In the Matter of:

DAVID W. PICKETT, **ARB CASE NOS. 02-056, 02-059**

COMPLAINANT, **ALJ CASE NO. 01-CAA-18**

v. **DATE: November 28, 2003**

TENNESSEE VALLEY AUTHORITY,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward A. Slavin, Jr., Esq., *St. Augustine, Florida*

For the Respondent:
Maureen H. Dunn, Esq., Thomas F. Fine, Esq., Linda J. Sales-Brent, Esq., *Tennessee Valley Authority, Knoxville, Tennessee*

FINAL DECISION AND ORDER

David W. Pickett filed a complaint against his former employer, the Tennessee Valley Authority (TVA), under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C. § 7622 (1995), Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i) (2003), Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 (1998), Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 (1995), Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971 (1995) and the Department of Labor's (DOL) implementing regulations set out at 29 C.F.R. Part 24 (2002). Pickett alleges that TVA blacklisted him in retaliation for a previous whistle-blower complaint he filed in 1999.[1]

[1] *See Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ No. 00-CAA-9 (ARB Apr. 23, 2003) (dismissing the complaint as untimely filed).

The Administrative Law Judge (ALJ) found that Pickett had established a *prima facie* case of discrimination and that TVA failed to produce legitimate, non-discriminatory reasons for its action.[2] Accordingly, the ALJ awarded compensatory damages of $5,000.00 and exemplary damages of $10,000.00. TVA timely appealed to the Administrative Review Board (ARB). Pickett cross-appealed.[3] For the reasons discussed below, we disagree with the ALJ's Recommended Decision and Order and dismiss the complaint.

BACKGROUND

Factual and procedural summary

Our previous decision on the claim filed by Pickett in 1999 outlined the factual history of Pickett's employment with TVA, his work injury, and his subsequent receipt of disability benefits. *Pickett, supra*, n. 1, slip op at 4-6. We summarize briefly. Between 1985 and 1988, Pickett worked as an Assistant Unit Operator at TVA's Widows Creek Fossil Plant (Widows Creek) in Stevenson, Alabama, inspecting plant machinery and assisting with its operation. During his tenure there, Pickett allegedly raised concerns about unsafe working conditions including nonworking pollution control equipment.

On February 11, 1988, Pickett sustained an injury to his left shoulder due to a malfunctioning turbine and began receiving disability benefits under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 8101-8193. In December 1988, TVA wrote to the Office of Workers' Compensation Programs (OWCP), which administers the federal disability program for DOL, requesting review of Pickett's entitlement to benefits in view of his refusal of a clerical job offer.

OWCP subsequently determined that the clerical position was unsuitable employment due to the excessive commuting distance between Pickett's residence and the plant location. (Pickett was by then living with his parents in the Knoxville area.) TVA terminated Pickett's employment in October 1993 because he had not actually worked in several years, but Pickett continued to receive disability benefits and

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[2] The following abbreviations are used herein: Claimant's Exhibit, CX; Respondent's Exhibit, RX; hearing transcript, TR; Recommended Decision and Order, R. D. & O.; and Administrative Law Judge's Exhibit, ALJX.

[3] Pickett filed a Protective Cross-Petition for Review, in which he asked that the ARB review "any and all issues on which he did not fully prevail or receive the full remedies requested." ARB Case No. 02-059. He also filed a Petition for Review of the award of attorney's fees. Because of our disposition of this case, there is no need for us to address these petitions. Therefore, we will not review the ALJ's findings regarding (1) Pickett's failure to prove a prior pattern of conduct by TVA, R. D. & O. at 5-8; (2) Robert E. Tyndall's statement, R. D. & O. at 27-29; (3) TVA's ex parte submission to OSHA after Pickett filed his complaint, R. D. & O. at 29-32; (4) TVA's internal investigation of Yates' conduct, R. D. & O. at 32-34; and (5) any of the recommended remedies, including attorney's fees, R. D. & O. at 36-52.

subsequently obtained a degree in chemical/environmental engineering from a community college through FECA job training.

In 1991 and 1993, TVA's Office of the Inspector General (OIG), which investigates allegations of waste, fraud and abuse, reviewed Pickett's receipt of FECA benefits, first at the request of TVA management and subsequently as the result of an anonymous report that Pickett had engaged in athletic activities inconsistent with his claim of total disability. CX 1. OIG provided TVA with an April 15, 1991 report stating that no further investigation by OIG was warranted but recommending that Pickett's case be monitored. CX 1-5B. A second report dated January 23, 1993 closed the OIG investigation and requested that OWCP continue to monitor the case. CX 1-5E.

In January 1999, OWCP advised Pickett that his benefits would be terminated because its "second opinion" physician had concluded that he was not disabled from his work injury. CX 1. Pickett appealed the benefit termination decision to the Employees' Compensation Appeals Board (ECAB) at DOL, which reversed the termination in November 2000 on the basis that OWCP had failed to meet "its burden of proof to establish by the weight of the medical evidence that physical residuals of the February 11, 1988, employment injury ha[d] ceased." *In the Matter of David W. Pickett and Tennessee Valley Authority*, ECAB No. 99-2220, slip op. at 3 (ECAB Nov. 28, 2000).

Also in 1999, Pickett filed a whistleblower complaint against TVA, contending that TVA had blacklisted him for raising concerns about unsafe working conditions at Widows Creek. RX 8. An ALJ dismissed that complaint on TVA's motion for summary judgment because he found it to be untimely filed, and the ARB affirmed his decision. *Pickett, supra*, n. 1, slip op. at 12, 14.

As a consequence of the ECAB decision in November 2000, OWCP computed a back payment of disability compensation for Pickett and restored his monthly benefits.[4] CX 1. Pickett then informed OWCP that he had worked part-time in 1999 and 2000 at Oak Ridge Fabricators in Oliver Springs, Tennessee. RX 3. Because of this work, OWCP sent a letter dated March 2, 2001 to Edward Scott Green, the owner of Oak Ridge Fabricators, seeking employment information that would allow it to determine whether Pickett had any wage-earning capacity.[5] TR at 388-92. OWCP asked for the following: job title and brief description of duties performed, number of hours worked per week,

[4] OWCP terminated Pickett's disability benefits again on July 14, 2001, based on new medical evidence. Respondent's Motion for Summary Judgment, Exhibit 4.

[5] Section 8115(a) of the FECA provides that the wage-earning capacity of an employee is determined by his actual earnings if they fairly and reasonably represent the employee's ability to earn wages. 5 U.S.C. § 8115(a). Typically, an injured employee's wage-earning capacity declines, compared with the earnings of his pre-injury job. OWCP's determination of wage-earning capacity governs the amount of disability benefits the employee receives. *See In the Matter of Dan C. Boechler and Department of the Interior*, Docket No. 01-1621 (ECAB May 24, 2002).

inclusive dates of employment, weekly rate of pay exclusive of overtime, and reason for leaving. RX 3.

Because Green did not respond to the letter, an OWCP claims examiner asked Nancy L. Branham, a claims officer in TVA's workers' compensation department, for her help in obtaining the requested information from Oak Ridge Fabricators. TR at 362-66, 380-81. Since OWCP was asking for information about non-TVA employment, Branham called Craig D. Yates, a special agent for TVA's OIG who handled workers' compensation claims, and requested that he obtain the information. Branham sent him a copy of OWCP's letter to Oak Ridge Fabricators. TR at 397.

Yates discussed the request with his supervisor, who confirmed that OIG's investigation file on Pickett's disability claim was closed[6] and advised Yates that he would consider how OIG should respond. TR at 415-18. The supervisor thereafter directed Yates to assist OWCP in obtaining the requested information. TR at 450-51. Yates then went to Oak Ridge Fabricators on March 30, 2001, and spoke with Green for about half an hour. TR at 457. After he left, Green called Pickett and told him of Yates' visit. RX 6; TR at 44-45, 468.

That same day, Pickett filed a complaint against the OWCP, TVA, its OIG, the TVA Inspector General, investigator Yates, and TVA chairman Craven Crowell, alleging that TVA had retaliated against him for his 1999 whistleblower complaint.[7] ALJX 2. Pickett contended that TVA had harassed him by sending Yates to conduct an "illegal" investigation of his disability claim and that in the course of his March 30, 2001 visit Yates had made "illegal blacklisting remarks" to Green.[8]

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[6] Yates had interviewed Pickett in December 1992 regarding his disability claim. CX 1-5D. Yates testified that the case was closed shortly after he made his report on Pickett's activities at the time. TR at 415-18, 442-49; CX 1-5E.

[7] The ALJ dismissed OWCP, TVA's OIG, Yates, and Crowell as parties, finding that only TVA was an employer as defined by the environmental acts. R. D. & O. at 5.

[8] Pickett stated in his complaint that TVA had harassed him by sending Yates to interview his former employer. He alleged that Yates made "illegal blacklisting remarks" to Green, violating Pickett's whistle-blower and privacy rights by stating that Pickett was a malingerer and that TVA doctors had determined that Pickett was not hurt and could go back to work. Pickett also accused Yates of making fun of him for living with his parents at age 36 and violating his right to confidentiality by revealing that he was receiving full disability and that TVA had recently cut him a check for $50,000.00. Pickett alleged that Yates repeatedly demanded to see Green's payroll and computer records, and improperly claimed that OWCP had sent him to investigate. Also, he alleged that Yates asked how much money Pickett made and told Green about specific details of Pickett's case, as well as activities inconsistent with his disability claim, such as his playing softball. The complaint stated that Yates repeatedly threatened Green with a subpoena for his business records and opined that Pickett's case would not look good in front of a jury, which would find him to be a malingerer. According to the complaint, Yates also told Green that his back hurt but he went to work every day and asked Green how he would feel if he were paying full disability to an employee who went to work for someone else. Finally, Pickett accused Yates of obsessing on the issue of Pickett living at home. ALJX 2.

Yates passed the information he had obtained from Green to Branham, who advised him that the work done by Pickett at Oak Ridge Fabricators was not sufficient for OWCP to determine that Pickett had wage-earning capacity, because it was not full time and the earnings were minimal. Based on her remarks, Yates decided that it was not necessary to subpoena Green's business records. TR at 70, 72, 466, 529-30.

On April 9, 2001 in response to his supervisor's request, Yates wrote a memorandum regarding his visit to Oak Ridge Fabricators and his conversation with Green. He explained the background behind his visit, described his interaction with Green, and denied making any derogatory remarks about Pickett. RX 5.

OSHA investigated the complaints made in Pickett's claim. On August 15, 2001 OSHA reported that Pickett's complaint had no merit. OSHA found that the evidence failed to support Pickett's allegations. ALJX 2. Pickett requested a hearing before an ALJ, which was held in Knoxville, Tennessee on September 19-21, 2001.

The ALJ concluded that certain statements Yates made to Green during the March 30, 2001 visit—remarks that he found ridiculed Pickett, accused him of malingering, and implied that Green should not hire Pickett again—constituted a *prima facie* case of blacklisting by TVA in retaliation for the 1999 whistleblower complaint Pickett had filed. The ALJ then found that TVA had failed to present any evidence articulating a legitimate, non-discriminatory reason for Yates' statements. R. D. & O. at 27-28, 41-42.

The ALJ concluded that Pickett failed to establish a factual foundation for reinstatement or front or back pay. R. D. & O. at 36-39. However, he awarded $5,000.00 in compensatory damages and $10,000.00 in exemplary damages, along with other equitable relief. R. D. & O. at 40-52.

TVA appealed to the ARB, and Pickett cross-appealed, requesting that he be granted all the relief sought in his complaint. Subsequently, he also filed a petition for attorney's fees with the ARB. *See* n. 3, *supra*.

The parties' contentions on appeal

TVA argues that Yates' actions and conduct during the March 30, 2001 interview were privileged because they were specifically authorized by the regulations implementing FECA. According to TVA, all of Yates' statements to Green were related to Yates' investigative duties and were not related to Pickett's 1999 whistleblower claim. TVA's Initial Brief at 7-8.

TVA also contends that Pickett was not blacklisted or subjected to any adverse action and that the ALJ erred in finding that Pickett had made allegations about Yates in his prior 1999 whistleblower claim and that the allegations motivated Yates to retaliate against Pickett. *Id*. at 10, 21. TVA asks the ARB to find that the record does not support the ALJ's adverse credibility determination regarding Yates. *Id*. at 12.

Further, TVA urges that Pickett failed to establish any causal link between the alleged blacklisting and protected activity. *Id.* at 24. Finally, TVA suggests that if the ARB were to affirm the ALJ, it should reverse the decision on remedies because (as to compensatory damages) Pickett failed to show any concrete damages and because (as to exemplary damages) punitive damages cannot be awarded against TVA, a public agency, because sovereign immunity has not been waived.

In his cross-petition for review, Pickett asks the ARB to remand this case for "upward recalculation" of the ALJ's remedies and reinstatement to TVA employment. Pickett's Reply Brief at 1. Pickett submits that the ALJ's findings of fact are supported by substantial evidence and must be upheld. *Id.* at 12, 24. He contends that TVA's claim of privilege is untenable, *id.* at 22, and that he established a *prima facie* case of blacklisting, which TVA failed to rebut, *id.* at 23.

ISSUES

I. Whether the record evidence establishes that TVA through Yates blacklisted Pickett.

II. Whether TVA established a legitimate, non-discriminatory reason for Yates' interview of Green.

III. Whether Pickett established that TVA retaliated against him because of his whistleblowing 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 recommended decision of the ALJ. *See* 5 U.S.C. § 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).

The Board is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). *See generally Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); *Mattes v. United States Dep't of Agriculture*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) in rejecting argument that higher level administrative official was bound by ALJ's decision). An ALJ's findings constitute a part of the record, however, and as such are subject to review and receipt of appropriate weight. *Universal Camera Corp.*, 340 U.S. at 492-497; *Pogue v. U.S. Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991); *NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 964 (7th Cir. 1988).

In weighing testimony, the fact-finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony and the extent to which the testimony was supported or contradicted by other credible evidence. *Jenkins, supra*, slip op. at 10 (citations omitted). The ALJ, unlike the ARB, observes witness demeanor in the course of the hearing, and the ARB defers to an ALJ's credibility determinations that are explicitly based on such observation. *Phillips v. Stanley Smith Security, Inc*., ARB No. 98-020, ALJ No. 96-ERA-30, slip op. at 10 (ARB Jan. 31, 2001).

However, when the ALJ fails to explain his assessment of witness credibility or his findings are not objectively supported by the record, the ARB will review the evidence and make its own credibility conclusions. *See Masek v. The Cadle Co.*, ARB No. 97-069, ALJ No. 1995-WPC-1, slip op. at 13 (ARB Apr. 28, 2000) (ALJ's finding that one of Respondent's witnesses was not credible rejected because the totality of his testimony did not support a conclusion that he lied or that the employer's explanation for complainant's termination was pretext and untrue). "Further, if the Secretary disagrees with the ALJ, the appellate court will 'defer to the inferences that the Secretary derives from the evidence, not to those of the ALJ.'" *Varnadore v. Secretary of Labor*, 141 F.3d 625, 628 (6th Cir. 1998).

DISCUSSION

I. The record does not establish that TVA blacklisted Pickett through Yates.

A. Definition of blacklisting

To prevail under the whistleblower protection provisions of the environmental statutes, Pickett must establish by a preponderance of the evidence that TVA is subject to

the statutes, that he engaged in protected activity of which the employer 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 adverse action. *Shelton v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-100, ALJ No. 95-CAA-19, slip op. at 6-7 (ARB Mar. 30, 2001); *Hasan v. Sargent and Lundy*, ARB No. 01-001, ALJ No. 02-ERA-7, slip op. at 3 (ARB Apr. 30, 2001). Failure to establish any of these elements defeats a complaint under the applicable whistleblower statutes. *Jenkins, supra,* slip op. at 16.[9]

In this case, the parties stipulated that TVA formerly employed Pickett, that he engaged in protected activity by filing a previous whistleblower claim in 1999, and that TVA and Yates were aware of Pickett's protected activity. R. D. & O. at 6. Thus, Pickett must establish whether (1) TVA took adverse action against him, and if so (2) whether the adverse action was motivated by his protected activity. We find that the record evidence does not establish that Yates engaged in blacklisting Pickett and that the alleged blacklisting was motivated by Pickett's protected activity.[10]

The implementing regulations for the environmental statutes under which this complaint was filed specifically mention blacklisting as a violation of the employee protection provisions. *See* 29 C.F.R. § 24.2(b).

A blacklist is defined as a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate. *Leveille v. New York Air National Guard*, Case No. 94-TSC-3, slip op. at 18-19 (Sec'y Dec. 11, 1995); *see Black's Law Dictionary* 154 (5th ed. 1979). As *Black's* explains, a trade union may blacklist workers who refuse to conform to its rules, or a commercial agency or mercantile association may publish a blacklist of insolvent or untrustworthy persons.

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[9] If the complainant establishes that the protected activity was a motivating factor for the adverse action by the respondent, it may nonetheless avoid liability by showing by a preponderance of the evidence that it would have taken the adverse action in any event. *Mourfield v. Frederick Plaas & Plaas, Inc.*, ARB Nos. 00-055 and 00-056, ALJ No. 1999-CAA-13, slip op. at 4 (ARB Dec. 6, 2002).

[10] The ALJ discussed the evidence in terms of Pickett's burden to establish a *prima facie* case and TVA's failure to rebut it. Once a case is tried by the ALJ, the issue is whether the complainant sustained his burden of proof by a preponderance of the evidence that the respondent discriminated because of protected activity. *USPS Bd. of Governors v. Aikens,* 460 U.S. 711, 715 (quoting *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. at 253); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, slip op. at 11 (Sec'y Feb. 15, 1995) (Secretary's order enforced *sub nom, Carroll v. United States Dep't of Labor,* 78 F.3d 352 (8th Cir. 1996)). 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 employer retaliated against him because of protected activity. We continue to discourage the unnecessary discussion of whether a whistleblower has established a prima facie case when a case has been fully tried. *See Williams v. Baltimore City Pub. Schools Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at 3 n.7 (ARB May 30, 2003).

A blacklisting may also arise "out of any understanding by which the name or identity of a person is communicated between two or more employers in order to prevent the worker from engaging in employment." 48 Am. Jur. 2d, *Labor and Labor Relations* § 669 (2002). Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. *Barlow v. U.S.*, 51 Fed.Cl. 380, 395 (2002) (citation omitted).

Blacklisting assumes that an employer covertly follows a practice of discrimination. *Black's Law Dictionary* 163 (7th ed. 1999) ("to put the name of (a person) on a list of those who are to be boycotted or punished"). *Cf. Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975) ("[s]ecret preferences in hiring and even more subtle means of illegal discrimination, because of their very nature, are unlikely to be readily apparent to the individual discriminated against").

The ARB has stated that blacklisting is the "quintessential discrimination," often "insidious and invidious [and not] easily discerned." *Leveille, supra,* slip op. at 18; *Egenrieder v. Metropolitan Edison Co.*, Case No. 85-ERA-23, slip op. at 8 (Sec'y Apr. 20, 1987). The Secretary stated in *Earwood v. Dart Container Corp.*, Case No. 93-STA-16, slip op. at 5 (Sec'y Dec. 7, 1994) that "effective enforcement of the Act requires a prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment opportunities as a result."

However, in *Odom v. Anchor Lithkemko,* Case No. 96-WPC-1, slip op. at 13 (ARB Oct. 10, 1997), the ARB emphasized that an employer is not prohibited from providing a negative reference simply because an employee has filed a whistleblower complaint. To be discriminatory, the communication must be motivated at least in part by the protected activity. In *Odom*, the complainant failed to prove that either criticisms of his work performance or a statement of his ineligibility for rehire was based on or motivated even in part by any of his protected activity. *Cf. Gaballa v. Arizona Public Service Co. and The Atlantic Group*, Case No. 94-ERA-9, slip op. at 3 (Sec'y Jan. 18, 1996) (the employer explicitly mentioned the employee's whistleblower complaint to a reference checking company).

In addition, blacklisting requires an objective action—there must be evidence that a specific act of blacklisting occurred. *See Howard v. Tennessee Valley Authority*, Case No. 90-ERA-24 (Sec'y July 3, 1991), *aff'd sub nom., Howard v. U.S. Dept. of Labor*, 959 F.2d 234 (6th Cir. 1992) (table) (the existence of a memorandum and status report on whistleblower complaints was insufficient to establish blacklisting without further indications of specific adverse action). Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place. *See Bausemer v. Texas Utilities Electric*, Case No. 91-ERA-20, slip op. at 8 (Sec'y Oct. 31, 1995) (an employer's letters to contractors requesting notice

of any discrimination cases filed against them did not constitute blacklisting of complainant).

Under *Smith v. Tennessee Valley Authority*, Case No. 90-ERA-12, slip op. at 4 (Sec'y Apr. 30, 1992), an allegation of blacklisting must include some form of detriment to the complainant. Thus, there must be some objectively manifest personnel or other injurious employment-related action by the employer against the employee, proved directly or circumstantially, to support a claim of illegal action under the statute. *McDaniel v. Mead Corp.*, 622 F. Supp. 351, 358 (W.D. Va. 1985), *aff'd*, 818 F.2d 861 (4th Cir. 1987) (table).

B. Components of Pickett's blacklisting claim

Pickett's claim that he was blacklisted rests on the comments and conduct of Yates during the March 30, 2001 meeting between Yates and Green.[11] Yates and Green differ over exactly what was actually said at that meeting, but we find that under either version, the statements attributed to Yates are insufficient to constitute any adverse action by TVA or Yates. Thus, we agree with TVA that Pickett failed to establish that he was blacklisted by TVA or Yates. Respondent's Initial Brief at 10.

The statements attributed to Yates by Green may be described as gratuitous personal observations, conversational gambits designed to elicit information, or malicious remarks aimed at blacklisting Pickett. The statements fall into three categories: (1) Yates' alleged dislike of Pickett and accusation of malingering; (2) Yates' supposed ridicule of Pickett for living at home; and (3) Green's potential re-employment of Pickett. We will discuss each in turn as factually insufficient to support the inferences drawn by the ALJ.

(1) Accusation of malingering

Pickett's allegations that Yates did not like Pickett and that he accused Pickett of malingering rest on the following exchanges as related by Green at the hearing.

[11] Pickett alleged in his complaint that Yates told Green Pickett's case would not look good in front of a jury, which would find him to be a malingerer. He also alleged that Yates said that OWCP sent him to investigate and not TVA. ALJX 2. In a written declaration, Green alleged that Yates discussed Pickett's case in front of Green's secretary, charged Pickett with being "a malingerer," and "repeatedly threatened" Green with a subpoena for his records. Green added that Yates made no appointment and interviewed him while he had "customers waiting." ALJX 24. Neither the record nor the hearing transcript corroborates or supports any of these allegations. Green did not testify about the alleged jury comment or Yates' actual use of the term malingering. Nor did he indicate at the hearing that his secretary was present during the interview or that he had customers waiting. He did testify, however, that Yates showed him his TVA badge and asked the same questions that OWCP had asked in its letter to him. And Green stated twice at the hearing that he did not feel threatened by Yates' remarks about a subpoena. *See* TR at 29, 35-38, 44, 457, 479.

According to Green, who admitted that he was a "very good friend" of Pickett's, TR at 43, he could tell that Yates "basically didn't like David, seemed like to me. I mean, he was real, you know – he made comments to me like, you know, 'I get up and go to work every, my knees and back hurt,' and you know, just stuff like that. I could see he wasn't real fond of David, let's put it that way, or agreeable to whatever David's doing." TR at 33.

Pickett's allegation that Yates called him a malingerer was specifically based on Green's declaration, ALJX 24, and Green's testimony on what Yates said about Pickett's doctors. The exchange was as follows:

> A. Yeah, he said that he had doubts about David's [disability] case, that you know, their doctors said he wasn't hurt, but David's doctors said he was hurt. And you know, he – and that's basically it.
>
> Q. What did he say about our doctors?
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> A. He just said our doctors. You know, I wasn't real – just said our doctors say he's not hurt and his say he is hurt. He asked me how I'd feel if one of my workers was, you know, saying his back was hurting, wasn't working and he went to work for somebody else. I said I didn't know. TR at 37-38.

Yates denied that he said anything about Pickett's doctors, TR at 467, and added that the bad back remark was made in the context of talking about workers' compensation generally in response to Green's questions. TR at 464.

The comments Green recounted, if made, could be interpreted as possibly supporting an inference of malingering. They also could be interpreted as a ploy to motivate Green to provide full employment information about Pickett, or as gratuitous remarks.[12] The evidence is therefore equivocal on this point.

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[12] Green stated in his September 14, 2001 declaration that Yates called Pickett a malingerer, that Yates' interview was "intimidating," and that, based on "the strength" of Yates' feelings, "he intended to hurt" Pickett's reputation. ALJX 24. At the hearing, Green did not testify directly about the alleged accusation of malingering. Green stated that he "could tell" Yates wasn't "real fond of" Pickett, but did not explain how or why. TR at 33. Green added that he took Yates' questions "personal," TR at 38, but admitted that Yates never "threatened me personally," TR at 44. We note that Yates' alleged remark that Pickett's doctors said he couldn't work and TVA's doctors said the opposite was factually correct. Although it may have suggested to Green an innuendo that Pickett was malingering, it does not corroborate the statement Green made in his declaration, that Yates called Pickett a malingerer outright.

(2) Ridicule of Pickett for living at home

Asked if Yates made any remarks about Pickett living with his parents, Green responded: "Yeah, he said he couldn't believe somebody thirty-six years old still lived at home. You know, he had a son. And when he told him – when he moved out, he paid his own way. And he couldn't understand why somebody that old lived at home. I said well, he didn't really have any money." TR at 39-40.

Taken at face value, Yates' alleged remark—that he couldn't understand somebody Pickett's age living at home—is responsive to Green telling him that Pickett had moved in with his parents. TR at 466-67. Even if Yates' comment could be interpreted negatively, any implication from his statement does not relate to Pickett's desirability as an employee. The fact that Yates, according to Green, couldn't understand why a 36-year-old man was living with his parents may indicate a lack of empathy for Pickett, but it is not evidence of blacklisting. Living at home at whatever age is simply unrelated to employment qualifications.

We note that Yates testified that he made no derogatory statements about Pickett living with his parents. TR at 78, 467. He added that he had asked Green where Pickett was living, and Green told him. Yates did admit that he talked about his son, who played college basketball and was happy to be on his own "part of the time." TR at 80-81, 465. Under Yates' version of the conversation, there was no ridicule. Under either version, these statements do not constitute blacklisting.

(3) Green's potential re-employment of Pickett

Asked how Yates' questions made him feel, Green stated that Pickett was his friend, and "I took it personal. I was just trying to help David get a little bit of income. I mean, he made all of all of fifteen hundred and some dollars working for me. It wasn't nothing." Pickett's counsel then asked Green:

> Q. If you didn't know David, how would Mr. Yates' statements have made you feel about him as an employer, sir?
>
> A. I wouldn't hire him. [Objection] There's no way.
>
> Q. Let me ask you to assume, sir, that you didn't know Mr. Pickett personally. And an agent with a badge came to your office asking the kind of questions that Mr. Yates did on March the 30th.

> A. I mean, there's no way I would hire him again. If I didn't know him, there's no way.[13] I mean, my shop worker, he [Yates] asked to see his [Pickett's] payroll records. I mean, you don't think that's going to be all over town? I mean, there's no way. Just to have to come over here and do this, I mean, there's no way.

TR at 38-39. In this exchange, Green indicated that the mere fact that Yates came to the shop and asked to see Pickett's payroll records would have motivated Green not to re-employ Pickett if he didn't know him personally. Clearly, Yates' request for the employment information identified in OWCP's letter would not constitute blacklisting. Similarly, the fact that Yates came to Green's place of business is unrelated to any form of blacklisting. Further, Green testified that he would rehire Pickett whenever there was enough work, TR at 42, thus supporting TVA's argument that Green's testimony in this regard was purely speculative. Therefore, in considering whether blacklisting occurred, we put little weight on Green's testimony that after Yates' visit he would have been unwilling to rehire Pickett if he had not known him personally.

Even if Yates thought Pickett was malingering, and conveyed this impression to Green, the evidence linking Yates' personal opinion to preclusion of re-employment by Green—"I wouldn't hire him"—is speculative at best, because Green was well aware of Pickett's capabilities and admitted he would hire him back. Further, since early in their conversation, Green told Yates that he was Pickett's friend and didn't want to get him in trouble, it appears unlikely that Yates expected Green not to re-employ Pickett as a consequence of his remarks.[14] TR at 33, 458.

Green also testified that Yates' visit "just tore him [Pickett] up. I mean, he – I know he can't feel good walking around town, because I know everybody knows. I mean, people got big mouths in our town. That's just the way it is. I know it's bothered him." TR at 40.

Small town proclivities for gossip aside, this testimony does not establish that Yates stated or even intimated that Green should blacklist Pickett and not hire him in the future.[15] Nor does it support any inference that TVA had blacklisted Pickett for re-

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[13] In response to a later question, Green stated: "If I didn't know David, I would come away thinking terrible of him." TR at 49.

[14] Yates testified that he knew that Pickett and Green were "extremely good friends" and had shared an apartment at one time. "I wasn't about to sit there and say things about [Pickett] that were not appropriate in front of his best friend." RX 5; TR at 466.

[15] In fact, we can find no motivation for Yates to suggest to Green that he not hire Pickett. Under FECA, TVA is charged with the amount of Pickett's disability compensation. If Pickett were to be hired by Green, TVA would benefit because Pickett's earnings could be offset against the disability benefits TVA currently pays.

employment. Green's beliefs that Yates' visit would "be all over town" and that Pickett could not feel good walking around town simply have no bearing on whether Yates or TVA blacklisted Pickett. Likewise, Pickett's reaction to Yates' visit—expressed in his irate telephone call to Yates the same day, RX 6; TR at 161, 163-66—is immaterial to the issue of blacklisting.

Under Yates' testimony, no blacklisting of any sort occurred. Rather, Yates' testimony reflects his efforts to obtain information from the individual—Green—who had failed to respond to OWCP's inquiry. Following OIG policy on conducting interviews,[16] Yates introduced himself and tried to establish rapport with Green. RX 5. Yates testified that the tone of his conversation with Green was casual, that his questions "didn't seem to bother" Green, and that he wasn't offended by Yates' remarks about getting a subpoena for Pickett's employment records, but rather seemed to want such a document before he would release any of Pickett's records. TR at 57-59, 451-52. Yates stated that he talked with Green "in generalities" about the workers' compensation system and people going to work with bad backs as well as softball and other sports. TR at 464.

Yates, a TVA special agent since 1992, explained at the hearing that obtaining relevant information during an interview in workers' compensation cases required conversational gambits designed both to put the interviewee at ease and elicit facts about the injured employee. TR at 464, 531-32.

For example, to allay Green's apprehension about releasing employment information on Pickett, Yates related that Pickett had reported some earnings, that his situation was not like most cases investigated by Yates, and that Pickett "had done nothing wrong." TR at 460. Yates told Green that his visit was "really just a very informal inquiry, . . . to verify the information." TR at 531. Yates added that Green asked questions and "we talked in generalities a little bit. That happens very often in the very normal course of business [with] the people I inquire or talk to." TR at 531-32.

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[16] The OIG manual provides the following guidelines for special agents conducting an interview:

> A well-planned interrogatory is the key to a successful interview. The [special agent] needs to carefully formulate questions to be asked during the interview and be prepared for the person's responses. After properly identifying yourself and showing your credentials, the agent should try to put the person being interviewed at ease by asking background questions first before addressing more important questions. The questions should be simple, short, understandable, and direct, and the agent should maintain absolute control of the interview and should lead or direct the discussion. Private and sensitive matters, such as financial matters, drinking or drug habits, and sexual matters are discussed only to the extent that they directly relate to the matter under investigation. CX 9.

Having carefully reviewed the record, including the hearing transcript, we find that the evidence adduced by Pickett fails to resolve the ambiguous conclusions that could be drawn from the March 30, 2001 interview of Green by Yates. Pickett has the burden of proof to establish by a preponderance of the evidence that TVA blacklisted him. For the reasons set forth above, we find the evidence insufficient to establish blacklisting.[17]

II. TVA has established a legitimate, non-discriminatory reason for Yates' interview of Green.

The FECA regulation at 20 C.F.R. § 10.118 contemplates that an employer may investigate the extent of an employee's disability and will monitor an employee's medical care. It requires the employer to provide to OWCP relevant documents it obtains. *See* 20 C.F.R. § 10.123(b); 20 C.F.R. § 10.140 (1998), superseded by 20 C.F.R. § 10.118; 20 C.F.R. § 10.506 (2002).

OWCP's procedure manual provides guidelines for claims examiners to obtain information from employers whose workers are injured. Where fraud is not involved, as in this case, investigation may be requested as a routine matter.[18] The claims examiner may request a limited investigation to secure the necessary evidence where only a few items are needed.[19] The manual provides the methods by which a claims examiner may

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[17] Because of our determination that Pickett has not established any adverse action of blacklisting, even crediting Green's evidence, it is not necessary for us to address the ALJ's credibility findings. However, we note that the evidence cited by the ALJ for finding Yates' testimony not credible depends on drawing unwarranted inferences.

For example, the ALJ faulted Yates because he testified that he did not know what a protected activity was. R. D. & O. at 30. The transcript reveals that Yates' expertise was in workers' compensation cases and that he had never worked or been trained in whistleblower cases. TR at 428, 541-50. Thus, it is understandable that he would not be able to define this term of art, even though he was aware of Pickett's whistleblower complaint when he attended the 1999 meeting with TVA's attorneys. Further, his role there was limited to explaining his investigation of Pickett's disability claim in 1992.

Similarly, the ALJ found Yates less than candid because he testified that he did not remember the "exact details" of Pickett's disability claim or whether he had won his appeal of the termination of his benefits. R. D. & O. at 30. Yates, testifying 11 years after his 1992 investigation, stated that opposing counsel's description of Pickett's work injury (which occurred in 1988) sounded "fairly close." TR at 108-09. He stated that he didn't recall whether he knew in November 2000 that Pickett had won his appeal because he was working on his active cases and Pickett's disability case investigation had been closed in early 1993. TR at 73-74, 443-44. It is reasonable that in 2001 Yates would not recall details of a case closed in 1993, especially in view of the fact that he had handled 70 to 100 cases since that time. TR at 440. Moreover, he would not have had any cause to follow Pickett's case since the investigation was closed.

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Security and the Prevention of Fraud and Abuse*, Chapter 2-402.6 (April 1995).

[19] *Id.*, Chapter 2.402.6.a.(2) (April 1995).

obtain needed information, including factual and medical evidence in the possession of an employer and earnings reported to the Social Security Administration.[20]

When an employee such as Pickett cannot return to his pre-injury job, but does report alternative employment, the claims examiner must determine whether his earnings fairly and reasonably represent the employee's wage-earning capacity.[21] The manual clearly states that sporadic or intermittent earnings should not be the basis of a wage-earning capacity determination, but should be deducted from the disability compensation being paid to the injured worker.[22]

Pickett argues that Yates' action was an "illegal investigation" of him, but we find no evidence that OWCP, TVA, or the OIG did anything illegal. As Yates explained to Green, Pickett's situation was different from the usual disability cases he investigated.[23] TR at 460. Pickett had reported some income to OWCP during the two years his benefits were terminated. OWCP computed the retroactive compensation due him after ECAB reversed OWCP's termination decision, but needed to verify the information he reported and obtain the particulars of Pickett's employment during that period to determine whether a wage-earning capacity decision was necessary. Accordingly, OWCP followed its usual procedures, and sent a form letter to Green requesting employment information. TR at 389-92.

When the letter produced no response, the OWCP claims examiner called Branham, a claims officer with TVA's workers' compensation department, which served as TVA's liaison with OWCP. CX 11-A; TR at 380. As Branham explained, she gets daily requests from OWCP for information on injured TVA workers. TR at 381, 408. Because this request sought information which was not in TVA's files but rather in the possession of an outside source—Oak Ridge Fabricators—Branham discussed the request with her manager and then asked TVA's OIG, specifically Yates, to help because she had worked with him in the past. TR at 380-81, 393, 397-98; *see* RX 3.

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[20] *Id., Development of Claims*, Chapter 2-800.7 (April 1993); *Periodic Review of Disability Cases*, Chapter 2-812.10-11 (June 2003).

[21] *Id., Reemployment: Determining Wage-Earning Capacity*, Chapter 2-814.7 (December 1993).

[22] *Id.*, Chapter 2-814.7.d.(3) (June 1996).

[23] Usually, disability cases that are investigated involve individuals who are receiving benefits and are also working or engaging in other activities inconsistent with being disabled. TR at 460. Under FECA, such individuals may face termination of benefits and criminal charges. *See generally,* 5 U.S.C. §§ 8106(b), 8148 (1993).

Because Yates knew that the disability investigation file on Pickett had been closed and that Pickett had filed a complaint against TVA in 1999, he consulted his supervisor, Charles Dale Hamilton, before proceeding. Hamilton checked with the head of OIG and then instructed Yates to set up the interview because he was the "logical choice" to work on it.[24] TR at 416-18, 429-30. Thus, it appears that Yates' visit to Oak Ridge on March 30, 2001 was properly authorized as a discretionary function within the scope of his authority as an OIG special agent.

Yates' interaction with Green can be seen as within the scope of his duty to obtain information about Pickett's employment. OWCP needed this information to determine whether Pickett had any wage-earning capacity, which would affect the amount of disability benefits he received. Even crediting the testimony of Pickett's witnesses, none of the statements Yates made concerning Pickett's employment records with Green, OWCP's request that he interview Green, or the statement that he was not there for TVA, exceeded the scope of Yates' employment.

Further, the peripheral questions and statements alleged by Green were arguably within the scope of Yates' duties because, as discussed previously, they could have been connected to Yates' ultimate goal of obtaining relevant information concerning Pickett's wage-earning capacity.

Pickett has not shown that TVA's explanation is not credible or is pretext for discrimination. Thus, we conclude that TVA has provided a legitimate non-discriminatory explanation for Yates' interview with Green—OWCP's request for employment information so that it could determine Pickett's wage-earning capacity.[25]

TVA argues that its actions in sending Yates to interview Green were privileged and therefore cannot be the basis of a whistleblower claim, citing *Billings v. Tennessee Valley Authority*, Case No. 91-ERA-12, slip op. at 12-14 (ARB June 26, 1996). In that case the sole factual issue was whether TVA discriminated against the complainant by persuading OWCP to terminate his disability benefits. The ARB agreed with the ALJ that TVA's actions in communicating with OWCP and asking for a review of Billings'

[24] As Hamilton explained, Yates was the logical choice because he was one of three agents assigned to workers' compensation cases, he had received the request from OWCP's Branham, and he had worked on the previous Pickett case, which was closed in January 1993. TR at 416-18.

eligibility for disability benefits did not violate the Energy Reorganization Act, 42 U.S.C. § 5851 (1988), and were specifically authorized by the regulations implementing FECA.

Although there is no statutory provision governing privilege in the environmental whistleblower statutes or the FECA, a privileged communication in the context of defamation law is one that, except for the occasion on which or the circumstances under which it is made, would be defamatory and actionable. 100 ALR 5th, *Libel and Slander—Immunity*, § 2 (2002).

In determining whether a qualified privilege exists, the nature of the subject, the right, duty, and interests of the parties, the time, place, and circumstances of the occasion, and the nature, character, and extent of the communication should be considered. 50 Am Jur 2d, § 276. Thus, the elements of this privilege include good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner to proper parties. *Id.* For public officials, the generally recognized elements are the performance of a discretionary function in good faith within the scope of the employee's authority. 100 ALR 5th, *Libel and Slander—Immunity*, § 2 (2002).

The privilege also attaches to accusations or comments about an employee by his employer to a person having an interest, which is direct and legitimate in, or as a duty as to, the matter to which the communication relates. 50 Am. Jur. 2d, *Libel and Slander*, § 328. Thus, statements made by former employers to state departments or offices or to various other entities have been covered by a qualified privilege if they do not go beyond the scope of the inquiry. *See Judge v. Rockford Memorial Hospital*, 150 N.E. 2d 202, 207 (App. Ct. Ill. 1958) (letter from director of nursing to nurses' grievance committee was covered by qualified privilege because no malice was proven).

While the factual circumstances of this case meet some of the requirements of common-law privilege, we have found that TVA has set forth a legitimate, non-discriminatory reason for Yates' interview of Green. We have also concluded that Pickett has not established that he was blacklisted. Therefore, we need not decide whether the March 30, 2001 interview was protected by any kind of qualified privilege.

III. Pickett has not established by a preponderance of the evidence that the alleged blacklisting was motivated by Pickett's protected activity in filing the 1999 complaint.

Even if we were to construe Yates' behavior as blacklisting, Pickett has failed to establish by a preponderance of the evidence that the blacklisting was motivated in whole or in part by Pickett's protected activity under the environmental whistleblower statutes. *See Odom, supra*, slip op. at 12. Rather, the record shows that if Yates had any actual animus toward Pickett, it stemmed only from his disability case. Thus, if Yates' remarks are interpreted as conveying negative views of Pickett, including that Pickett was a

malingerer, it appears that the source of such animus, if it existed, was Pickett's receipt of disability benefits under the workers' compensation system.

The ALJ found a causal connection between Pickett's protected status as a prior whistleblower and his blacklisting by Yates based on certain "facts," the most significant of which was that Pickett had made charges against Yates personally in his 1999 whistleblower complaint.[26] The ALJ noted that Pickett's 1999 complaint "involved investigations conducted by Yates" and "allegations that derogatory statements were spoken by Yates." Based on these findings, the ALJ determined that Yates had a motive for retaliating against Pickett and further determined that Yates' desire for retaliation, coupled with the opportunity afforded by the 2001 investigation, constituted the requisite causation. R. D. & O. at 40. Our review of the evidence convinces us otherwise.

As part of his job, Yates had investigated Pickett's activities in late 1992 in connection with his receipt of disability benefits. Yates' November 17-18, 1992 memorandum explained that Yates had called Pickett twice to set up a time for an interview concerning an allegation about his physical activities. Pickett was unavailable, and an interview was finally arranged for December 2, 1992. CX 1-5D. Yates, along with fellow investigator Curtis Phillips, went to Pickett's parents' home and interviewed Pickett in the presence of his father. Yates taped the interview and later wrote a report for the OIG. CX 1-5D. The report is a factual account of what Pickett told Yates about his physical and athletic activities, and contains no language or conclusions detrimental to Pickett.

The December 2, 1992 report and the November 17-18, 1992 memorandum by Yates were attached as exhibits to Pickett's 1999 whistleblower complaint, in which Pickett accused two other TVA employees, George Prosser and Donald Drumm,[27] of blacklisting him and lobbying OWCP to terminate his disability benefits in retaliation for

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[26] The ALJ listed the following:

1) Yates and TVA knew that Pickett had filed a complaint in 1999;
2) Yates also knew that Pickett had made charges against him in that complaint;
3) Pickett told Yates of TVA's environmental violations during the 1992 interview regarding his disability compensation;
4) Neither Yates nor TVA investigated these charges;
5) Yates attended a 1999 meeting on Pickett's complaint and explained the investigation he conducted relating to Pickett's eligibility for benefits due to disability;
6) TVA failed to investigate fully Pickett's charges against Yates in his 2001 complaint;
7) The OWCP inquiry was referred to Yates because of the pending 1999 complaint; and
8) Yates' 2001 investigation was an opportunity to retaliate against Pickett.

Although the ALJ stated that Pickett made allegations in the 1999 complaint against Yates personally, he did not identify the specific charges purportedly made. R. D. & O. at 35-36.

[27] George T. Prosser was TVA's manager of fraud investigations in the OIG and Donald K. Drumm was the manager at Widows Creek Fossil Plant, where Pickett worked. CX1-5B, 5C. The 1999 complaint also accused Drumm of "bearing animus" against Pickett for years and stated that Prosser had fabricated an anonymous complaint to support an "illegal" investigation of Pickett's disability case. Both managers were charged with conspiring to have Pickett's disability compensation terminated. RX 8; *see* n. 1.

his whistleblower activity.[28] The two documents were described as follows: "November 17 & 18 1992 TVA IG 02 by Agent Craig A. Yates and December 1992 TVA IG Form 02 by Agents Curtis Phillips and Craig A. Yates regarding their 'investigation' of alleged 'anonymous' concerns about Mr. Pickett being on FECA compensation." CX 1. Because Pickett had charged in his 1999 whistleblower complaint that TVA, *i.e.*, Prosser and Drumm, initiated the 1992 investigation to harass Pickett, Yates was briefly called into a meeting of TVA's attorneys in 1999 to describe his investigation of Pickett's disability claim. However, Yates had no further involvement regarding Pickett's 1999 complaint. TR at 492.

The ALJ erred in finding that there was an allegation against Yates personally in Pickett's 1999 complaint. Based on the record before us, Pickett did not accuse Yates of anything in his 1999 complaint. Yates' name is on the November 17-18, 1992 memorandum and the December 2, 1992 report of Pickett's activities and appears in the description of these documents. But Pickett's quarrel was with Prosser and Drumm, and their 1991 letter and memo. While Yates' December 2, 1992 report was sent to DOL and was part of the investigation by TVA's OIG, which was closed in January 1993, the report, in Pickett's own words, revealed nothing derogatory about him. It simply states what Pickett told Yates and Curtis. The statement in Pickett's claim about the "investigation" and the attached copies of Yates' memorandum and investigative report—were not derogatory of Yates. The 1999 complaint made no charges against Yates personally. It did not impugn Yates' integrity or identify any impropriety in his conduct of his portion of the OIG investigation in 1992.

Thus, the evidence linking Yates with Pickett's 1999 whistleblower action consists of the following: Yates' actions in investigating Pickett's disability claim in 1992, his participation in the meeting with TVA counsel in 1999, and his knowledge that Pickett had filed a whistleblower suit against TVA. These are insufficient to establish that Yates was motivated to engage in retaliatory blacklisting because of Pickett's whistleblowing activity.[29]

We observe, moreover, that in his conversation with Green on March 30, 2001, Yates made no mention of Pickett's whistleblowing activity. Even accepting as credible

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[28] The September 10, 1991 memorandum by Drumm stated: "Mr. Pickett has successfully sidestepped the return to work issue for three years by manipulating both OWCP and TVA. His apparent success in abusing the compensation system should be questioned and corrected." CX 1-1. Prosser stated in an October 18, 1991 memo referring to an anonymous call to the OIG Hotline alleging that Pickett's activities were inconsistent with those of a disabled person: "Fraud on Pickett's part did not appear to be a factor, but OWCP handled the case poorly." CX 1-5C.

[29] Pickett alleges that he told Yates in 1992 of his whistleblowing activities at Widows Creek and that Yates had done nothing about investigating his complaints about unsafe conditions. TR at 157-58. Yates did not recall receiving this information. TR at 506-08. Even if Pickett had conveyed his concerns about the plant, Yates had no obligation or authority to investigate because his assigned responsibilities were related to disability compensation investigations. TR at 107, 418. Therefore, no adverse inferences flow from his failure to investigate Pickett's charges of unsafe working conditions at TVA's Widows Creek plant in 1992.

Green's version of the conversation, neither Green nor Yates referred to Pickett's whistleblowing activities or the whistleblower protection complaint Pickett filed in 1999. Yates and Green discussed only the FECA claim and Pickett's conduct and history as a beneficiary of disability compensation. Further, there is no other evidence that Yates had animus against Pickett because of his 1999 whistleblower complaint. The only accusations Pickett made against Yates are contained in the 2001 complaint, which was filed after Yates had visited Green on March 30, 2001.

Indeed, if Yates' remarks are interpreted as conveying negative views of Pickett, including that Pickett was a malingerer, it appears that the source of any animus on Yates' part was Pickett's continued receipt of disability benefits. From his 1992 investigation, Yates was well aware of the varied physical activities which TVA subsequently cited in seeking an OWCP review to determine whether Pickett was in fact still disabled. He was also well aware of the general framework of the federal workers' compensation program and had investigated many cases in which claimants receiving disability benefits were either earning income from other sources or engaging in activities that reasonably belied the work injury for which they were receiving compensation. As an experienced investigator of workers' disability claims, Yates might have been skeptical of Pickett's continued disability for work.

Also, all of the conversation with Green as to Pickett's status related to Pickett's work for Green and his receipt of workers' compensation. TR at 42-43. Green's responses support an inference that any reluctance on his part to rehire Pickett would not be based on his whistleblowing, but rather because he was involved with litigation over his disability claim. *See Mourfield, supra*, slip op. at 4 (any blacklisting resulted from the employer's displeasure with complainant's pro-union activity and was not related to his whistleblower complaint). *See also Odom, supra*, slip op. at 13 (negative work reference, made with the knowledge that the employee had filed a whistleblower complaint, did not constitute blacklisting communication); *Webb v. Carolina Power & Light Co.*, Case No. 96-176, slip op. at 10-11 (ARB Aug. 26, 1997) (negative remarks made to complainant's friend did not constitute blacklisting).

Pickett has alleged additional "facts" upon which the ALJ relied to find causation. *See* n. 26, *supra*. These allegations do not support a conclusion that the alleged blacklisting was motivated by the 1999 complaint. Further, TVA has offered legitimate, non-discriminatory reasons for its actions with respect to Yates' participation in the 1999 meeting with TVA counsel, TVA's alleged failure to investigate fully Pickett's charges against Yates in the 2001 complaint, and OWCP's request for employment information being referred to Yates. Pickett has not shown that any of TVA's reasons for its actions are not credible. In fact, TVA's explanations of its actions in investigating Pickett are well supported in the record. We therefore find that Pickett has not established by a preponderance of the evidence that Yates blacklisted him because he had engaged in protected activity under the environmental whistleblower laws.

CONCLUSION AND ORDER

Because we do not find that blacklisting occurred, it is unnecessary for us to rule on either Pickett's cross-petition, which requests additional relief for the alleged blacklisting, or on TVA's motion to dismiss Pickett's cross-petition and to strike his April 24, 2002 brief. *See Solnicka v. Washington Public Power Supply Systems*, ARB No. 00-009 (Apr. 25, 2000) (order dismissing appeal because of petitioner's failure to file an initial brief); *Pickett v. Tennessee Valley Authority*, ARB No. 00-076, ALJ Nos. 99-CAA-025, 00-CAA-009, slip op. at 2 (by refusing to comply with the ARB's format requirements for briefs, counsel risks return of his non-conforming pleadings).

For the foregoing reasons, we do not adopt the ALJ's findings and recommendations with respect to blacklisting, and we **DISMISS** Pickett's complaint.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge