



In the Matter of:

RAYMOND L. SCHLAGEL,

ARB CASE NO. 02-092

COMPLAINANT,

ALJ CASE NO. 01-CER-1

v.

DATE: April 30, 2004

DOW CORNING CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

A. Alene Anderson, Esq., Project On Liberty & The Workplace, Seattle, Washington, Robert C. Seldon, Esq., Project On Liberty & The Workplace, Washington, D.C., and Raymond L. Schlagel, pro se, Florence, Kentucky

For the Respondent:

Kenneth S. Handmaker, Esq., and Timothy P. O'Mara, Esq., Middleton Reutlinger, Louisville, Kentucky

FINAL DECISION AND ORDER

This case is before the Administrative Review Board (ARB) pursuant to the employee protection provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (West 1995), Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998), Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 1995) and the Department of Labor's (DOL) implementing regulations set out at 29 C.F.R. Part 24 (2003). The Complainant (Schlagel) asserts that his employer, Dow Corning Corporation (Dow), violated the employee protection (whistleblower) provisions of the CERCLA, TSCA and CAA when Dow allegedly retaliated against him for raising environmental safety concerns. Following a hearing, the Administrative Law Judge (ALJ) concluded that Schlagel had failed to meet his ultimate

evidentiary burden and demonstrate his entitlement to relief under the environmental whistleblower statutes. Specifically, the ALJ determined that the Complainant had failed to prove by a preponderance of the evidence that the Respondent discriminated against him because of his protected activities. Recommended Decision and Order (R. D. & O.) at 45. Thus, the ALJ recommended that Schlagel's complaint be dismissed. Schlagel appeals and, for the reasons set forth below, we affirm the ALJ's recommended findings and rulings denying the complaint as a whole.

BACKGROUND

Dow employed Schlagel at its chemical plant in Carrollton, Kentucky, from May 1989, until the termination of his employment on November 10, 1999. Hearing Transcript (HT) at 42. At all relevant times, the Carrollton plant manufactured silicones that were used in various products, such as deodorants and shampoos. HT at 33. Schlagel initially worked as a plant engineer and then worked as a project engineer. HT at 166-169. In 1996, Schlagel became a project engineer with the manufacturing group of the plant, where his original supervisor was Andy Pierce and, subsequently, Chris Kneale was his supervisor from January 1998, until his termination. HT at 38, 42-43. Pierce and Kneale both reported to the plant manager, John Lackner. *Id.* While Schlagel's performance appraisals contained in the record are, in general, positive regarding his technical skills as both a plant engineer and project engineer, Schlagel's appraisals as early as March 25, 1997, and April 30, 1997, indicate his need to improve his poor leadership skills. Joint Exhibit (JX) 4 at 37; JX 5 at 63-65; Joint Stipulated Exhibit (JSX) 10 at 3; JSX 11 at 14.

After learning of a release of methylchloride from the plant into the atmosphere on July 27, 1997, Schlagel spoke with his supervisor, Andy Pierce. HT at 53-65. Schlagel expressed his safety and environmental concerns that the use of a bypassed valve and solids build-up on the machinery caused the release. *Id.* Schlagel also reported his research on the cause and solutions for the solids build-up in an e-mail dated October 10, 1997, to Andy Pierce, as well as to John Lackner and Chris Lanthier. Complainant's Exhibit (CX) 73 at 121-122. Lanthier headed the C3 Motors Project, a compressor project on which Schlagel was also involved at the time. Carrollton HT at 136-137. In addition, Schlagel expressed safety issues in a November 6, 1997 e-mail to Pierce regarding the use of bypassed valves with the C3 Motors Project. HT at 65-66; CX 75 at 125-126. Dow removed Schlagel from the C3 Motors Project on November 12, 1997. CX 107 at 194-195; HT at 1018-1019; Carrollton HT at 135, 162.

Schlagel met with John Lackner in December 1997 and again raised his safety and environmental concerns about valve bypasses, equipment issues, compressor problems, as well as freon releases. HT at 72-74. Andy Pierce offered Schlagel a new position with the reliability group for the first time in January 1998. HT at 75; CX 184 at 495. In a subsequent meeting with Lackner in June 1998, Schlagel reiterated his safety and environmental concerns and Lackner again offered Schlagel the position with the reliability group. HT at 79-80; CX 22 at 62. In addition, in June 1998, Schlagel requested a "process change request" or PCR, which he believed was necessary to

comply with regulatory standards, in order to replace a malfunctioning flow meter that was providing incorrect measurements regarding the release of waste gases into the atmosphere. HT at 80-87; CX 82 at 147.

Schlagel met with Lackner again on August 28, 1998. HT at 88-90; CX 26 at 66. Lackner again offered Schlagel the reliability group position and Schlagel reiterated his previously raised safety and environmental concerns related to his job with the manufacturing group. *Id.* On August 31, 1998, Schlagel sent an e-mail to his supervisor, Chris Kneale, stating his opinion that freon in the refrigeration units needed to be replaced. HT at 91; CX 118 at 249. Schlagel further noted that replacing the freon must be reported as a “freon release” to comply with regulatory standards. *Id.* Later that day, Schlagel met with Mike Nevin regarding his possible transfer to the reliability group. HT at 90; CX 29 at 69. Schlagel reiterated his previously raised safety and environmental concerns related to his manufacturing group job to Nevin, who was to be his supervisor with the reliability group. *Id.* Ultimately, Nevin withdrew the job offer with the reliability group and Dow reassigned Schlagel’s methylchloride responsibilities in the manufacturing group in September 1998 to another project engineer, Katy Biallas. HT at 93; CX 24 at 64. Schlagel retained his hydrolysis responsibilities in the manufacturing group. *Id.* Subsequently, on September 29, 1998, Schlagel wrote an e-mail summarizing tasks that needed to be completed in preparation for an inspection from the manufacturer of the refrigeration units. *See* HT at 96-99; CX 122 at 260-261. Schlagel again recommended replacing the freon in the refrigeration units. *Id.*

On January 7, 1999, Schlagel wrote a review of his supervisor’s, Kneale’s, performance for Lackner, in which he made reference to his previous discussions with Lackner regarding his safety and environmental concerns. HT at 100; CX 32 at 72. On February 25, 1999, Schlagel sent an e-mail to Kneale, Lackner and others regarding the performance of heat exchangers and their compliance with regulatory standards. HT at 102; CX 153 at 395-396.

In April 1999, Kneale provided Schlagel with a written appraisal of Schlagel’s performance in 1998, which indicated a need for Schlagel to improve his poor leadership skills. JX 3 at 26. Shortly thereafter, on April 23, 1999, Schlagel sent an e-mail to Ed Ovsenik, a Dow attorney in its legal department, Ovsenik’s supervisor, Jeanne Dodd, and Burnett Kelly, detailing what he considered to be his unfounded performance evaluation and his safety and environmental concerns and complaints, which instigated a Dow investigation. CX 44 at 85-86; Respondent’s Exhibit (RX) 9.

Finally, in September 1999, Dow offered Schlagel a new position as the coordinator of the Backstep program, which was a program Dow initiated to mothball plant equipment in light of a reduction in production at the Carrollton plant. CX 57 at 104; CX 58 at 105. On October 15, 1999, Dow transferred Schlagel to the Backstep position, where his new supervisor would be Chris Lanthier. HT at 131-132. Later that day Schlagel sent an e-mail to the CEO of Dow, Gary E. Anderson, with his April 23, 1999 e-mail, detailing his safety and environmental concerns and complaints attached. JX 13 at 103; JSX 1 at 19. Schlagel asked “Gary” to “check into this” and opined that

“he felt like I have been bullied into another job.” *Id.* Schlager then sent an e-mail to everyone at the Carrollton plant, including outside contractors not employed by Dow, and attached both his e-mail to Anderson and his April 23, 1999 e-mail. HT at 332-333; JX 13 at 1-6; JSX 1 at 22; RX 24. In his e-mail to everyone at the Carrollton plant, Schlager generally asked “would you have any misgivings working for Chris Lanthier?,” while noting that “I might get myself fired.” *Id.* John Lackner informed Schlager later that same day, by phone and by letter, that Schlager was suspended with pay. HT at 136; JX 13 at 102; JSX 1 at 18; RX 25. Ultimately, at a meeting held on November 10, 1999, Schlager’s supervisor, Chris Kneale, along with Eric Heimke, a Dow human resources representative, informed Schlager that Dow had terminated his employment.

Schlager contends that the particular occasions on which he raised his safety and environmental concerns about problems that he perceived at the plant with his supervisors, either in meetings, by e-mail or when requesting a PCR, constituted protected activity and that Dow took a number of adverse actions against him because of his protected activities. Complainant’s Trial Brief (before the ALJ) at 16-23. Specifically, Schlager alleges that his initial protected activity occurred when he spoke with his supervisor, Andy Pierce, on July 27, 1997, about his safety and environmental concerns regarding the methylchloride release. *Id.* Schlager also contends that Dow took adverse action against him when: removing him from the C3 Motors Project; offering him a new position with the reliability group; reassigning his methylchloride responsibilities in the manufacturing group; criticizing his leadership skills in his April 1999 performance evaluation; and transferring him to the Backstep position. *Id.* Both Dow and Schlager stipulate that his suspension and termination were adverse actions.

Schlager filed a complaint against Dow with the United States Department of Labor, Occupational Safety and Health Administration (OSHA), on November 15, 1999. *See* Respondent’s Motion for Summary Decision [before the ALJ], May 10, 2001, Exhibit A. After OSHA initially denied the complaint on February 12, 2001, ALJ Exhibit (ALJX) 3, Schlager requested a hearing with the Office of Administrative law Judges. A hearing was held before the ALJ on October 2 to October 4, 2001, in Cincinnati, Ohio, on October 5, 2001, in Carrollton, Kentucky, and on December 5 and 6, 2001, in Cincinnati.

ISSUES

- I. Whether certain adverse actions Schlager alleges that occurred more than thirty days preceding the filing of his complaint are time barred under the relevant environmental whistleblower statutes.
- II. Whether, as to those adverse actions that are not time barred, Schlager proved by a preponderance of the evidence that Dow discriminated against him because of his protected activity.

JURISDICTION AND STANDARD OF REVIEW

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

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

DISCUSSION

Elements of complaint

To prevail on a complaint of unlawful discrimination under the whistleblower protection provisions of the environmental statutes, a complainant must establish by a preponderance of the evidence that the respondent took adverse employment action against the complainant because he engaged in protected activity. See *Jenkins*, slip op. at 16-17. Specifically, Schlagel must establish by a preponderance of the evidence that Dow is subject to the statutes, that he engaged in protected activity of which Dow was aware, that he suffered adverse employment action and that the protected activity was the reason for the adverse action, i.e., that a nexus existed between the protected activity and the adverse action. *Id.* Failure to establish any of these elements defeats a complaint under the applicable whistleblower statutes. *Jenkins*, slip op. at 16.¹

¹ We note that, in setting forth the legal standard governing proof of discrimination in cases arising under the environmental whistleblower statutes, the ALJ, citing cases arising under the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 1995), stated that if a complainant meets his initial burden of establishing a prima facie case of unlawful discrimination under the environmental whistleblower statutes, then the burden shifts to the employer "to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior," citing *Zinn v. University of Mo.*, 93-ERA-34 and 36 (Sec'y Jan.18, 1996); R. D. & O. at 1-2, and "would have taken the adverse action even if the complainant had not engaged in the protected activity," citing *Lockert v. United States Dep't of Labor*, 867 F.2d 513 (9th Cir. 1989). R. D. & O. at 24, 41.

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To clarify the ALJ's apparent misunderstanding or misstatement of the parties' respective burdens of production and proof, we summarize the standards appropriate to establishing discrimination under the environmental whistleblower statutes.

To establish a prima facie case of unlawful discrimination under the environmental whistleblower statutes, a complainant needs only to present evidence sufficient to raise an inference, a rebuttable presumption, of discrimination. As the Secretary and the Board have noted, a preponderance of the evidence is not required. *See Williams v. Baltimore City Pub. Schools Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at 1 n. 7 (ARB May 30, 2003). A complainant meets this burden by initially showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in protected activity under the statute of which the employer was aware, that the complainant suffered adverse employment action and that a nexus existed between the protected activity and the adverse action. *See Jenkins*, slip op. at 16-17; *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-934 (11th Cir. 1995); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995). Contrary to the ALJ's characterization, once a complainant meets his initial burden of establishing a prima facie case, the burden then shifts to the employer to simply produce evidence or articulate that it took adverse action for a legitimate, nondiscriminatory reason (a burden of production, as opposed to a burden of proof). When the respondent produces evidence that the complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, the rebuttable presumption created by the complainant's prima facie showing "drops from the case." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence. *Jenkins*, slip op. at 18. *Cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Thus, after a whistleblower case has been fully tried on the merits, the ALJ does not determine whether a prima facie showing has been established, but rather whether the complainant has proved by a preponderance of the evidence that the respondent discriminated because of protected activity. *Williams*, slip op. at 1 n. 7; *Jenkins*, slip op. at 16-17.

If the complainant proves by a preponderance of the evidence that a retaliatory or discriminatory motive played at least some role in the respondent's decision to take an adverse action, only then does the burden of proof shift to the respondent employer to prove an affirmative defense and show that the complainant employee would have been fired even if the employee had not engaged in protected activity. *Lockert*, 867 F.2d at 519 n. 2. Contrary to the ALJ's characterization of the employer respondent's burden of proof to prove an affirmative defense at this stage, while Congress has specifically placed a higher burden on the employer in an ERA case in such circumstances, i.e., to demonstrate by "clear and convincing" evidence that it would have nevertheless taken the same action, *see* 42 U.S.C.A. § 5851(b)(3)(D), it has not done so with respect to employers under the CERCLA, TSCA or CAA. Under these environmental whistleblower statutes, the employer may meet that burden by only a preponderance of the evidence. *See Cox v. Lockheed Martin Energy Sys., Inc.*, ARB No. 99-040, ALJ No. 97-ERA-17, slip op. at 4 n.7 (ARB Mar. 30, 2001). Nevertheless,

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The employee protection (whistleblower) provisions of the CERCLA, TSCA and CAA prohibit an employer from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions or privileges of employment, i.e., take adverse action, because the employee has notified the employer of an alleged violation of the Acts, has commenced any proceeding under the Acts, has testified in any such proceeding or has assisted or participated in any such proceeding.²

the ALJ correctly placed the ultimate burden of proof on Schlagel and the ALJ's isolated misstatement of the burdens of proof did not affect the relevant analysis and outcome of the case, with which we agree.

² Pursuant to the CERCLA:

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

See 42 U.S.C.A. § 9610(a).

Pursuant to the TSCA:

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

15 U.S.C.A. § 2622(a). The CAA contains a similar, parallel provision, *see* 42 U.S.C.A. § 7622(a). *See also* 29 C.F.R. §§ 24.2(a), 24.3(a), 24.4(d)(3) (2002).

Section 24.2(a) states:

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

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I. Certain alleged adverse actions are time-barred.

A. Thirty-day limitations period

Schlagel alleges that Dow took a number of adverse actions against him because he engaged in protected activity. We do not consider the merits of some of the adverse actions that Schlagel alleges, however, because they are time-barred. These alleged adverse actions include Dow's removing Schlagel from the C3 Motors Project on November 12, 1997, offering him a new position with the reliability group in January, June and August of 1998, reassigning his methylchloride responsibilities in the manufacturing group in September 1998, and criticizing his leadership skills in his April 1999 performance appraisal.

A complainant must file a complaint of unlawful discrimination under the environmental whistleblower statutes within thirty days of a discrete adverse action. 42 U.S.C.A. § 9610(b); 15 U.S.C.A. § 2622(b)(1); 42 U.S.C.A. § 7622(b)(1). The thirty-day limitations period begins to run on the date that a complainant receives final, definitive and unequivocal notice of a discrete adverse employment action. The date that an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation. *See Sasse v. Office of the United States Attorney*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98-CAA-7, slip op. at 6 (ARB Jan. 30, 2004); *Jenkins*, slip op. at 14; *see generally Chardon v. Fernandez*, 454 U.S. 6 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful); *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated).

Discrete acts of discrimination or retaliation are easy to identify. Examples are failure to promote, denial of transfer, termination, and refusal to hire. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002); *Belt v. United States Enrichment Corp.*, ARB No. 02-117, ALJ No. 01-ERA-19, slip op. at 9 (ARB Feb. 26, 2004). "A discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.' A party therefore must file a charge within [the number of days allowed by the relevant statute] of

request, engaged in any of the activities specified in this section.

29 C.F.R. § 24.2(a).

the date of the act or lose the ability to recover for it.” *Morgan*, 536 U.S. at 110; *see also Belt*, slip op. at 14-15.

Consequently, because Schlager filed his complaint on November 15, 1999, the ALJ properly determined that the alleged discrete adverse actions that occurred prior to the thirty-day limitations period preceding the filing of Schlager’s complaint, i.e., those dating before October 15, 1999, as enumerated above, are time-barred and, therefore, not actionable charges on which he can recover under the environmental whistleblower statutes. R. D. & O. at 33-34, 39; *Morgan*, 536 U.S. at 110. Thus, it is unnecessary for us to determine whether these alleged discrete adverse actions were indeed adverse for the purposes of weighing the merits of Schlager’s complaint. On the other hand, the alleged discrete adverse actions occurring within the thirty-day limitations period preceding the filing of Schlager’s complaint, i.e., dating from October 15, 1999, are actionable.

B. Continuing violation theory waived, no longer legally viable

Schlager seeks to remove himself from operation of the thirty-day limitations period under the environmental whistleblower statutes, however, by arguing that all of the alleged adverse actions Dow took should either be considered together as evidence of a continuing course of violations or of a hostile work environment. Schlager contends on appeal that the ALJ erred because he did not apply the continuing violation theory exception to the thirty-day limitations period when considering the timeliness of Schlager’s complaint regarding all of the alleged adverse actions Dow took. Complainant’s Initial Brief [On Appeal] at 11-13. Specifically, Schlager argues that the ALJ erred in failing to recognize that all of the alleged adverse actions constitute a systematic, continuing course of conduct to discriminate against him pursuant to the continuing violation theory.

Contrary to Schlager’s contention that the ALJ did not address the continuing violation theory, the ALJ specifically noted that Dow’s alleged discrete adverse actions occurring more than thirty days prior to the filing of his complaint could be considered as an exception to the thirty-day limitations period if they constituted a continuing pattern of retaliatory conduct or if the doctrine of equitable tolling is appropriate. R. D. & O. at 33. The ALJ correctly noted, however, that Schlager did not assert that Dow’s discrete adverse actions that occurred more than thirty days prior to the filing of his complaint constituted a continuing pattern of retaliatory conduct or assert equitable tolling. R. D. & O. at 33-34. Thus, although Schlager notes that the Board reviews the recommended decision of the ALJ de novo, as Schlager did not raise a continuing pattern of retaliatory conduct below, this argument, as the Respondent argues, is waived on appeal. *See Exeter Bank Corp., Inc. v. Kemper Securities Group, Inc.*, 58 F.3d 1306, 1318 (8th Cir. 1995); *Rose v. Dole*, 945 F.2d 1331, 1335-36 (6th Cir. 1991); *Immanuel v. Wyoming Concrete Indus., Inc.*, ARB No. 96-022, ALJ No. 95-WPC-3, slip op. at 1 n.4 (ARB May 28, 1997).

In any event, regardless of whether the issue was preserved for review, the Supreme Court has refused to recognize the continuing violation doctrine for discrete acts. *Morgan*, 536 U.S. at 113-115; *see also Belt*, slip op. at 14. The Court held that discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges, as “[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act.” *Morgan*, 536 U.S. at 113. The Court concluded that each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable “unlawful employment practice” and that only incidents that took place within the timely filing period are actionable, while all prior discrete discriminatory acts are untimely filed and no longer actionable. *Morgan*, 536 U.S. at 114-115. Thus, the alleged discrete adverse actions that occurred prior to the thirty-day limitations period preceding the filing of Schlagel’s complaint are time-barred and, therefore, are not actionable alleged adverse actions under the relevant environmental whistleblower statutes. R. D. & O. at 33, 39. Consequently, Schlagel’s contention on appeal that Dow’s alleged adverse actions constituted a systematic, continuing course of conduct is rejected.

C. Hostile work environment not shown

Alternatively, Schlagel’s attorney below alleged a hostile work environment before the ALJ, but only in her pre-hearing brief dated June 15, 2001, and did not subsequently raise the issue in her post-hearing trial brief or reply brief before the ALJ. On appeal, Schlagel only raises a hostile work environment in his reply brief, in response to the Respondent’s response brief noting that the Supreme Court has refused to recognize the continuing violation doctrine for discrete acts in *Morgan*. Complainant’s Reply Brief at 4-5. Schlagel alternatively contends, therein, that the series of separate acts by Dow constitute one unlawful employment practice, or a hostile work environment and a continuing violation.

In *Morgan*, the Supreme Court distinguished hostile work environment claims from those based on discrete adverse actions. In contrast to discrete adverse actions, a hostile work environment occurs over a series of days, or perhaps years, and a single act of harassment may not be actionable on its own. *Morgan*, 536 U.S. at 115. Hostile work environment claims are based on the cumulative effect of individual acts. *Id.* A complaint alleging hostile work environment is not time-barred if all the acts comprising the claim are part of the same practice and at least one act comes within the thirty-day filing period. *Morgan*, 536 U.S. at 117. If Schlagel were able to show that at least one act comprising the hostile work environment occurred within thirty days prior to filing his complaint, his entire hostile work environment cause of action would be deemed timely and he could proceed to litigate the merits.

To establish a hostile work environment, a complainant has to prove that: 1) he engaged in protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally

affect the complainant. *Jenkins*, slip op. at 38; *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ Nos. 97-ERA-14 et al., slip op. at 13 (ARB Nov. 13, 2002). Circumstances germane to gauging a work environment 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.” *Jenkins*, slip op. at 38; *Berkman*, slip op. at 16. A respondent is liable for the harassing conduct of a complainant’s coworkers or supervisors if the employer knew, or in the exercise of reasonable care, should have known of the harassment and failed to take prompt remedial action. *Jenkins*, slip op. at 38; *Williams*, slip op. at 55.

Even if Schlager properly alleged a hostile work environment before the ALJ, with at least one purported hostile employment action occurring within thirty days of Schlager’s complaint, Schlager still did not establish the existence of a hostile work environment on the merits. Assuming the otherwise untimely alleged personnel actions were adverse actions, Schlager has not addressed or shown that they were “sufficiently severe or pervasive . . . to create an abusive working environment” and “detrimentally affect[ed]” Schlager’s work or that the alleged actions rose to the requisite level of hostility or that they were attributable to the Respondent’s negligence. *Jenkins*, slip op. at 38; *Williams*, slip op. at 13. Thus, Schlager failed to address or prove the existence of a hostile work environment and, therefore, the limitation period for filing a claim was not enlarged.

Nevertheless, as Schlager asserted that Dow’s alleged adverse actions occurring more than thirty days prior to the filing of his complaint constituted relevant evidence when considering the adverse actions occurring within the thirty-day limitations period, the ALJ properly admitted evidence of the otherwise time-barred alleged adverse actions and fully considered them as relevant evidence probative of Dow’s decision-making process with regard to the adverse actions occurring within the thirty-day limitations period. R. D. & O. at 33-34; *Morgan*, 536 U.S. at 113 (a statutory filing period does not bar a complainant from using prior acts as background evidence in support of a timely claim). Hence, the alleged adverse actions Dow took occurring beyond the thirty-day limitations period are not actionable, whereas the adverse actions occurring within the thirty-day limitations period are actionable and may be considered on the merits.

II. As to the alleged adverse actions that are not time barred, Schlager failed to prove that Dow discriminated against him because of his protected activity.

We next consider the merits of Schlager’s complaint regarding the alleged adverse actions occurring within the thirty-day limitations period preceding the filing of his complaint. Schlager alleges that when raising safety and environmental concerns with Dow management from July 1997 until his suspension in October 1999, he repeatedly

engaged in protected activity under the relevant environmental whistleblower statutes.³ He further contends that his transfer to the Backstep position on October 15, 1999, and his subsequent suspension and termination, all constitute adverse actions taken against him. However, as we conclude herein, Schlagel has failed to prove by a preponderance of the evidence that Dow took adverse action because of his protected activity.

A. Protected activities and adverse actions

Protected activity furthers the purpose of the environmental whistleblower statutes. *Jenkins*, slip op. at 15. Under the “participation” provisions of the employee protection (whistleblower) provisions of the CERCLA, TSCA and CAA, we have construed the term “proceeding” broadly to encompass all phases of a proceeding that relate to public health or the environment, including the initial *internal* or external statement or complaint of an employee that points out a violation, whether or not it generates a formal or informal “proceeding.” *Passaic Valley Sewerage Comm’rs v. United States Dep’t of Labor*, 992 F.2d 474, 479 (3d Cir. 1993); *Sasse*, slip op. at 9; *Jenkins*, *supra* (emphasis added). Complaining internally about inadequate and inappropriate regulation is a protected activity. *See, e.g., Passaic Valley Sewerage Comm’rs*, 992 F.2d at 478-480 (“proceeding” includes intracorporate complaints that sewerage system was “inordinately expensive, inefficient, scientifically unreliable and in violation of the Clean Water Act user charge provisions”); *Pogue v. United States Dep’t of Labor*, 940 F.2d at 1288-1289 (complainant employed in “hazardous waste oversight position charged with the responsibility for surveying and reporting on hazardous waste compliance[;]” undisputed protected activity included preparation of internal reports documenting noncompliance at Navy shipyard and transmittal of letter to shipyard commander detailing environmental violations).

The ALJ determined that Schlagel’s initial allegation of a protected activity, when he expressed his safety and environmental concerns to his supervisor, Andy Pierce, regarding the methylchloride release on July 27, 1997, was indeed protected under the relevant environmental whistleblower statutes. R. D. & O. at 27. The ALJ further concluded that Schlagel’s reiteration of his safety and environmental concerns in meetings with John Lackner in December 1997, June 1998, and August 1998, as well as his request for a “process change request” or PCR to replace a malfunctioning flow meter in June 1998, constituted protected activity. R. D. & O. at 28-30. Similarly, the ALJ ruled that Schlagel’s August 31, 1998 e-mail to his supervisor, Kneale, regarding his concern that freon in the refrigeration units needed to be replaced and reported as a “freon release” and his meeting the same day with Nevin, at which he reiterated his previously raised safety and environmental concerns, constituted protected activity. R. D. & O. at 30. The ALJ also determined that Schlagel’s February 25, 1999 e-mail to his

³ Neither Schlagel nor Dow raise any issue regarding the fact that Dow is subject to the applicable whistleblower statutes.

supervisor, Kneale, and Lackner, regarding the compliance of plant heat exchangers with regulatory standards, constituted protected activity. R. D. & O. at 31.

Finally, the ALJ concluded that Schlager's April 23, 1999 e-mail, following the receipt of his performance appraisal, in which he detailed and summarized his previously raised safety and environmental concerns and complaints that ultimately instigated an investigation by Dow, was protected activity. R. D. & O. at 31-32. Thus, the ALJ also determined that his October 15, 1999 e-mail to Dow's CEO, Gary E. Anderson, requesting that Anderson "check into" the concerns raised in his April 1999 e-mail, which was attached, was protected activity. *Id.*

As the ALJ concluded, Schlager engaged in protected activity of which Dow was aware when he raised safety, environmental and regulatory compliance concerns internally with his supervisors. *See Passaic Valley Sewerage Comm'rs, supra; Pogue, supra; Sasse, supra; Jenkins, supra.* Thus, we affirm the ALJ's conclusions as to Schlager's activities that the ALJ identified as protected, dating from July 1997 until his October 15, 1999 e-mail to Anderson.⁴ In addition, although the ALJ determined that

⁴ Schlager argues that the ALJ erred in finding that certain disclosures that Schlager made prior to the actionable alleged adverse actions in 1999 did not constitute protected activity. Thus, Schlager contends that the ALJ did not have an accurate understanding of the extended pattern of his protected activity or disclosures reaching back to 1997 through 1999. Specifically, Schlager argues that the ALJ erred in concluding that his e-mails dated October 10, 1997, November 6, 1997, and September 29, 1998, as well as the January 7, 1999 performance review Schlager completed, did not sufficiently raise safety or environmental concerns to be considered protected activity. R. D. & O. at 10-11, 15, 27-28, 30-31. According to Schlager, the ALJ unnecessarily judged the merits of his disclosures, whereas he contends that complaints that are grounded in reasonably perceived violations of the environmental whistleblower statutes need not be shown to be meritorious for a complainant to prevail.

We note, however, that the ALJ nevertheless determined that Schlager's earliest alleged disclosure, his conversation with Andy Pierce in August of 1997, was indeed protected activity, along with finding other protected activities from December 1997 through October 1999. R. D. & O. at 27-32. Thus, as the ALJ nevertheless found that Schlager's protected activities extended from August 1997 through 1999, any potential errors by the ALJ as to whether specific subsequent activities were protected are harmless. Moreover, the asserted errors do not relate to and, therefore, are not relevant to the ultimate basis of the ALJ's denial of Schlager's complaint on the merits, that Schlager failed to prove by a preponderance of the evidence that Dow discriminated against him because of his protected activities dating from August 1997 through October 1999. The ALJ determined that the record establishes legitimate, nondiscriminatory reasons for the actionable adverse actions in 1999 that occurred subsequent to these alleged protected activities, which the ALJ concluded Schlager did not prove were a pretext for discrimination.

Schlagel's subsequent e-mail on October 15, 1999, to everyone at the Carrollton plant, was not protected activity, R. D. & O. at 32, we will nevertheless assume that the all encompassing Carrollton e-mail was protected to the same extent as the protected April 1999 e-mail that was attached to it for the purposes of weighing the merits of Schlagel's complaint.⁵

Next, Dow and Schlagel stipulated that his suspension on October 15, 1999, and his termination on November 10, 1999, were adverse actions. R. D. & O. at 39. In addition, for the purposes of weighing the merits of Schlagel's timely complaint, we will also assume that Schlagel's transfer to the Backstep position on October 15, 1999, did constitute actionable adverse action.

B. Failure to prove unlawful discrimination

We now review the evidence, therefore, to determine if Schlagel has ultimately proved by a preponderance of the evidence that Dow, by transferring, suspending and ultimately firing him in October and November 1999, discriminated against him because of his protected activity. *See Jenkins*, slip op. at 16-17.

Schlagel contends that the reasons that Dow proffered for transferring him to the Backstep position (due to a reduction in plant production and because he was the best fit for the job) were merely a pretext for demoting him because of his protected activities. Similarly, Schlagel contends that the reasons that Dow proffered for suspending and ultimately firing him (due to the insubordination expressed in his October 15, 1999 e-mail to everyone at the plant and the breach of confidentiality and plant disruption it caused) were also a pretext for retaliating against him because of his protected activities or disclosures. Complainant's Initial Brief (On Appeal) at 13-27.

To meet his burden of establishing by a preponderance of the evidence that Dow took the adverse employment actions against him because he engaged in protected activity, Schlagel may prove that the legitimate reasons proffered by the employer were not the true reasons for its action, but rather were a pretext for discrimination, *see St.*

⁵ We note, however, that because Dow had already investigated Schlagel's safety and environmental concerns and complaints raised in his April 1999 e-mail by the time that he sent his October 1999 e-mails, a viable argument may be raised that Schlagel's attachment of his April 1999 e-mail to his October 1999 e-mails was not protected, since Schlagel would seemingly no longer have a reasonable, good faith belief that Dow had not addressed the safety and environmental hazards he raised. *Eltzroth v. Amersham Medi-Physics, Inc.*, ARB No. 98-002, ALJ No. 97-ERA-031, slip op. at 15 (ARB April 15, 1999); *Van Beck v. Daniel Constr.*, 86-ERA-26, slip op. at 4 (Sec'y Aug. 3, 1993) (the pertinent issues are whether complainant had a reasonable, good faith belief that conditions were unsafe, and whether respondent provided sufficient information to dispel these concerns and adequately explained the safety issues raised).

Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-508 (1993), or, in other words, that he suffered intentional discrimination by establishing that Dow's proffered explanations are unworthy of credence, *see Burdine*, 450 U.S. at 256. *Sasse*, slip op. at 15; *Jenkins*, slip op. at 14. As we now discuss, we find that Dow did not manufacture reasons for its actions as a pretext for retaliation against Schlagel. We therefore hold that Schlagel has failed to establish by a preponderance of the evidence that Dow intentionally discriminated against him.

Initially, a review of the record and relevant testimony indicates that, contrary to Schlagel's characterization, he was not discouraged from raising safety and environmental issues. Lackner, the plant manager, noted that plant employees were supposed to raise environmental issues and concerns. HT at 1026-1030. Indeed, this is evidenced by the fact that Schlagel's April 23, 1999 e-mail, detailing and summarizing his safety and environmental concerns and complaints, prompted the Ed Ovsenik investigation for Dow. HT at 737-750, 765-768. The result of the investigation concluded that the concerns raised by Schlagel in his April 1999 e-mail had either previously been addressed and resolved or proven to be unfounded. *See* HT at 748; CX 204.

In addition, the record indicates that while Schlagel was respected for his technical engineering skills (e.g., Mike Green testified that Schlagel was a "competent" and "reliable" engineer, HT at 548, 555), Schlagel's performance appraisals as early as March 1997 specified the need to acquire better leadership skills necessary to perform his job as a project engineer with the manufacturing group at the plant.⁶ JX 4 at 37; JX 5 at 63-65; JSX 10 at 3; JSX 11 at 14. Both of his immediate supervisors in manufacturing, Andy Pierce and Chris Kneale, testified that Schlagel had poor leadership skills, HT at 579-581, 606, 633-634, Carrollton HT at 29-30, and Lackner and Lanthier, who was to be his supervisor in the Backstep position, both testified that Schlagel lacked the necessary skills required to perform his job in manufacturing. HT at 134, 528. Specifically, Lackner noted Schlagel's inability to bring projects he was assigned to in manufacturing in on time and within budget,⁷ HT at 529, 1013-1014, 1019, and Lanthier also noted his inability to meet time deadlines. HT at 135, 137, 160.

⁶ Schlagel points out that his performance record was good until he moved into manufacturing. Schlagel's performance appraisals as early as March 1997, preceding his initial asserted protected activity or disclosure in July 1997, call attention to the need to acquire better leadership skills, however, which belie any characterization by Schlagel that his performance appraisals while he worked in manufacturing were motivated by his asserted protected activities. *See* HT at 641.

⁷ Schlagel asserts that the ALJ erred in concluding that Lackner removed Schlagel from the C3 project due to cost overruns on the former C2 project, R. D. & O. at 11, as Ray Williamson testified that he was "mostly" responsible for the C2 project cost overruns. HT at 716. As the ALJ observed, however, Lanthier, not Lackner, had removed Schlagel from the

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In light of an upcoming reduction in production by Dow at the Carrollton plant, Schlagel could no longer remain in his manufacturing position, so Dow offered him a new position as the coordinator of the Backstep program. CX 57 at 104; CX 58 at 105; CX 204; HT at 526. Dow initiated the Backstep program to mothball plant equipment as a result of the reduction in production. CX 57 at 104; CX 58 at 105. According to Lackner, Dow offered Schlagel the Backstep position in an effort to prevent any loss of jobs for those in manufacturing resulting from the reduction in production and because his skills were the best fit among those considered for the position. HT at 537-538, 1037, 1045-1047, 1065; CX 1 at 10; CX 204. Lackner believed that it was a “good opportunity” for Schlagel, HT at 1037, and his supervisor, Kneale, concurred that the position was not a demotion and that Schlagel was the “first choice” among the candidates considered for the position. HT at 55; RX 20. Lanthier, Schlagel’s potential supervisor in the Backstep position, reiterated that the position was not a demotion, but fit Schlagel’s skills. Carrollton HT at 149, 154; *see also* Gordon Venema’s testimony, HT at 401. In their testimony, Pierce, Biallas, Nevin, Green and Williamson all echoed the viewpoint that Schlagel’s skills would have made him a good Backstep coordinator. HT at 554, 586, 611, 613, 672, 725, 942.

Nevertheless, the same day that Kneale informed Schlagel of his transfer to the Backstep position, he forwarded his e-mail to Dow’s CEO, in which he remarked that he felt “bullied” into the job, and ultimately forwarded an e-mail to everyone at the Carrollton plant, including outside contractors not employed by Dow, generally asking whether anyone would have misgivings working for Lanthier, his potential supervisor. As a result, Lackner, the plant manager, justifiably decided the same day to suspend Schlagel to generate a cooling off period to decide what action to take. HT at 486-487; JX 102; JSX 1 at 18; RX 25.

The decision to suspend Schlagel was, according to Lackner, based on the insubordination expressed towards Lanthier and management in Schlagel’s e-mail to everyone at the Carrollton plant, including outside contractors,⁸ as well as the breach of confidentiality and plant disruption it caused. HT at 486, 499. Lackner testified that a breach of confidentiality resulted from the fact that Schlagel attached his April 1999 e-mail, containing confidential plant and personnel information, and knowingly forwarded it to persons that Dow did not employ. HT at 499, 510, 515-517, 522. Schlagel

C3 project for other reasons, including failing to meet time tables and failing to define the scope of the C3 project, while the ALJ further recognized that the scope of the C3 project was “not solely in the hands of” Schlagel. R. D. & O. at 11; Carrollton HT at 135, 162.

⁸ Contrary to Schlagel’s contention on appeal, he was found to be insubordinate due to his apparent expressed misgiving working for Lanthier, not for sending the e-mail to everyone at the Carrollton plant. HT at 499.

confirmed that he was aware that outside contractors, that were not Dow employees, would receive his e-mail. HT at 332-333. Lackner also described the disruption at the plant that the dissemination of the e-mail caused. A disruption in production resulted from plant employees discussing the e-mail and expressing their personal safety concerns regarding an apparent disgruntled employee, as well as the need for Lackner to clarify to employees that the safety and environmental concerns that Schlagel raised had already been investigated and resolved. HT at 487-489, 499; CX 204; JX 13 at 88, 97; RX 33, 36; JSX 1 at 4, 13. Biallas's, Kneale's, Nevin's, Gordon Venema's and Mark O'Malley's testimony, for example, confirms the plant disruption and personal safety concerns of plant employees. HT at 382, 651, 676, 678, 943-944; Carrollton HT at 57-59. Ultimately, as detailed in letters from Heimke contained in the record, Dow reviewed Schlagel's performance record and as a result of the insubordination expressed in Schlagel's e-mail, and the breach of confidentiality and disruption it caused, as well as his overall performance record, Dow decided to terminate his employment. JX 13 at 88, 97; CX 1 at 10 RX 33, 36, 40; JSX 1 at 4, 13.

Consequently, as the ALJ determined, we hold that the record establishes legitimate reasons for Dow's actions in transferring, suspending and ultimately terminating Schlagel's employment in October and November 1999 and that Schlagel has not proven by a preponderance of the evidence that Dow proffered the reasons for its actions as a pretext for discriminating or retaliating against him because of his protected or whistleblowing activity.⁹ R. D. & O. at 43-44; *see Jenkins*, slip op. at 16-17.¹⁰

⁹ Schlagel contends that the ALJ erred in failing to consider the pretextual context for his transfer, evidenced when Dow previously took adverse action against him in removing his methylchloride responsibilities in September 1998 after he reported safety issues related to the methylchloride release and other concerns. Schlagel also asserts that the ALJ made erroneous findings of fact in regard to his testimony, which influenced the ALJ to make wrongful conclusions regarding Schlagel's credibility in regard to certain events that occurred prior to the actionable adverse actions in 1999.

The asserted errors, however, do not relate to and, therefore, are not relevant to the basis of the ALJ's denial of his complaint, that the record establishes legitimate, nondiscriminatory reasons for the actionable adverse actions in 1999, which Schlagel did not prove were pretextual. Thus, the asserted erroneous findings of fact are harmless. Moreover, the ARB defers to an ALJ's credibility findings. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No.99-STA-21, slip op. at 9 (ARB July 31, 2001) quoting *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983); *Jenkins*, slip op. at 9. In any event, as the ALJ determined that the "substantial majority" of Schlagel's testimony was credible, R. D. & O. at 4, any potential error in this regard was harmless. Thus, we reject Schlagel's contentions in this regard.

Alternatively, Schlagel argues that his October 1999 e-mail to everyone at the Carrollton plant was nevertheless defensible because it was impulsive and provoked because Dow failed to properly investigate his safety and environmental concerns, which he asserts

Continued . . .

CONCLUSION

Accordingly, because certain adverse actions that Schlagel alleges Dow took because he engaged in protected activity are time-barred and because, as to the balance that are timely, Schlagel has not demonstrated by a preponderance of the evidence that

were justifiable complaints regardless of his motivations. Contrary to Schlagel's characterization of the factual premise of his argument, however, a review of the record establishes, as we previously observed, that Dow had already investigated the concerns Schlagel raised in his April 1999 e-mail and had found that they were previously addressed and resolved or proven to be unfounded. *See* HT at 748; CX 204.

Similarly, Schlagel further contends that any insubordination expressed his October 1999 e-mail to everyone at the Carrollton plant was excusable in light of Dow's unjustified adverse action in transferring him. Again, the factual premise of Schlagel's argument is misplaced for, as we previously discussed, the record further establishes that his transfer to the Backstep position was as a result of the future reduction in production at the plant and because his skills were the best fit for the position. Thus, Schlagel's contentions that his actions were otherwise defensible are also rejected.

¹⁰ On December 16, 2002, the Board received "Complainant's Attorneys' Application to Intervene for the Limited Purpose of Protecting Their Right to Attorneys' Fees" from A. Alene Anderson, Esq., and on December 20, 2002, the Board received a "Motion for Raymond L. Schlagel to Participate as an Attorney/Pro Se and to Protect Complainant's Right to All Damages, Remedies and Attorney Fees (Response to Complainant's Attorney's Application to Intervene)." Subsequently, on January 9, 2003, the Board issued an "Order Granting Complainant's Motion to Represent Himself Before the Board and to Show Cause" as to why the Board should not deny Anderson's application to intervene.

Subsequently, Schlagel filed a "Motion to Amend, Reconsider/Restate Order," dated January 14, 2003, to reflect that he had not rescinded his representation by Anderson. Finally, the Board received a "Motion to Order Petitioner [Anderson] to Present Fee Petition to Complainant" from Schlagel on February 13, 2003.

The whistleblower provisions of the environmental statutes entitle a successful complainant to an award of attorney fees. 42 U.S.C.A. § 9610(c); 15 U.S.C.A. § 2622(b)(2)(B)(iv); 42 U.S.C.A. § 7622(b)(2)(B). Attorney's fees may be ordered, however, only if an order has been issued following a decision that the whistleblower provisions of the environmental statutes have been violated. In light of our disposition of this case, since no such decision and order have been issued at this time, we need not rule on Schlagel's outstanding "Motion to Amend, Reconsider/Restate Order" and "Motion to Order Petitioner [Anderson] to Present Fee Petition to Complainant," and the portion of the Board's "Order Granting Complainant's Motion to Represent Himself Before the Board and to Show Cause," ordering the parties to Show Cause as to why the Board should not deny Anderson's application to intervene, is moot.

Dow discriminated against him in violation of the CERCLA, TSCA or CAA, we **DISMISS** his complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge