issued a memo, he had told me. And in being in their areas, I tried to not have any more contact with any of the

other people than I had to. Judging by the reaction of some of them, I was a little bit nervous about it.[32/]

* * * *

Q. Does [Wright] not say [in the May 14 memorandum], "Please routinely check with supervisors to see if they have any waste which they need assistance in filling out?"

A. Yes, sir, that's what it says.

Q. But you felt that you should await the call of the supervisor, is that right?

A. Well, I felt that I should await the call. Or also, any time I was in their area, their holding areas were always pretty well empty.

Q. Did you check with the supervisors?

A. No, sir, I don't recall discussing that with any of the supervisors.

T. 245-246, 299, 301 (Varnadore).

The ALJ described Varnadore's failure to contact any supervisors in order to complete this MOP:

> [Varnadore] stated that he did not take action to help ACD personnel with waste disposal because he "was rather cautious to approach most ACD personnel." . . . He stated that he waited for them to come to him; that he did not volunteer for jobs.

Varnadore II R. D. and O. at 7. Thus, there is no disagreement on this issue; Varnadore did not attempt to comply with this MOP.

4. MOP 4: Work with Jim Botts and Darrell Wright to initiate Bar coding of chemical inventory.

Wright accurately stated on Varnadore's Performance Review that "[b]ar coding of chemical inventory has been delayed by lack of progress from HMIS organization. Planned for FY93." RX 1-A at 4. Wright testified that his comment on this MOP was to assure "that it was clear that that wasn't [Varnadore's] problem, that wasn't his fault that he didn't do it." T. 212 (Wright).

5. MOP 5: Inventory ACD 2C-Series Locks at all ACD facilities.

32/ Varnadore did not elaborate on this comment.

Wright's May 14 memorandum contained detailed instructions for the completion of this MOP. RX 1-A at 10. As the performance evaluation accurately noted, Varnadore "[c]ompleted inventory of ACD 2C-Series Locks." *Id.* at 4.

6. Tool stores inventory.

In the May 14 memorandum Wright added this item to Varnadore's MOPs, together with instructions for completion of the task. RX 1-A at 9. Varnadore's performance evaluation correctly noted that he had "[c]ompleted facilitation of tool stores inventory." *Id.* at 4.

7. Computer inventory.

This project was also assigned in the May 14 memorandum. RX 1-A at 10. In the appraisal Wright accurately noted that Varnadore had "[a]ttempted to begin computer inventory assignment late in the year; was delayed because of possible job change." *Id.* at 4.

8. 90 Day Accumulation Area Training.

This assignment was included in the May 14 memorandum. RX 1-A at 9. Varnadore failed to take this training, and Wright accurately noted that fact on his evaluation. RX 1-A at 4; *Varnadore II* R. D. and O. at 6.

In summary, Wright's description of Varnadore's significant accomplishments in the appraisal was accurate. Wright noted those tasks which Varnadore had completed and also those which Varnadore had not, and the ALJ correctly confirmed Wright's assessment of the MOPs which Varnadore did not successfully complete.

The ALJ also discussed Wright's evaluation of Varnadore relative to the "performance factors" listed on the evaluation form. These factors include quality; job knowledge; initiative; performance improvement; interpersonal skills; productivity; attitude; environment, safety and health; attendance; ethics; and Energy Systems values. RX 1-A at 5. In his testimony, Varnadore was highly critical of the ratings and comments he received on these factors. As detailed below, there is ample factual basis to support the accuracy of these ratings and comments.

Varnadore was given a "meets" for "quality." Wright's written comment was that "[w]ork that is completed has been correct and neat." *Id.* This was the most favorable rating that Varnadore received in this part of his evaluation. As it is beyond dispute that Varnadore did not complete many of his assignments, it is hard to question Wright's comment.

> Varnadore was rated "below expectations" for "job knowledge." Wright wrote:
> Bud lacks knowledge to [sic] commensurate with his job level. He was instructed to take training in waste generator certification this year, to improve job knowledge. He failed two of three courses. He has not suggested or requested additional training.

Id. Varnadore evidently thought that this comment was unfair:

> In job knowledge, I feel that yes, I was aware that I did not have the ability to do the job. But I also feel that I had gone to the class; I didn't know that it was mandatory that I had to pass that class the first time that I went. And due to no fault of mine, I was getting into the classes as soon as I could, and tried to go back through and complete the training. And that hadn't been --
>
> So I felt like [Wright] left out that I was really putting an effort into trying to get the qualifications to be able to do that job. And just to come out and say, "He lacks the knowledge." That's a little harsh to me. I think it would have been nice of him to say, you know, "He failed two of the three courses, but he has put forth an effort and tried to get back into the courses and pass them."[33/]

T. 326 (Varnadore). Thus, Varnadore thought the wording was too harsh. However, Varnadore himself agreed that he did not possess an understanding of the job, Wright accurately noted that Varnadore had repeated one class and passed it after the close of the evaluation period, and there is no evidence in the record that Varnadore attempted to retake the other class. Varnadore failed to demonstrate that Wright's evaluation of him on this performance factor was inaccurate or unfair in any respect.

Varnadore was rated "below expectations" on "initiative," with a comment that he "[h]as shown no improvement over 90-91 rating period." RX 1-A at 5. In this regard, Varnadore engaged in the following colloquy with the ALJ:

> JUDGE CLARKE: Did you volunteer or take on any additional work duties, other than those Mr. Wright asked you to do?
>
> WITNESS: I don't really recall volunteering for any other jobs. As I think I stated earlier, I was in a somewhat precarious position in being around some of the other people that had testified in the first case. And I tried to keep down as much ill will toward me as I could.
>
> * * * *
>
> I would have thought that I would have improved [on initiative] considerably, under the circumstances, and tried to, too, and be certified as a waste generator, and even feeling as strong as I did about holding that position.[34/]

33/ Varnadore did not mention that the Generator Certification Official training requirement had been in his MOPs for two years.

34/ This comment is in reference to Varnadore's apparent objections to Energy Systems' plans to make him a Generator Certification Official. *See* n.30 above. Nothing in the record indicates

(continued...)

JUDGE CLARKE: Do you think that is the initiative you showed in trying to get the certification for waste generator service?

THE WITNESS: I would think so, yes, sir.

JUDGE CLARKE: Do you think you showed initiative in any other ways?

THE WITNESS: Well, I don't really, I don't really know. I'd have to think pretty hard on the situation. But that's just more or less the first thing that comes to mind, since I have the waste generator right above, that I referred to.

T. 320, 326-327 (Varnadore). Consistent with this testimony, the ALJ found:

> In order to complete the MOPS, Complainant had to exhibit a degree of initiative and interact with other employees and supervisors. Complainant, however, was nervous around some of the other employees as a result of the [*Varnadore I*] litigation . . . . He tended to stay in his office as much as possible, to keep down what he perceived as ill-will toward him by other employees . . . . He did not volunteer for jobs . . . . He was under treatment by a doctor and a psychiatrist and had major sleep disorders. While he had experienced problems in his personal life, he was depressed and angry at the way he had been treated at Martin Marietta for the last eight to nine years
> . . . .
>
> It was obvious from Complainant's testimony and that of other witness [sic] that he was angry, depressed and trying to maintain a low profile at work by staying in his office as much as possible and avoiding contact with other employees.[35/]

R. D. and O. at 5. This description of Varnadore, which is based upon Varnadore's own testimony, is consistent with Wright's evaluation of Varnadore's initiative.

Wright rated Varnadore as "below expectations" on "performance improvement" and noted that he hadn't "perceived any effort to improve performance." RX 1-A at 5. Varnadore did not contest this portion of the evaluation and the R. D. and O. does not discuss it. However, it is plain that the rating on this factor was consistent with Varnadore's failure to complete four of his MOPs.

Varnadore was given a "below expectations" rating on "interpersonal skills," and Wright noted that he had "received complaints from co-workers of sarcastic attitude." RX 1-A at 5.

34/ (...continued)
that Varnadore ever voiced these objections to his supervisors.

35/ All of Varnadore's MOPs required him to be out of his office.

Wright and another witness testified at the hearing regarding the origin of this comment, and the R. D. and O. referred to one incident:

> Complainant's job dissatisfaction came to the surface when he took business papers to Ms. MacDougall, an employee in Analytical Services in ACD. She described the occurrence as an encounter during which Complainant made derogatory remarks about ACD and Mr. Wright; which she immediately reported to Mr. Wright.

Varnadore II R. D. and O. at 5. Moreover, Varnadore, although he complained that Wright had not told him prior to his evaluation about the allegation that he had been sarcastic, admitted that he was, in fact sarcastic:

> Q. Mr. Varnadore, have you not, in your testimony, previously said that you had a habit of bad-mouthing people?
>
> A. I think that probably was in, what is it we were referring to, [*Varnadore I*]?
>
> Q. Okay.
>
> A. That I was somewhat vocal when I shouldn't be.
>
> Q. And you were vocal about employees or managers a lot, were you not?
>
> A. I think probably that was said.
>
> Q. Are you suggesting that you changed your habits in that regard?
>
> * * * *
>
> [A.] I want to think that -- I had very little contact with the other employees in ACD. After the hearing [in *Varnadore I*], I feel sure that I had very little contact.

T. 302-303 (Varnadore). Varnadore was more direct in response to the ALJ's question whether he could have made sarcastic remarks to coworkers: Varnadore stated that he didn't "doubt it in the least." T.327-328 (Varnadore).

With regard to "productivity," Wright rated Varnadore as between "meets expectations" and "below expectations" and commented that Varnadore had "shown some improvement over 90-91 rating period. Level of effort and time required to accomplish tasks are well below expectations." RX 1-A at 5. The ALJ noted that "[Varnadore] testified that he was hampered in completing assignments by Mr. Wright's failure to send memos to supervisors requesting their cooperation . . . ." *Varnadore II* R. D. and O. at 7. However, it is clear from the record as well as from the ALJ's findings that it was Varnadore's responsibility -- which he admittedly shirked

-- to initiate the contacts necessary for him to perform his MOPs. See, *e.g.* Varnadore II R. D. and O. at 5; RX 1-A at 10; T. 299-301 (Varnadore); T. 224 (Wright).

Wright rated Varnadore as "below expectations" in "attitude" and noted that "Mr. Varnadore exhibits a negative attitude about his work by showing little interest or initiative in completing assignments, successfully completing necessary training, and taking on additional responsibility." RX 1-A at 5. Varnadore testified:

> I have to wonder about the negative attitude and the initiative, because I asked [Wright] on two or three occasions about the program that he and Mr. Botts were supposed to help me with, and he says never did come about. So I did try to inquire as much as I could, as I was trying to work on the other jobs that I was doing. And like I say, on into each area I went into, I tried to observe as much as I could.

T. 329 (Varnadore). Nothing in Varnadore's testimony supports a conclusion that it was inaccurate to state that he had a negative attitude. In fact, the ALJ found that Varnadore was "depressed, angry, and withdrawn. . . . His attitude and feelings of repression were not conducive to performing his job duties in a professional and appropriate manner in ACD." R. D. and O. at 9. This finding is supported by ample evidence.

Varnadore's greatest criticism regarding his ratings on performance factors is that he was not rated at all by Wright on two of those factors: environment, safety, and health; and ethics.

> JUDGE CLARKE: Now, can you tell me specifically where you disagree with Mr. Wright's appraisal? In other words, what did you do that he has not recognized?
>
> WITNESS: To me, I felt like it was almost flagrant by not filling out the blanks on ethics and environmental safety and health. After spending 16 days in a hearing [in *Varnadore I*] pertaining to such issues.

T. 324-325 (Varnadore). However, the ALJ found that Wright's failure to rate Varnadore on these two factors was not significant:

> Mr. Wright testified that he didn't think he had a basis to rate complainant in these two areas [environment, safety, and health, and ethics] . . . . Assistant ORNL director B. R. Appleton didn't think it was unusual to not rate an employee on all areas specified on the appraisal form . . . . That view was shared by Murray W. Rosenthal, a former Deputy Director at ORNL . . . . *I accept their testimony and find that it was not unusual to omit ratings in appraisal categories and that the omissions complained of in this case were not discriminatory.*

R. D. and O. at 6 n.5 (citations omitted, emphasis supplied).

We concur with this conclusion. Both Appleton and Rosenthal testified that it was not mandatory that every factor be evaluated for all employees. Moreover, Wright was questioned about this by Varnadore's counsel:

> Q. Sir, is there a reason why, in Mr. Varnadore's 1991 to 1992 performance appraisal, you did not rate him on either ethics or environment, safety and health?
>
> A. As I stated in my affidavit for this case, I didn't feel I had a basis to make a judgment in those two areas.
>
> Q. Why?
>
> A. I didn't feel like the jobs that I had him doing lended themselves to give me any basis for that.
>
> Q. Do the jobs that you have him doing not involve environmental issues and environmental laws?
>
> A. That's the jobs I would like for him to be doing, yes.
>
> Q. Do the issues that he raised in his Department of Labor complaint not involve both ethics and environment, safety and health?
>
> A. His issues do, but I don't necessarily agree with the issues he raised.

T. 196-197 (Wright).

Evidence in the record in *Varnadore I* also supports the ALJ's conclusion that not all performance factors are necessarily evaluated. Varnadore's performance appraisals reflect that in FY-87 He was not rated on quality, performance improvement, attitude, safety, attendance, or ethics. *Varnadore I*, EX 18-G. In FY-90 Varnadore was not rated on any performance factor other than attendance. *Id.* at 18-B. And in FY-91 Varnadore was not rated on ethics or Energy Systems values. *Varnadore I*, EX 4 at 5.

For these reasons we concur with the ALJ's conclusion that it was not out of the ordinary, and was not discriminatory for Wright to have failed to evaluate Varnadore on ethics and environment, safety, and health.

Varnadore was rated "below expectations" on attendance. In reaching this rating, Wright did not take into account work days that Varnadore missed because of the *Varnadore I* litigation. Even so, Wright noted that Varnadore had been "absent 33 days this year" when the ORNL average was 7 days. RX 1-A at 5. Wright's rating on this factor is unassailable.[36/]

[36/] Varnadore was also rated "below expectations" on Energy Systems values." This factor is

(continued...)

In summary, nothing in Varnadore's FY-92 performance evaluation is significantly out of line with Varnadore's own assessment of his performance, or with the facts found by the ALJ. As the evaluation is an accurate assessment of Varnadore's performance, we cannot conclude that it was retaliatory.

The ALJ stated that "whatever one thinks of the appraisal, the circumstances that existed in the ACD between Mr. Varnadore and other ACD personnel, and in particular Mr. Wright and Dr. Shults, make the validity of the appraisal suspect and the continuation of it in complainant's personnel file unfair and prejudicial." *Varnadore II* R. D. and O. at 8. In fact the opposite is true: Whatever one thinks of the "circumstances that existed in the ACD" *vis a vis* Varnadore, the appraisal is an accurate rendition of Varnadore's job performance in FY-92, and therefore cannot be found to have been retaliatory.

Of course, employees and their supervisors who are engaged in litigation against each other -- whether it is over charges of discrimination or a labor/management dispute -- face the difficult challenge presented by continuing to work with each other while the litigation is in progress. In spite of his litigation against Energy Systems, Varnadore was entitled to be treated and evaluated in a non-retaliatory manner. He was not entitled to be treated more favorably than other employees who were not in litigation against Energy Systems. In short, Varnadore had a continuing responsibility to do his job. The evaluation he received was both a reasonable and accurate assessment of his performance, and as such could not have been retaliatory.

D. Whether the Raise Accorded Varnadore in 1993 was Retaliatory.

Varnadore challenged the fact that he had not received any pay raises in several years other than the 3.7 percent pay raise he received in 1993. In his summary judgement decision the ALJ ruled that issues relating to Varnadore's salary prior to 1993 already had been decided by the ALJ in *Varnadore I* and were thus *res judicata.* O. S. J. at 8; C. O. S. J., at 2-3. In his decision on the merits the ALJ found:

> Mr. Varnadore was not displeased with the 3.7 percent raise he received with the EA rating. However, he wants raises for the preceding years with ACD during which he did not receive salary increases . . . . The 3.7 percent raise was established, through the testimony of Fred Shull, Manager of Compensation, to be the norm for raises granted to employees in complainant's position during fiscal year 1992 . . . . As such it appears reasonable.

[36/] (...continued)
explained on the form as: "Actively supports Energy Systems values through personal commitment and modeling; inspires and promotes others to practice values." RX 1-A at 5. Although the meaning of this factor is not self-evident, Wright commented on it that Varnadore's "[n]egative attitude and non productivity do not promote others to practice values." Neither Varnadore nor the ALJ took issue with the rating on this factor.

As the 3.7 percent pay increase was not even contested by Varnadore, and, moreover, as it is reasonable and in accord with standard Energy Systems procedures, we concur with the ALJ's recommendation that the pay increase not be found to be retaliatory. We also concur with the ALJ's conclusion that the issues relating to Varnadore's salary prior to 1993 were litigated and decided in *Varnadore I* and therefore are not part of *Varnadore II*.

E. Summary.

Because there were no material facts in dispute and Energy Systems was entitled to summary judgment as a matter of law regarding the Shults statement and the Energy Systems press release, summary judgment is granted in favor of Energy Systems on these issues. Because we adopt the ALJ's well supported finding that Levenhagen did not make the derogatory remark about Varnadore attributed to him by Mincey, we conclude that Varnadore did not establish that Energy Systems engaged in adverse action in that regard. Varnadore failed to prove that the narrative in his FY-92 performance evaluation was retaliatory. He did not contest the raise he received as a result of the rating on that evaluation, and issues relating to previous years' salaries were previously litigated and are foreclosed. Therefore Varnadore's claims regarding the performance appraisal and his salary are denied.

Because Varnadore has failed to establish any of the acts of retaliation alleged in *Varnadore II*, that case is dismissed.

II. *Varnadore III.*

Although we disagree with minor portions of the ALJ's analysis in *Varnadore III*, for the reasons articulated below, we agree with his recommendation that the case be dismissed.

A. Scope of Review.

It is, of course, a given that ALJs' recommended decisions under the environmental whistleblower provisions are subject to plenary review by the Secretary of Labor or his or her delegatee. *See* n.2 above. For that reason we address the multitude of issues raised in the *Varnadore III* complaint. However, we note that Varnadore has chosen to discuss only three issues in his briefs: whether the ALJ erred in denying Varnadore an evidentiary hearing (*Varnadore III*, Motion for Summary Reversal and Complainant's Opening Brief at 4-8); whether DOE, Secretary O'Leary, and DOE's Oak Ridge Operations Office (the DOE Respondents) are proper party respondents in this case (*Id.* at 8-13); and whether the ALJ erred in denying discovery into the question whether Respondent Culbreth's alleged actions in providing legal advise to Energy Systems are unethical. *Id.* at 14-16. Thus, virtually none of the issues raised in the complaint, some of which are capsulized in the Background portion of this decision, are discussed in Varnadore's briefs. We emphasize at the outset that all of Varnadore's claims in this case were appropriately recommended for dismissal on at least one, and in some cases as many as three, different grounds.

B. Claims Brought Against the DOE Respondents.

Varnadore made two major claims against the DOE Respondents:[37] that they retaliated against him at an April 29, 1994 "stakeholders' meeting" held at the Oak Ridge Museum of Science and Energy (Complaint, ¶¶ 15-24); and that DOE improperly reimbursed Energy Systems for fees and costs related to its defense of *Varnadore II*. *Id.* at ¶¶ 3-10.

The ALJ correctly ruled that the complaint was untimely filed with regard to the stakeholders' meeting held on April 29, 1994, under all of the environmental whistleblower provisions other than the ERA. *Varnadore III* R. O. D. at 4-5. The CAA, TSCA, RCRA, and CERCLA each contain a 30 day statute of limitations.[38] As the stakeholders' meeting occurred more than 30 days prior to August 2, 1994, Varnadore's complaint was untimely filed as to events related to that meeting under all environmental whistleblower provisions other than the ERA.

Because the ERA as amended contains a 180 day statute of limitations, the allegations of DOE retaliation related to the stakeholders' meeting are timely under that statute. 42 U.S.C. § 5851 (1988 and Supp. V 1993). However, as the Secretary has previously held, DOE is not a proper party Respondent in an ERA whistleblower case, because the United States has not waived DOE's sovereign immunity under that statute. *Teles v. U.S. Department of Energy*, Case No. 94-ERA-22, Sec. Dec. and Ord., August 7, 1995. Therefore, Varnadore's claims relating to the April 29, 1994 stakeholders' meeting are not actionable against DOE under the ERA either, and are dismissed.

Varnadore's claims against Secretary O'Leary must be dismissed for the same reason. In addition, claims against Secretary O'Leary must be dismissed because she is not Varnadore's employer within the meaning of the ERA. The ERA as amended prohibits retaliation by "employers" which include:

> (A) a licensee of the [Nuclear Regulatory] Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 . . .;
>
> (B) an applicant for a license from the Commission of such an agreement State;
>
> (C) a contractor or subcontractor of such a licensee or applicant;
>
> (D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954

---

[37] Varnadore named, in addition to DOE, the Department of Energy's Oak Ridge Operations Office (ORO) and DOE Secretary Hazel O'Leary. As ORO is merely a subdivision of DOE, it is subsumed within DOE and cannot be held independently liable. *See Varnadore III* R. O. D. at 6. Secretary O'Leary's status as a Respondent is discussed below.

[38] 42 U.S.C. § 7922(b)(1) (1988)(CAA); 15 U.S.C. § 2622(b) (1988)(TSCA); 42 U.S.C. § 6971 (1988)(RCRA); 42 U.S.C. § 9610(b) (1988)(CERCLA).

> . . . , but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344.

42 U.S.C. § 5851(a)(2) (1988 and Supp. V 1993). In *Stevenson v. National Aeronautical and Space Administration*, Case No. 94-TSC-5, Sec. Dec. and Ord. of Remand, July 3, 1995, slip op. at 3-5, the Secretary of Labor held that individuals were not subject to suit under the environmental whistleblower provisions of TSCA and the CAA, which, like the ERA, prohibit "employers" from retaliating against employees who engage in protected activity. The *Stevenson* rationale applies here; persons who are not "employers" within the meaning given that word in the ERA may not be held liable for whistleblower violations.[39/]

The ALJ also correctly dismissed, pursuant to Rule 12(b)(6), Fed. R. Civ. P., the claim that DOE improperly reimbursed Energy Systems for its defense of *Varnadore II*.[40/] *Varnadore III* R. O. D. at 7-10. Neither the rules governing hearings in whistleblower cases, 29 C.F.R. Part 24 (1995), nor the rules governing hearings before ALJs, 29 C.F.R. Part 18 (1995), provide for dismissal of a complaint for failure to state a claim upon which relief can be granted. Therefore, the analogous Federal Rule of Civil Procedure governs Respondents' motion to dismiss. 29 C.F.R. § 18.1(a)(1995).

In considering dismissal under Rule 12(b)(6), the facts as alleged in the complaint are taken as true, and all reasonable inferences are made in favor of the non-moving party. *RMI Titanium Co. v. Westinghouse Electric Corp.*, 1996 U.S. App. LEXIS 5131 at *26-27 (6th Cir. 1996), *citing Mortensen v. First Federal Savings and Loan Assn.*, 549 F.2d 884, 890 (3d Cir. 1977). A dismissal under Rule 12(b)(6) "is then purely on the legal sufficiency of the plaintiff's case: even were plaintiff to prove all its allegations, he or she would be unable to prevail." *Mortensen v. First Federal Savings and Loan Assn.*, 549 F.2d at 890.[41/] Varnadore here has

---

[39/] The ALJ also correctly concluded that "Varnadore did not adequately articulate how the alleged actions or omissions by Secretary O'Leary constitute discriminatory conduct which adversely affected the terms or conditions of his employment." *Varnadore III* R. O. D. at 11. It is an understatement to find that Varnadore's accusations in this regard are frivolous. *See, e.g.,* Complaint at ¶¶ 16-23.

[40/] The ALJ also ruled that this claim should be dismissed because "DOL maintains no jurisdiction to decide claims contesting the DOE's . . . use of funds appropriated to it by Congress." *Varnadore III* R. O. D. at 9. That holding is patently correct.

[41/] Varnadore argues against dismissal, citing the Secretary of Labor's decision in *Helmstetter v. Pacific Gas and Electric Co.*, Case No. 91-TSC-1, Sec. Dec. and Ord. of Remand, Jan. 13, 1993, slip op. at 8. There the Secretary held that "[d]ismissal for failure to state a claim is disfavored, particularly in cases which present a novel or extreme theory of liability since it is important that new legal theories be explored." *Helmstetter* is distinguishable on the facts. There complainant sought to litigate a novel theory of retaliation: that the employer retaliatorily failed to provide Helmstetter with information regarding hazardous substances to which he had been exposed.

(continued...)

failed to state a claim which, even if the facts alleged are taken as true, would entitle him to relief. First, as the ALJ correctly pointed out, by no stretch of the facts or the law can it be concluded that Varnadore is DOE's employee. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-324 (1992); *Reid v. Methodist Medical Center of Oak Ridge*, Case No. 93-CAA-4, Sec. Dec. and Ord., Apr. 3, 1995, slip op. at 8-19; *appeal pending sub nom.*, *Reid v. Secretary of Labor*, No. 95-3648 (6th Cir.). Second, Varnadore has failed to articulate how DOE's funding policies (which are contained in DOE's contract with Energy Systems) had an adverse effect upon the compensation, terms, conditions, or privileges of Varnadore's employment with Energy Systems. Third, Varnadore has failed to claim that DOE's funding of the *Varnadore II* defense was motivated by retaliatory animus. Thus, this aspect of Varnadore's complaint collapses of its own weight, and it is dismissed. *See Varnadore III* R. O. D. at 7-9.

C. Claims Brought Against M. Elizabeth Culbreth.

The ALJ correctly held that the claims against Culbreth should be dismissed for a variety of reasons. First Varnadore did not allege that he was Culbreth's employee. *Varnadore III* R. O. D. at 6. Culbreth's only connection to Varnadore is that she is alleged to have been employed by Energy Systems to provide advise on the *Varnadore* cases. *See* Complaint at ¶¶ 11-12. As an employment relationship between the complainant and respondent is an essential element of any claim brought under the environmental whistleblower provisions, this cause of action must be dismissed for failure to state a claim upon which relief can be granted. Rule 12(b)(6), Fed. R. Civ. P.

In any event, the gist of Varnadore's claim against Culbreth is that she allegedly acted in an unethical manner by advising Energy Systems on an environmental whistleblower case which was pending in the Department of Labor at the time she was Director of the Department's Office of Administrative Appeals. Even assuming that acting as an advisor to Energy Systems (as opposed to appearing as an attorney before the Department in a case which had been pending during her employment) was an ethical violation, *see* 29 C.F.R. § 2.2 (1995), such a claim would not be actionable under the environmental whistleblower provisions. Thus, this claim is also appropriately dismissed for lack of jurisdiction over the subject matter. Rule 12(b)(1), Fed. R. Civ. P.

[41/] (...continued)
Helmstetter at 8. It was certainly arguable that under some asserted facts the employer's actions could be determined to have been retaliatory under the environmental whistleblower provisions. Here, on the other hand, the point is that under the facts alleged DOE could not, as a matter of law, be determined to be Varnadore's employer. Even more fatal under Rule 12(b)(6), under the facts alleged the Department of Labor could not possibly have authority under the environmental whistleblower provisions to evaluate DOE's reimbursement of Energy Systems for its defense of *Varnadore II*.

D. Claims Against the Other Energy Systems Respondents.[42/]

The ALJ correctly dismissed all claims against the remaining Energy Systems Respondents. As the ALJ correctly held in *Varnadore I*, and as the ALJ in this case also held, ORNL is an unincorporated division of Energy Systems and is not a legal entity. *Varnadore III* R. O. D. at 5; *Varnadore I* R. D. and O. at 83. Thus, ORNL is dismissed as a party. The same holds true for several other entities named in Varnadore's complaint: Energy Systems Medical, Health, Health Physics, Occurrence Reporting, Environmental Monitoring, and Industrial Hygiene Departments. As they are merely departments within Energy Systems, they are not proper respondents and claims against them are dismissed. Finally, although Shults is a named Respondent in this case, Varnadore does not allege that Shults was his employer, or that Shults retaliated against him within the period covered by the applicable statutes of limitations. Therefore Shults is dismissed as a Respondent. *See Varnadore III* R. O. D. at 6. Similarly, Respondents Lockheed Martin and Lockheed Martin Technologies are not alleged to have employed Varnadore and are merely parent companies of Energy Systems. They too are dismissed as Respondents. *Id.*

Varnadore's claims against Energy Systems fall into four categories. First, Varnadore alleges various retaliatory acts committed by Energy Systems before and at the April 29, 1994 stakeholders' meeting. Complaint at ¶¶ 23-24. They include allegations that improprieties were committed at the meeting, such as the claim that when Varnadore was introduced there were "multiple, audible murmurs expressing disdain and ridicule, including but not limited to grunts and groans" from the audience. Complaint at ¶ 23. Energy Systems is also charged with "blacklisting" Varnadore "in the form of defamatory statements or bad references spread by phone or in writing, including to the Secretary of Energy herself. . . ." Complaint, ¶ 36. Energy Systems is also alleged to have unethically used Varnadore's company medical records in *Varnadore I* and *II*, by, among other things providing those records to its attorneys. Complaint at ¶¶ 37-45. Finally, Energy Systems is alleged to have failed adequately to post the ERA's environmental whistleblower provision at ORNL, apparently in violation of 42 U.S.C. § 5851(a)(1) (1988 and Supp. V 1993).[43/] As discussed below, the ALJ correctly dismissed these remaining claims. Because the ALJ correctly dismissed all *Varnadore III* claims, he also correctly denied Varnadore's request to depose M. Elizabeth Culbreth and correctly denied Varnadore a hearing on the merits.

[42/] Included within this category are Oak Ridge National Laboratory; Energy Systems; Lockheed Martin, Inc.; Lockheed Martin Technologies; ORNL and Energy Systems Medical, Health, Health Physics, Occurrence Reporting, Environmental Monitoring, and Industrial Hygiene Departments; and Wilbur Dotrey Shults.

[43/] The complaint also includes numerous paragraphs of "allegations" which are virtually verbatim repetitions from Complainant's Post Hearing Brief before the ALJ in *Varnadore II*. *Compare* Complaint, ¶¶ 68-90, 99-109 with Post Hearing Brief at ¶¶6-29, 61-71. These paragraphs contain rambling discussions of the history of the Varnadore cases, the history of Oak Ridge, Tennessee, the corporate structure of Lockheed Martin, and other topics.

1. The Stakeholders' Meeting.

Varnadore alleged that at the stakeholders' meeting he was introduced in a 'stigmatizing fashion (e.g., "we all know him") by [Energy Systems] manager Will Minter, Vice Mayor of the City of Oak Ridge . . . ." Complaint, ¶ 24. Second, Varnadore alleged that when he was introduced there were "multiple audible murmurs expressing disdain and ridicule" from the audience. Complaint, ¶ 23. Third, Varnadore alleged that Secretary O'Leary's allegedly unfriendly treatment of Varnadore at the stakeholders' meeting was a result of Energy Systems' "blacklisting communications." Complaint, ¶ 35. None of these claims can withstand scrutiny under Rule 12(b)(6).[44/]

Varnadore alleged almost no facts about the stakeholders' meeting. It appears that the meeting, which was public, was organized by DOE, was held at the DOE owned Oak Ridge Museum of Science and Energy, and that DOE invited Varnadore to be on the panel.[45/] Varnadore's claim that Minter introduced him by saying "[w]e all know him," does not support Varnadore's contention that he was introduced in a "stigmatizing manner." Given the amount of publicity that the Varnadore cases have generated, Minter's comment was merely a statement of fact. Certainly nothing which even arguably had an adverse impact on Varnadore's work environment can be read into this innocuous remark. Thus, Varnadore has alleged no facts from which a reasonable person could conclude that Minter's introduction constituted retaliatory adverse action by Energy Systems.

Second, Varnadore's allegation that the "murmurs and groans" which were generated by his introduction on the panel constitute retaliatory adverse action on the part of Energy Systems is frivolous. The alleged "murmurs and groans" came from an audience which Varnadore asserted was made up of a "diverse group of people" including people who were not employees at ORNL (Complaint, ¶ 23). The alleged murmurs and groans occurred, not in the auditorium

---

[44/] Varnadore did not address these issues in his Response to the motions to dismiss filed by Energy Systems and DOE.

[45/] Varnadore alleged that:

> On April 29, 1994, Energy Secretary O'Leary held a public session in Oak Ridge, including a luncheon and public "stakeholder" meeting to which Mr. Varnadore was invited as a guest, along with leaders of Citizens for Better Health, unions and other entities.

Complaint, ¶ 15. *See also* DOE's Motion to Dismiss Mr. Varnadore's Complaint, November 23, 1994, at 4: 'On approximately April 29, 1994, Secretary O'Leary visited Oak Ridge. During her visit, Ms. O'Leary conducted a "stakeholders" meeting, in which she met with various members of the public at the Oak Ridge Museum of Science and Energy.'

I have already dismissed Varnadore's claims against the DOE Respondents related to this meeting.

where the panel (with Varnadore) was located, but in an "overflow" room where a group of approximately 200 to 250 people were watching the proceedings on television monitors. Complaint, ¶ 23. Thus, Varnadore did not even allege that he was personally subjected to these "murmurs and groans." In any event, Varnadore failed to allege any facts which could lead to a conclusion that the "murmurs and groans" contributed to a hostile work environment.

Third, Varnadore asserted that a remark that Secretary O'Leary allegedly made in private to him at the April 29, 1994 meeting:

> . . . is redolent with the smell of blacklisting communications directed against Mr. Varnadore by [Energy Systems] propagandists.
>
> * * * *
>
> The Wage-Hour Division must learn who spread to the Secretary and her top assistants and managers any disinformation, including blacklisting in the form of defamatory statements or bad references spread by phone or in writing, including to the Secretary of Energy herself, whose cold reaction to Mr. Varnadore betokens Martin Marietta's desperate propaganda efforts against Mr. Varnadore at the highest levels of government.

Complaint, ¶¶ 35-36. The ALJ concluded that:

> General allegations, without well-pleaded facts of a specific discriminatory act within the limitations period, are not sufficient to raise the inference of discrimination . . . .
>
> Furthermore, even assuming all facts in Count Two to be true, the Complaint fails to adequately express how such acts by [Energy Systems], such as allegedly bad-mouthing him to DOE officials, adversely effected the Complainant's compensation, terms, conditions or privileges of employment.

R. O. D. at 12. Therefore, the ALJ recommended dismissal of this claim pursuant to Rule 12(b)(6), Fed. R. Civ. P.

The ALJ's conclusion is clearly correct. A decision on a Rule 12(b)(6) motion is "purely on the legal sufficiency of plaintiff's case: even were plaintiff to prove all its allegations, he or she would be unable to prevail." *Mortensen v. First Federal Sav. and Loan Ass'n*, 549 F.2d at 891 (3d Cir. 1977). Pursuant to a hostile work environment analysis, it is not enough for Varnadore to allege that Secretary O'Leary had a negative reaction to him, and that negative reaction must have been caused by "blacklisting communications" from Energy Systems. Varnadore must allege facts that show that Energy Systems made blacklisting remarks to Secretary O'Leary which in turn contributed to a hostile work environment. In the absence of any alleged facts regarding this element of his claim, it must be dismissed pursuant to Rule 12(b)(6).

2. Varnadore's Medical Records.

This allegation relates to activities which occurred during the preparation for the *Varnadore I* hearing. *See* Complaint, ¶¶ 37-46. As that hearing took place in 1992, this claim is clearly barred by the applicable statutes of limitations, and therefore is dismissed. Even if the claim were timely, however, Energy Systems would be entitled to summary decision.[46/]

First, Varnadore failed to present any evidence that Energy Systems' use of his medical records in *Varnadore I* had an adverse effect on the terms, conditions, or privileges of his employment. Second, Energy Systems submitted uncontroverted evidence to the ALJ which demonstrated that Varnadore's allegations that Energy Systems misused medical information to force him "to relive the death of his son and his near-death experience with cancer under intense questioning in depositions and at trial by counsel for Respondents" (Complaint, ¶ 37) were not based upon fact. *See* Varnadore III, Br. in Support of Respondents' Motion to Dismiss at 11-15 and APX G. Varnadore made no attempt to counter this evidence. Thus, there are no outstanding issues of material fact regarding this claim, and Energy Systems is entitled to summary decision as a matter of law.

3. Posting of the ERA.

Varnadore alleged that Energy Systems had not properly posted the whistleblower provision of the ERA as required by 42 U.S.C. § 5851(a)(i) (1988 and Supp. V 1993), which states that "[t]he provisions of this section shall be prominently posted in any place of employment to which this section applies." Varnadore III Complaint, ¶¶ 47-53. However, Varnadore conceded that Energy Systems has posted "the text of the statute. . . ." *Id.* at ¶ 50. Varnadore's complaint apparently is that Energy Systems has posted the text of the statute "rather than explanatory material that would make it meaningful for Oak Ridgers." *Id.* As such, Varnadore has not stated a claim upon which relief can be granted, and the claim is appropriately dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P.

4. The Denial of Discovery and a Hearing on the Merits.

The ALJ denied Varnadore's request to depose Culbreth. Because we concur with the ALJ's ruling that Culbreth was not a proper party respondent in this case, and that the claims against her must be dismissed, we also agree that discovery was appropriately denied.[47/] Varnadore has also failed to demonstrate that he is entitled to a hearing on the merits of any of

---

[46/] Because Energy Systems introduced evidence in support of its motion to dismiss this allegation, this claim is converted by operation of Rule 12(b), Fed. R. Civ. P. to a motion for summary decision. *See Stephenson v. National Aeronautics & Space Administration*, Case No. 94-TSC-5, Sec. Ord. of Remand, September 28, 1995, slip op. at 4-5.

[47/] Varnadore makes no claim that deposing Culbreth could lead to discoverable information regarding any Respondents other than Culbreth herself.

his allegations, as they were all appropriately dismissed on one or more grounds, as set out above.[48/]

III. Issues Remaining in *Varnadore I.*

As a result of our holdings regarding *Varnadore II* and *Varnadore III*, the sole issue which remains to be decided is that which was held over from *Varnadore I*: whether the Murphy incident and the incident of the posting of the Smith memorandum created a hostile work environment for Varnadore. *See Varnadore I* D. and O. at 82-84. The Secretary held that in both of these instances an Energy Systems supervisor was motivated, at least in part, by retaliatory animus. With regard to the Murphy incident, which occurred in February 1992, the ALJ concluded that Murphy, a supervisor in another Division of ORNL, discouraged his employees from having contact with Varnadore in the halls. *Varnadore I* R. D. and O. at 80. The Secretary concluded that "Murphy engaged in a retaliatory act when he warned his employees not to be seen talking with Varnadore." *Varnadore I* D. and O. at 80.

In the posting incident in August 1992, just after the completion of the first hearing in *Varnadore I*, an ACD supervisor (Botts) posted on an ACD bulletin board a memorandum from an ORNL employee to an Energy Systems attorney which referred to Vamadore and his whistleblower case. *Varnadore I* D. and O. at 53-55. The ALJ held:

> Two sentences in that memorandum, "[t]he radiation phobia in the United States is just that . . . a phobia brought about by an over-zealous health physics establishment. It's time to illuminate this unreality at the expense of Mr. Varnadore" is on its face ridicule of Complainant for pursuing this proceeding. the action of Botts in posting the memorandum on a company bulletin board is clearly retaliatory.

Varnadore I R. D. and O. at 74. The Secretary concluded that:

> [T]he true reason that Botts posted the Smith memorandum was to retaliate against Varnadore for filing his whistleblower complaint . . . .
>
> . . . [T]here is no doubt that it was thoughtless and cruel of Botts to post a memorandum which made a comment on this litigation and named Varnadore. It is understandable that Varnadore would have found the posting of the memorandum upsetting . . . . [T]he posting was a senseless, obnoxious, offensive act of an ACD middle manager.

Varnadore I D. and O. at 80-81. We must now determine whether these two retaliatory incidents, which did not result in a "tangible job detriment," created a hostile work environment

---

[48/] Therefore Vamadore's Motion to Supplement the Record, filed March 19, 1996, with its attendant request for an Order of Remand, is denied.

and therefore constituted unlawful retaliation for Varnadore's filing of his complaint in *Varnadore I*.

As the Secretary noted in *Varnadore I*, the concept of a hostile work environment, first developed in the context of race and sex based employment discrimination, is applicable to whistleblower cases. *Varnadore I* D. and O. at 79. The Supreme Court has articulated standards to be applied in hostile work environment cases:

> . . . [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 371 (1993). As the Secretary noted in *Varnadore I*, based upon *Harris* the Third Circuit has articulated factors to be weighed in a hostile work environment case, which "can be tailored to a whistleblower retaliation claim alleging a hostile work environment." *Varnadore I* D. and O. at 80. These factors are:

> (1) the plaintiff suffered intentional discrimination because of his or her membership in the protected class;
>
> (2) the discrimination was pervasive and regular;
>
> (3) the discrimination detrimentally affected the plaintiff;
>
> (4) the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and,
>
> (5) the existence of respondeat superior liability.

West v. Philadelphia Electric Co., 45 F.3d 744, 753 (3d Cir. 1995). *See Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 619-20 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Gebers v. Commercial Data Center, Inc.*, 1995 U.S. App. LEXIS 614 (6th Cir. 1995); (unpublished decision articulating necessary factors in hostile work environment case in light of *Harris*).

In *Varnadore I* the Secretary concluded that Vamadore had established the first *West* factor because both Murphy and Botts had retaliated against Varnadore for filing his *Varnadore I* complaint. *Varnadore I* D. and O. at 80. For the reasons that follow, we conclude that Varnadore failed to establish other elements of his hostile work environment claim.

First Varnadore failed to establish that the discrimination which he suffered was "pervasive and regular." *Harris v. Forklift Systems, Inc.*, 114 S.Ct. at 370-371; *West v. Philadelphia Electric Co.*, 45 F.3d at 753. Although Varnadore has attempted to do so through allegations that he was retaliated against beginning in 1989 and continuing through 1993, the Secretary has concluded in *Varnadore I,* and we have concluded in this decision, that the only two actionable incidents of retaliatory conduct are the February 1992 Murphy incident and the August 1992 posting incident. We cannot conclude that these two incidents, when considered cumulatively, were pervasive or regular.

The Murphy incident took place in a division other than the one in which Varnadore worked. *See Varnadore I* D. and O. at 53. There is no evidence that Murphy's statement to the effect that employees should be careful not to talk to Varnadore in the halls actually altered anyone's behavior, or that Varnadore was even aware of Murphy's statement until months after Murphy made the comment.[49/] Similarly, the posting of the Smith memorandum was an isolated incident, which was not shown to have had any significant impact upon Varnadore's working environment, although Varnadore was understandably upset by it. In fact, it is not clear that the posting would have received any attention in ACD absent the publication of a story about it in the *Oak Ridger*, which was arranged by Varnadore or his counsel. *Varnadore I*, T. 3317 (Varnadore). The Court in *Harris* stated that a workplace constitutes a hostile work environment when it is permeated with "discriminatory intimidation, ridicule, and insult" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. . . ." *Harris v. Forklift Systems, Inc.*, 114 S.Ct. at 370, *quoting Meritor Savings Bank v. Vinson*, 477 U.S. at 67. However '"mere utterance of an . . . epithet which engenders offensive feelings in an employee," . . . does not sufficiently affect the conditions of employment to implicate Title VII.' *Id. See Batts v. NLT Corp.*, 844 F.2d 331 (6th Cir. 1988) (five isolated incidents of racial hostility over a six-year period, which either were not brought to management's attention, or were effectively attended to after they were, did not constitute a hostile work environment); *Davis v. Monsanto Chemical Co.*, 858 F.2d 345 (6th Cir. 1988)(same). We conclude that the two remaining incidents of retaliation considered together were not pervasive, severe or regular discrimination.

Moreover, there is no testimony that the Murphy incident detrimentally affected Varnadore or would have detrimentally affected a reasonable person in Varnadore's position. Thus, Varnadore did not satisfy the third and fourth elements of the *West* test with regard to that incident.

The Secretary has held, in essence, that the posting of the Smith memorandum did detrimentally affect Varnadore, and reasonably so. We emphasize that we fully concur with the Secretary's characterization of the posting. *See Varnadore I* D. and O. at 80-81 (posting was "thoughtless and cruel," "a senseless, obnoxious, offensive act of an ACD middle manager"). However, the factor upon which the posting incident founders is respondeat superior. As the

---

[49/] Varnadore did not testify regarding the Murphy incident. The only testimony regarding Murphy's statement was that of employee Freels and of Murphy himself. *Varnadore I*, T. 940-958 (Freels); T. 2675-2693.

Supreme Court has made clear in *Meritor Savings Bank v. Vinson*, 477 U.S. at 73, employers are not to be held absolutely liable "for the acts of their supervisors, regardless of the circumstances of a particular case." The Sixth Circuit has expounded upon the relevance of employer knowledge and action in evaluating hostile work environment cases:

> In a hostile working environment claim, the determination of whether an employer is liable for its supervisor's actions depends on 1) whether the supervisor's harassing actions were foreseeable or fell within the scope of his employment and 2) even if they were, whether the employer responded adequately and effectively to negate liability.

Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 803 (6th Cir. 1994). In a footnote the court emphasized that its rule in this regard 'allows for the "negation of an employer's liability" regarding supervisors if the employer responds "adequately and effectively" to the harassment. . . .' *Id.* at 803 n.10. Similarly, the Second Circuit has held that:

> [A]n employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship . . . . In contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's co-workers; consequently, . . . the employer will not be liable unless "the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it."

Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994).

The ALJ in *Varnadore I* found that the posting of the Smith memorandum was "almost inevitable" in light of the anti-whistleblower environment which the ALJ found to exist at ORNL. R. D. and O. at 75. The Secretary in *Varnadore I*, and we here, have not adopted the *Varnadore I* ALJ's anti-whistleblower environment findings. Therefore we cannot concur that the posting was "almost inevitable." *See Varnadore I* D. and O. at 59-73. In any event, we conclude that ACD Director Shults' reaction to the posting, once he was made aware of it by an article in the local newspaper,[50/] effectively negated any potential liability Energy Systems might have had for the posting.

[50/] As was found in *Varnadore I*, D. and O. at 54, when Varnadore found the Smith memorandum posted on an ACD bulletin board, he:

> . . . copied it and supplied a copy to his attorneys
> . . . . Within a day, Varnadore was interviewed by the *Oak Ridger* for an article about the Smith memorandum
> . . . . The article was published on August 14 . . . . Thereafter Botts removed the memorandum from the bulletin board . . . .

When Shults read about the posting, he immediately called a meeting with Botts, at which he informed Botts that the posting was inappropriate:

> Q. Can you relate briefly to us the substance of your conversation with Jim Botts?
>
> A. Well, I asked him, you know, why he posted the memo and his reasons for doing that, and we talked about the significance of it, in view of the fact that there had been the litigation and the complaints, and I essentially told him that I thought that it was not good judgment on his part to have posted that memo. I also told him that I would follow up our conversation with a memo.

Varnadore I, T. 3364 (Shults). Shults then sent Botts a memorandum on the subject:

> After reading the Smith letter and reviewing the sequence of events with you, I can see how the letter found its way to a bulletin board in Bldg. 2026. It could be of interest to new employees who may have some uncertainty about radiation effects. On the other hand, since the letter mentions Mr. Varnadore specifically, it should not have been posted. Rightly or wrongly, an argument can be made that posting that letter results in a hostile working environment for him. We want to avoid even the perception of a hostile working environment for him and for all other ACD people.
>
> Please be extra cautious in the future and avoid episodes like this. The slightest event can turn into a major issue.

Varnadore I, Ex. 261.

The Seventh Circuit has provided useful guidance on how to determine whether an employer's reaction is sufficiently effective to warrant a conclusion that it should not be held liable for an employee's retaliatory conduct toward another employee:

> [T]he employer's legal duty is . . . discharged if it takes reasonable steps to discover and rectify acts of sexual harassment of its employees.
>
> Here we add that what is reasonable depends on the gravity of the harassment. Just as in conventional tort law a potential injurer is required to take more care, other things being equal, to prevent catastrophic accidents than to prevent minor ones, . . . so an employer is required to take more care, other things being equal, to protect its female employees from serious sexual harassment than to protect them from trivial harassment . . . .

* * * *

> The test is reasonableness, and reasonableness, as we have said, depends among other things on the gravity of the harassment alleged. No one would think it rational to spend more money investigating a traffic offense than a murder or to punish the traffic offender more heavily.

Baskerville v. Culligan International Co., 50 F.3d 428, 431-432 (7th Cir. 1995).

Analysis of the posting incident in light of these considerations leads to the conclusion that Shults' immediate response to Botts' retaliatory act was sufficient to negate any possible liability for Botts' actions.

Contrary to the assertions of Varnadore's counsel, this case is readily distinguished from *Smith v. Esicorp, Inc.*, Case No. 93-ERA-00016, Sec. Dec. and Ord. of Remand, Mar. 13, 1996. In *Smith*, a known whistleblower was, over a period of two and one-half months, the subject of "sarcastic and derogatory" cartoons. *Smith*, slip op. at 25-26. The cartoons, which were drawn by a company foreman on a drawing board located in the company lunchroom, ridiculed Smith and his whistleblowing activities. *Smith*, slip op. at 25-26. The ALJ held that although the cartoons were of an "abusive and harassing nature," they were not sufficiently severe and pervasive to create a hostile work environment. *Smith*, slip op. at 24. The Secretary rejected this finding:

> The cartoons constitute a series or pattern of retaliatory jokes and comments sufficient to satisfy the [pervasive and regular] element of proof . . . . During this several month period, a pattern of overtly retaliatory cartoons appeared in a common workplace area frequented by employees and utilized by carpenter foremen as an office. Dixon, who was a foreman, acknowledged repeatedly, "there were so many drawings." . . . Morgan testified that he saw at least four or five different cartoons of Smith. . . . As explained by both Dixon and Morgan, a cartoon would remain on the drawing board for a period of time and then be replaced by another. . . .
>
> Numerous witnesses testified, without contradiction, that the cartoons were sarcastic and derogatory. . . . Morgan confessed that some were funny and some were tacky, but for the most part they were insulting to Smith.

Smith, slip op. at 25-26.

This case does not present facts remotely approaching those of *Smith*. Although the Secretary held that Botts' posting of the Smith (no connection to *Smith v. Esicorp*) memorandum was "thoughtless and cruel," and that Murphy's warning that the employees in his section should not be seen talking to Varnadore in the halls was retaliatory, there is no indication that these were anything other than completely isolated incidents -- one occurring in February, and the other in August of 1992.

Moreover, in stark contrast to the facts in *Smith*, when Shults learned of the posting of the Smith memorandum he held a meeting with Botts and emphasized the importance of avoiding even the appearance of harassment.[51/] Thus, unlike *Smith,* in which upper level managers knew of the repeated, derogatory cartooning that was being done in the lunchroom, and took no action whatsoever to remedy the situation (*Smith*, slip op. at 27), here Shults took immediate action.

Shults' action also must have been effective, for although Varnadore has made numerous claims regarding acts of retaliation which allegedly occurred after the Smith posting incident in August 1992, none of them has withstood adjudicative scrutiny.[52/] Thus, the records of these three cases reveal two isolated retaliatory acts, one which Varnadore may not even have known about until months later, and did not testify about (the Murphy incident), and the other which was effectively handled by higher level management (the posting incident). Based upon this record we cannot conclude that Varnadore was subjected to a hostile work environment as a result of the filing of his whistleblower complaint.

[51/] Shults also testified that he had held staff meetings at which he emphasized that harassing conduct was contrary to ACD and Energy Systems values:

> Q. And, what have you told [ACD employees]?
>
> A. Basically that we will not tolerate retaliation in any form, and I encourage people to report any instance that they even perceive to be retaliation.
>
> * * * *
>
> Q. Is this a meeting of all employees, not just supervisors?
>
> A. Yes. In general, it is attended by 125 people or so. And, at that, I devoted a considerable amount of time at that meeting to the events of the trial, to the events of the panel investigation, to the Webster report, and wound up by making essentially a speech about retaliation. At that time I indicated all of the various avenues that people could take if they wanted to report it and urged them to do that.

Varnadore I, T. 3367 (Shults).

[52/] Thus, for example, Varnadore alleged that Shults made retaliatory remarks regarding Varnadore at an ACD staff meeting, Energy Systems released a retaliatory press release regarding the *Varnadore I* R. D. and O., and Levenhagen made a derogatory retaliatory remark about Varnadore to another Energy Systems employee. *See* discussion of *Varnadore II*, above.

CONCLUSION

For the reasons articulated above the three *Varnadore* cases are dismissed.

SO ORDERED.

DAVID A. O'BRIEN

KARL J. SANDSTROM

JOYCE D. MILLER