In the Matter of:

MORTON E. CULLIGAN,

COMPLAINANT,

v.

AMERICAN HEAVY LIFTING SHIPPING COMPANY, INTERNATIONAL ORGANIZATION OF MASTERS, MATES, AND PILOTS, AND INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,

RESPONDENTS.

ARB CASE NO. 03-046

ALJ CASE NOS. 00-CAA-20
01-CAA-09
01-CAA-11

DATE: June 30, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

For the Respondent, American Heavy Lifting Shipping Company:
Leslie A. Lanusse, Esq., Francis V. Liantonio, Jr., Esq., Raymond P. Ward, Esq., ***Adams and Reese LLP, New Orleans, Louisiana***

For the Respondent, International Organization of Masters, Mates, and Pilots, and International Longshoremen's Association:
John M. Singleton, Esq., ***Albertini, Singleton, Gendler & Darby, LLP, Owings Mills, Maryland***

FINAL DECISION AND ORDER

Morton E. Culligan filed a complaint under the whistleblower protection provisions of the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 2003); the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (West 1995); the Solid Waste Disposal Act (SWDA, also known as

the Resource Conservation and Recovery Act, RCRA), 42 U.S.C.A. § 6971 (West 2003); the Federal Water Pollution Control Act (FWPCA), 33 U.S.C.A. § 1367 (West 2001); the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998); and the Safe Drinking Water Act (SDWA), 42 U.S.C.A. § 300j-9 (West 2003) (collectively the environmental whistleblower statutes), as implemented by the regulations at 29 C.F.R. Part 24 (2003).[1] Culligan alleged that the American Heavy Lifting Shipping Company (AHL) terminated his employment in retaliation for participating in activities that these statutes protect. In a Recommended Decision and Order (R. D. & O.), the Administrative Law Judge (ALJ) concluded that AHL established legitimate nondiscriminatory reasons for firing Culligan, and recommended dismissal of his complaint. We agree with the recommendation and dismiss the complaint.

BACKGROUND

Culligan, an experienced merchant seaman, started work as third assistant engineer, his first officer position, aboard the *Monseigneur* on January 18, 2000.[2] TR at 1184-90. He oversaw the engine room watches, making rounds, maintaining and repairing equipment and systems, and supervising the watch engineers. TR at 160-61, 1211-12; CX 8, 28. Typically, Culligan stood two, four-hour watches in the engine room each day, reporting to the chief engineer, Lincoln Nye, and several other first and second assistant engineers. TR at 317-19, 950-52, 1541.

After joining the crew, Culligan quickly became "surprised" and "shocked" at what he termed physical hazards, unsafe practices, and deficient working conditions. ALJX 16; TR at 1208, 1216-18. He testified that in his opinion general maintenance and safety were lax aboard the ship, a double-hulled vessel first built in 1958 and overhauled in 1997.[3] TR at 1219-23, 1230-32. For example, Culligan complained about a ballast pump overheating, a burst oil line, a malfunctioning marine sanitation device and fire foam pump, and rusted fuel lines in a lifeboat engine. TR at 1213-16, 1258-59; CX 3A.

---

[1] These statutes generally prohibit employers from discharging or otherwise discriminating against any employee "with respect to the employee's compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activities such as initiating, reporting, or testifying in any proceeding regarding environmental safety or health concerns. *See* 29 C.F.R. § 24.2.

[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] The tanker carried petroleum products and other combustible and hazardous materials.

Culligan acknowledged that he had to follow orders from his superiors, but numerous confrontations with the ship's officers and other crewmen over assignments and orders marked his 88-day tenure aboard the *Monseigneur*. TR at 66-72, 1264-70, 1323-27; CX 5-6, 12. For example, he accused a first assistant engineer of ordering him to throw overboard bags of garbage that contained non-biodegradable items. TR at 778, 1237-43. He also stated that he was once instructed to punch holes in empty oil drums and dump them into the ocean. TR at 741, 1235-38.

On February 2, 2000, he confronted a first assistant engineer about the garbage order and later complained that another incident involving the wash down of the engine room while under way was an unsafe practice. TR at 774, 957-58, 964-67; RX 8. Culligan recorded these two incidents in the logbook, the official record of all activities in the engine room. TR at 354-55, 1238. However, these entries were scratched out by his superiors, in violation of AHL policy, which required that a line be drawn through incorrect entries. TR at 112-13, 1242-45, 1252; CX 30A. The captain of the *Monseigneur*, Michael Herig, had a counseling session with Culligan about this interaction. TR at 1249-51; RX 9.

Subsequently, on March 20, 2000, Culligan objected to a painting assignment from Chief Engineer Nye, poked him in the chest, cursed him, and shouted that he would not work for him. TR at 67, 155, 265-66. Later that day, Culligan directed another outburst of anger at Nye, in the presence of the captain, a representative from Citgo Oil Company, which had chartered the ship, and other officers in the mess. TR at 68, 265-66, 272, 971-74. Captain Herig and Nye wrote a warning letter to Culligan about his unacceptable behavior, which had embarrassed all the officers. TR at 270-72, 978-79; RX 1, 5, 72.

The working relationship between Nye and Culligan deteriorated further, with Culligan countermanding Nye's orders to the other watch engineers and refusing direct assignments. TR at 69-71, 243-44, 372-73, 852-53. Nye testified that Culligan would spend most of his watches reading the safety manuals and taking notes rather than carrying out his duties. TR at 76-77, 243-44, 268-69, 300; RX 7-8. Other officers described the crewmembers' complaints about Culligan's working relationships with them—none of the three watch engineers wanted to be on Culligan's watches. TR at 292-97, 315, 869-70; RX 2, 6.

Early on April 13, 2000, Nye met with Captain Herig and they agreed that Culligan should be relieved of his duties because of his insubordination, inability to work peacefully with his colleagues, and overall poor quality of his work. TR at 65-66, 70-71, 224-25, 304-07, 337-38, 471-72, 989-90. They informed AHL headquarters that morning, and were told to follow company policy and withhold the decision from Culligan until the ship docked the next day at Wilmington, North Carolina. TR at 210-11, 306-07, 330-31, 335-36, 420-22, 988-89. AHL's Chief Executive Officer also told Captain Herig to have Culligan document his complaints about the ship. TR at 988-89.

Later that day, Nye asked Culligan to describe what he believed were deficient working conditions, safety hazards, and other mechanical problems on the ship. TR at 130-31, 331, 422, 307-08. Culligan completed 24 Non-Conformity Action Reports (NCARs),[4] which detailed faulty steam valves and stops, broken pipe brackets, ballast pump problems, unsafe storage of paint cans, uninsulated steam pipes, overloaded circuits and disconnected wiring, and Culligan's logbook entries that had been scratched out. TR at 128, 153-54; CX 3A, 19; RX 13-36. Culligan and Nye then inspected the engine room to verify the items that Culligan had written up in the NCARs. TR at 131, 1313; RX 3. Of the 24 NCARs, the *Monseigneur's* safety management team accepted three that needed corrective action, including the faulty steam valves left on while in port, the ballast pump problems, and the logbook incidents. CX 3A, 19.

After reaching port late on April 14, 2000, Culligan was escorted off the *Monseigneur*. TR at 831-32, 1331; RX 7. He then contacted the United State Coast Guard (USCG) to report the safety complaints contained in the NCARs. TR at 1334-35. A USCG team boarded the ship on April 15, 2000 in Wilmington, N.C., and inspectors checked the engine room items listed in the 24 NCARs, but "found no evidence of alleged problems." RX 106. Minutes of the ship's safety team's meeting on April 24, 2000 stated that no "discrepancies" were cited. CX 19, RX 37.

Culligan worked for another maritime company after being fired, but AHL subsequently put his name on its "do not hire" list because of his numerous communications to the company expressing his displeasure over his discharge. TR at 571-72, 1143-44, 1333; RX 6, CX 32. A few months later, a maritime union rejected his application for membership. TR at 622-26; CX 21A, D.

PROCEDURAL HISTORY

Culligan contacted the Department of Labor's Occupational Safety and Health Administration (OSHA) and filed three complaints under the whistleblower protection provisions of the six environmental acts, alleging that (1) AHL fired him in retaliation for engaging in protected activities, (2) the International Organization of Masters, Mates and Pilots (the union) and the International Longshoremen's Association (ILA) expelled him from the union for filing a complaint against AHL, and (3) AHL engaged in "hardball litigation tactics."

Culligan stated that he was ordered to throw toxic materials overboard, that lax maintenance in the engine room threatened oil spills, that the ship discharged sewage and

[4] The NCAR is a company complaint form, which reports an unsafe condition and requests corrective action or suggests safety improvements. The written complaint or suggestion is submitted to the ship's safety committee, which determines its merit and any further action to be taken. TR at 58, 130, 331-32, 604, 1205.

oily water because of malfunctioning purification equipment, that plastics were incinerated rather than recycled, that steam valves were left running while the ship was docked, and that a sister oil tanker polluted the water at Lake Charles, Louisiana. June 20, 2000 Amended Complaint at 1-3. Culligan charged that AHL fired him for reporting these concerns, maintained a retaliatory, hostile working environment, and blacklisted him in the maritime industry. *Id*. at 4-7. Further, Culligan accused AHL of operating unsafe "rust bucket" tankers like the *Monseigneur*, which are "a clear and present danger" to the environment. *Id*. at 7.

OSHA dismissed all three claims for lack of jurisdiction.[5] ALJX 16. An OSHA inspector advised Culligan that his complaints belonged in the USCG forum because the *Monseigneur* was a USCG-inspected vessel, and thus not within OSHA's safety and health jurisdiction. RX 42, 44-45. Culligan requested a hearing.

Following the hearing, the ALJ dismissed the hardball claim against AHL, Case No. 01-CAA-011, for failure to state a cause of action or establish jurisdiction. R. D. & O. at 22. She then consolidated Case No. 01-CAA-009 against the union and Case No. 00-CAA-020 against AHL.[6] The ALJ also determined that Culligan had no cause of action against any of the Respondents under the CAA or SDWA because he had not alleged any potential pollution of the United States' air or drinking water. R. D. & O. at 21 n. 44.

After determining that she had jurisdiction, R. D. & O. at 29-30, *see* discussion *infra*, the ALJ found that Culligan had failed to establish a causal nexus between his protected activities and his discharge. R. D. & O. at 31. She also found that AHL established legitimate, non-discriminatory reasons for firing Culligan. R. D. & O. at 32. Accordingly, she recommended dismissal of Culligan's complaint. He timely appealed to the Administrative Review Board (ARB).

ISSUES PRESENTED

1. Whether the ARB has subject matter jurisdiction over Culligan's complaints under the environmental whistleblower protection statutes.

---

[5] The September 1, 2000 OSHA letter to Culligan dismissing his complaint stated that "the evidence indicates that the safety and concerns he reported to the USCG when he was discharged did not include alleged violations of any of the environmental acts noted above." RX 45; *see* RX 42, 44.

[6] Culligan also named several individual respondents in the three complaints. *See* discussion, *infra*.

2. Whether Culligan established that AHL discharged him in retaliation for engaging in activities protected by the whistleblower provisions.

3. Whether Culligan established that the union and the ILA discriminated against him because of his protected activities.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review an ALJ's recommended decision in cases arising under the environmental and nuclear whistleblower statutes. *See* 29 C.F.R. § 24.8 (2002). *See also* 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) (West 1996); 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 Nos. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

DISCUSSION

To prevail on a complaint of unlawful retaliation or discrimination under the whistleblower protection provisions, a complainant must first establish that he is an employee and the respondent is an employer. *Demski v. Indiana Michigan Power Co.*, ARB No. 02-084, ALJ No. 01-ERA-36, slip op. at 4 (ARB Apr. 9, 2004). *See also Anderson v. Metro Wastewater Reclamation Dist.*, ARB No. 01-103, ALJ No. 97-SDW-7, slip op. at 8 (ARB May 29, 2003) (noting that SWDA, SDWA, CERCLA, FWPCA, TSCA, and ERA require complaining employee to have an employment relationship with respondent employer).

A complainant must also show that he engaged in protected activity of which the respondent 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. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). *See also Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1, slip op. at 5 (ARB Apr. 30, 2004). The burden then shifts to the employer to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. At that point, the inference of discrimination disappears, leaving the complainant to prove intentional discrimination by a preponderance of the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000); *McDonnell Douglas Corp. v. Green*, 411

U.S. 792, 802 (1973); *Jenkins*, slip op at 18.

Subject matter jurisdiction

The core issue for any adjudicatory body is its authority to decide a case, that is, whether it has jurisdiction over the matter before it. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 88 (1998) (subject matter jurisdiction is required for a court to decide a given case and must be established at the threshold). It cannot be waived by either party or inferred by a court, and a decision made in its absence is void *ab initio*. *Sasse v. U.S. Dept. of Justice*, ARB No. 99-053, ALJ No. 1998-CAA-7, slip op. at 4 (ARB Aug. 31, 2000). It is axiomatic that the party asserting jurisdiction has the burden of proving it. *Evans v. B. F. Perkins Co.*, 166 F.3d 642, 646 (4th Cir. 1999).

In this case, the ALJ initially asked the parties to brief the issue of jurisdiction, but none directly addressed subject matter jurisdiction under the environmental whistleblower statutes.[7] ALJX 1. As the ARB has long held, safety and health issues that pertain only to a complainant's workplace are not covered under the whistleblower protection provisions. *See Stephenson v. National Aeronautics & Space Admin.*, ARB No. 98-025, ALJ No. 94-TSC-5, slip op. at 15 (ARB Jul. 18, 2000) (environmental statutes confer no jurisdiction over whistleblower complaints arising from purely occupational safety and health concerns). Further, we lack jurisdiction over complaints filed under section 11(c) of the Occupational Safety and Health Act (OSHAct), 29 U.S.C.A. § 660(c) (West 1999). *Conaway v. Valvoline Instant Oil Change*, Case No. 91-SWD-4, slip op. at 1 n.1 (Sec'y Jan. 5, 1993). Thus, the ALJ properly dismissed Culligan's claims requesting relief under the OSHAct for lack of jurisdiction. R. D. & O. at 22.

In addition, AHL correctly stated that the OSHAct is pre-empted by the USCG provisions covering employee and workplace health and safety because the *Monseigneur* is a USCG-inspected vessel. 46 U.S.C.A. § 3301 *et seq.*; 29 U.S.C.A. § 653(b)(1); *cf Chao v. Mallard Bay Drillers, Inc*, 534 U.S. 235, 243 (2002) (pre-emption does not apply to uninspected vessels where the Coast Guard has not exercised its authority to regulate). Thus, the OSHAct's prohibition against employer retaliation, 29 U.S.C.A. § 660(c)(1), is pre-empted for blue-water seamen such as Culligan. *See Donovan v. Texaco Inc.*, 720

[7] DOL's regional solicitor stated that the ALJ had procedural jurisdiction to hear this case because OSHA issued a notice of determination under 29 C.F.R. § 24.4(d)(2). Secretary of Labor's Response to Court's Order at 2. AHL cited *Mallard Bay Drilling, Inc. v. Herman*, 212 F.3d 898 (5th Cir. 2000) and argued that OSHA's jurisdiction was pre-empted by the United States' Coast Guard. AHL Response to the ALJ's Order at 5-8. Culligan's counsel responded only that environmental jurisdiction existed and that the whistleblower protections applied to U.S. ships in the coastal oil tanker trade. Further Response to Court's September 18 Order at 2.

F.2d 825, 828 (5th Cir. 1983) (noting that because a seaman's working conditions are unique, the OSHAct does not apply to occupational health and safety issues).

However, such pre-emption of occupational safety and health for seamen does not necessarily preclude OSHA from investigating employee whistleblower complaints filed under the environmental statutes. 42 U.S.C.A. § 7622(b)(1); 42 U.S.C.A. § 9610(b); 42 U.S.C.A. § 6971(b); 42 U.S.C.A. § 300j-9i(2)(a); 33 U.S.C.A. § 1367(b); 15 U.S.C.A. § 2622(b). Thus, in considering subject matter jurisdiction, we must determine whether the concerns Culligan raised qualify for protection under the six environmental statutes.

In whistleblower cases, subject matter jurisdiction exists only if the complainant is alleging that the respondent illegally retaliated against him for engaging in activities protected by the environmental statutes' whistleblower provisions.[8] *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 93-ERA-6, slip op. at 15 (ARB July 14, 2000). That is, the complainant must have alleged activities that are protected under the environmental acts because they further the purposes of those acts or relate to their administration and enforcement. *See* 20 C.F.R. § 24.2(a)-(b).

We agree with the ALJ that most of Culligan's complaints about the working conditions aboard the *Monseigneur* concerned occupational safety and health issues that did not relate to the environment. R. D. & O. at 29-30. *Cf. Smith v. Western Sales & Testing*, ARB No. 02-080, ALJ No. 01-CAA-17, slip op. at 11-12 (ARB Mar. 31, 2004) (complainant engaged in protected activity by reporting release of paint fumes despite personal concerns for health and property). From the record, we discern four incidents that could conceivably have had some general impact on the overall environment. These include the dumping of the oil drums and unsorted garbage, the steam valves left on in port, and the malfunctioning sanitation equipment. To determine whether Culligan has established subject matter jurisdiction, we examine the purposes of each of the six acts and then determine whether any of these alleged environmental violations are related to the concerns covered by the acts.

---

[8] The six environmental statutes under which Culligan filed his complaints contain the same basic whistleblower protection provisions, which generally prohibit an employer or person from discriminating or retaliating against an employee for engaging in protected activities, including internal complaints, that constitute "action to carry out the purposes of the acts" or relate to "the administration and enforcement of the provisions of the acts." 42 U.S.C.A. § 7622, 42 U.S.C.A. § 9610, 42 U.S.C.A. § 6971, 42 U.S.C.A. § 300j-9, 33 U.S.C.A. § 1367, 15 U.S.C.A. § 2622. The ARB has held that the use of "person" in the FWPCA, SWDA, and CERCLA in place of "employer" in the other environmental statutes still requires that the respondent have an employment relationship with the complainant or act in the capacity of an employer, that is, exercise control over the terms, conditions, or privileges of the complainant's employment. *Lewis v. Synagro Technologies, Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-12, 14, slip op. at 10-14 (ARB Feb. 27, 2004).

The purpose of the CAA is to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population. 42 U.S.C.A. § 7401(b)(1). *See Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 764 (D.C. Cir. 1984) (purpose of the CAA is to protect the public health by controlling air pollution). Toward that goal, the federal government will provide financial assistance and leadership to develop cooperative federal, state, regional and local programs to prevent and control air pollution. 42 U.S.C.A. § 7401(a)(4). The purpose of the SDWA is to promote the safety of the nation's public water systems through the regulation of contaminants so as to provide water fit for human consumption. 42 U.S.C.A. 300f(1).

The ALJ noted that Culligan had failed to state a cause of action under both the CAA and the SDWA because he had not alleged that any of his protected activities could potentially pollute either the air or drinking water of the United States. R. D. & O. at 21 n. 44. While Culligan named these activities in his complaints, nothing in the record indicates that any of his alleged protected activities or any alleged actions by Respondents had, or could have had, any impact on the nation's air or drinking water. Because Culligan has not articulated any relationship between his protected activities and the purposes of either the CAA or SDWA, we find that he has failed to establish subject matter jurisdiction under these statutes. *See Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-12, slip op. at 4 (ARB Apr. 8, 1997) (protected activity must be grounded in conditions that constitute "reasonably perceived" violations of the environmental laws, not just in a complainant's subjective opinion that the activity could affect the environment).

Similarly, subject matter jurisdiction is lacking under the other four environmental statutes because none of the four activities that we have found might be protected could be considered as carrying out the purposes of the acts or relating to the administration or enforcement of their provisions.

In enacting the TSCA, Congress found that human beings and the environment are exposed to a large number of chemical substances and mixtures whose manufacture, processing, distribution in commerce, use, or disposal may present an unreasonable risk of injury to health or the environment. 15 U.S.C.A. § 2601(a). The purpose of the TSCA is to regulate chemical substances and mixtures that present such risks and to take action against imminent hazards. 15 U.S.C.A. § 2601(b)(2). *See Rollins Environmental Services, Inc. v. Parish of St. James,* 775 F.2d 627, 632-33 (5th Cir. 1985). One goal of the act is to assure that chemicals will be tested for safety and be carefully scrutinized before being manufactured or distributed to the public. *See* 122 Cong. Rec. 33,039-40 (1976).

Congress found under the SWDA that that the nation's economic and population growth had resulted in "a rising tide of scrap, discarded, and waste materials," which required new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal.

42 U.S.C.A. § 6901(a)(2), (4). The act's purpose is to promote the reduction of hazardous waste and the treatment, storage, or disposal of such waste so as to minimize threats to human health and the environment. 42 U.S.C.A. § 6902(b); *see generally Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996).

None of the four activities described previously has any connection to the toxic substances or hazardous wastes described in the TSCA or SWDA. These acts are essentially aimed at minimizing the dangers and risks to human health and the environment from products developed and distributed, and wastes generated, by private and public enterprises. *See generally Melendez*, slip op. at 17-19; *Timmons v. Franklin Electric Co.*, ARB No. 97-141, ALJ No. 97-SWD-2, slip op. at 4 (ARB Dec. 1, 1998).

Culligan alleged that empty oil drums, unsorted garbage, and untreated sewage, which could conceivably be considered toxic or hazardous, were thrown overboard on the *Monseigneur*.[9] Whether this dumping actually occurred is beside the point. Culligan has not shown that these incidents posed any threat or risk to human health or the environment that would bring his concerns within the ambit of the SWDA or the TSCA. In fact, he testified that dumping the empty drums was "nothing unusual. It's just what they do." TR at 1235. Culligan has also failed to demonstrate that he had a reasonable belief that such dumping would impact the regulation of new chemicals under the TSCA. *Johnson v. U.S. Dep't of Energy*, ARB Case No. 97-057, ALJ No. 95-CAA-20, 95-CAA-21, 95-CAA-22, slip op. at 10-12 (ARB Sept. 30, 1999). We find insufficient nexus between the dumping activities alleged by Culligan and the purposes of these two acts.

Finally, while the CERCLA and the FWPCA both refers to the oceans, neither act confers jurisdiction over Culligan's complaints. The two main purposes of CERCLA are the "prompt cleanup of hazardous waste sites and the imposition of all cleanup costs on the responsible party." *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990).

The CERCLA applies to the environment, which is defined as the navigable waters, the waters of the contiguous zone, and the ocean waters[10] *of which the natural*

---

[9] These activities are covered by the ocean dumping provisions of 33 U.S.C.A. § 1401 *et seq*., or by 33 U.S.C.A. § 1901 *et seq*. covering the prevention of pollution from ships. Neither subchapter has any provision for whistleblower protection.

[10] Territorial waters of the United States extend three miles from the coasts. *U.S. v. California*, 332 U.S. 19, 33-34 (1947). The contiguous zone extends nine miles from the three-mile limit, cite, and both make up the customs waters, 19 U.S.C.A. § 1401(j). The navigable waters include the territorial seas, 33 U.S.C.A. § 1362(7). The Magnuson Act covers the continental shelf, defined as the seabed and subsoil of the submarine areas adjacent to the coast but outside the territorial waters. 16 U.S.C.A. § 1802(6). The high seas consist of all waters beyond the territorial waters. 16 U.S.C.A. § 1802(19). International

Continued . . .

resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]**,** and any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air *within the United States or under the jurisdiction of the United States*. 42 U.S.C.A. § 9601(8) (emphasis added).

The definition of the term facility under CERCLA specifically excludes any vessel. 42 U.S.C.A. § 9601(9). Thus, by its terms, the environmental statute addressing waste sites and cleanup costs does not apply to Culligan's workplace, the *Monseigneur*, which is a U.S. flagged vessel operating under the jurisdiction of the USCG. TR at 606, 610.

The objective of the FWPCA, also known as the Clean Water Act, is to restore and maintain the chemical, physical, and biological integrity of the nation's waters, with the goal of eliminating the discharge of pollutants by industry into the navigable waters, waters of the contiguous zone, and the oceans. 33 U.S.C.A. § 1251(a). While not condoning the dumping of oil and garbage into the oceans, we find that the incidents Culligan alleged are too remotely related to the FWPCA's purpose of eliminating the discharge of industrial pollutants into the nation's waters to be covered as protected activities.

Based on our review of the record, we conclude that none of the six environmental statutes addressing the quality and preservation of the nation's air, land, and water resources confer subject matter jurisdiction over Culligan's complaints. The entire tenor of his lengthy testimony at the hearing conveys his concerns over what he considered to be decrepit machinery, poor maintenance, and unsafe working conditions. TR at 1207-20, 1226-30, 1257-61, 1313-16; CX 3A. We could, therefore, dismiss his complaints for lack of subject matter jurisdiction.

In this case, however, we note that the record is not clear exactly where the protected activities that could have potentially affected the environment took place. The *Monseigneur* delivered its cargo from port to port, but there is no itinerary evident. Culligan's claim that he was ordered to dump garbage that had not been stripped of its non-biodegradable contents could adversely affect the waters of the United States. But the record does not reveal the location of the alleged dumping.

Culligan also alleged that a marine sanitation device was malfunctioning, permitting untreated sewage to be dumped into the "ocean." Again, the record reveals no place where this incident actually occurred. The alleged dumping of oil-contaminated

---

waters are beyond the contiguous zone and are not subject to the sovereignty of any nation. *See generally United States v. Hidalgo-Gato*, 703 F. 2d 1267 (11th Cir. 1983).

drums,[11] and the steam valves left on "in port," which allegedly could cause fuel spill, are similarly uncorroborated with definitive details of where, thus leaving open the remote possibility that at least some of the incidents occurred within the scope of the CERCLA or FWPCA.

In view of this imprecise record and mindful of the ALJ's general finding that some of the alleged protected activities could "pose a credible risk to the environment," R. D. & O. at 30, we proceed alternately to the merits of Culligan's complaints. We recognize, of course, that if subject matter jurisdiction is not established, a decision on the merits of Culligan's claim is not necessary. Nonetheless, we will consider whether Culligan proved by a preponderance of the evidence that AHL fired him because of the environmental complaints he raised. *See Mourfield v. Frederick Plaas & Plaas, Inc.*, ARB Nos. 00-055 and 00-056, ALJ No. 1999-CAA-13, slip op. at 5 (ARB Dec. 6, 2002) (ARB finds that issue of protected activity was moot in view of complainant's failure to establish causation between alleged environmental complaints and employer's adverse action).

Case No. 00-CAA-020

While most of Culligan's alleged protected activities concerned only general health concerns, workplace safety, or routine maintenance issues, we will assume, for the purposes of the following analysis, that at least the four activities mentioned previously[12] are covered under the FWPCA, the TSCA, and the SWDCA. Accordingly, we address the merits of his environmental whistleblower complaint, No. 00-CAA-020, against AHL.

We find that Culligan's employer was aware of his activities because even though Culligan completed the 24 NCARs after AHL decided to fire him, he had conveyed at least some of those complaints orally to his supervisors in the three months he was aboard the *Monseigneur*. However, we agree with the ALJ that Culligan failed to establish a causal nexus between those activities and his discharge. R. D. & O. at 31. Further, we adopt and summarize the ALJ's findings of fact regarding AHL's legitimate, nondiscriminatory reasons for firing Culligan. R. D. & O. at 6-18, 32.

Culligan's behavior toward his superiors and fellow seamen aboard the *Monseigneur* provided ample grounds for his discharge and AHL's subsequent decision

---

[11] AHL introduced evidence that (1) the oil drums were not dumped at sea, and (2) that those oil drums were properly disposed of in Tampa, Florida. TR at 778-79; RX 38-39.

[12] These include the alleged dumping of oil-contaminated drums and untreated garbage into the ocean, the malfunctioning sanitation equipment, and the faulty steam valves left open while the ship was docked.

to place him on its "do-not-hire" list.[13] He openly confronted superior officers over their orders, countermanded orders given to other crew members, showed blatant disrespect to Captain Herig and other officers, neglected his duties while on watch, engaged in shouting and cursing, and directed denigrating and racial remarks at shipmates. R. D. & O. at 12-15.

The decision to fire Culligan was made the morning of April 13, 2000, prior to the time that he completed the 24 NCARs at the request of Chief Engineer Nye. R. D. & O. at 31. Company policy required that he not be informed of his discharge until the ship was in port, which happened late on April 14, 2000, in Wilmington, North Carolina. *Id.* There is no evidence that any of the safety complaints voiced by Culligan prior to his discharge played any role in his firing. R. D. & O. at 32.

Thus, we conclude that Culligan failed to establish by a preponderance of the evidence that his discharge resulted from his protected activities and that AHL established legitimate, nondiscriminatory reasons for terminating Culligan's employment. Therefore, we agree with the ALJ's recommendation to dismiss Culligan's complaint.

Case No. 01-CAA-009

Culligan's complaint against the masters, mates, and pilots union and ILA alleged that they retaliated against him by expelling him from the union because of his case against AHL, the union's "wholly-owned subsidiary," which had blacklisted him. RX 46; CX 21D. Culligan argued that the union and AHL had a joint employer relationship and were thus both liable under the whistleblower statutes.

As stated previously, an essential element of any whistleblower claim is that the complainant be an employee and that the respondent be his or her employer. *Demski, supra.* In establishing an employer-employee relationship, the crucial factor is whether the respondent acted in the capacity of an employer, that is, exercised control over, or interfered with, the terms, conditions, or privileges of the complainant's employment. *Seetharaman v. General Electric Co.*, ARB No. 03-029, ALJ No. 02-CAA-21, slip op. at 5 (ARB May 28, 2004); *see Lewis v. Synagro Technologies, Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-12, 02-CAA-14, slip op. at 8 n.14, 9-10 (ARB Feb. 27, 2004) and cases cited therein.

Such control, which includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a

[13] We agree with the ALJ's conclusion that the same reasons prompting AHL to fire Culligan supported its "do-not-hire" decision, especially when coupled with the vituperative e-mail communications Culligan sent to AHL after his discharge. R. D. & O. at 33. *See* RX 74-86.

complainant, is essential for a whistleblower respondent to be considered an employer under the statutes. *Seetharaman*, slip op. at 5. If a complainant is unable to establish the requisite control and thus an employer-employee relationship, the entire claim must fail. *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 95-CAA-10, slip op. at 9 (ARB Jan. 31, 2001).

Culligan's allegation that the union wrongfully ejected him because of his complaint against AHL is completely undermined by the fact that he was not a member of the union when AHL fired him. The union suspended his membership in April 1999 for nonpayment of dues. RX 20. Culligan had reregistered as an applicant on January 11, 2000 before joining the *Monseigneur*, but the union disqualified him from membership on November 30, 2000, based on his prior record. CX 21A. Culligan presented no evidence that the union controlled his employment with AHL or had any connection to his firing in April 2000.

Even assuming, as did the ALJ, that the union's rejection of Culligan could be considered an adverse action under the whistleblower protection provisions,[14] Culligan offered nothing in support of his allegation that his protected activities while employed by AHL motivated the union's decision to reject his membership. In fact, union president Timothy Brown testified that he was not even aware that Culligan had filed any environmental complaints when the union rejected his application. TR at 647-48.

Moreover, the record contains no evidence that the union had any input into Culligan's employment with AHL, which was jointly owned by its pension fund and that of the ILA, which are both employee benefit plans recognized under the Employee Retirement Income Security Act (ERISA), 29 U.S.D.A. § 1001 *et seq*. (West 1999). TR at 423, 431-32, 561; CX 4. Brown's testimony that neither he nor the union exerted any control over AHL's operations was not refuted. TR at 649-50. Therefore, we agree with the ALJ that Culligan failed to prove that the union took any adverse action against him as an employer. R. D. & O. at 25.

We also agree that the ALJ properly dismissed all five individuals named as Respondents in the three complaints. R. D. & O. at 25-26. As the ALJ stated, Culligan presented no evidence that any of these Respondents was an employer under the CAA, SDWA, and TSCA, or a person under the SWDA, FWPCA, and CERCLA with control over the terms and conditions of Culligan's employment, or acted in any capacity except as a supervisor within the scope of their employment with AHL. R. D. & O. at 25-27. *See Seetharaman, supra, Stephenson, supra*. Even if they engaged in discriminatory

---

[14] The union informed Culligan in a letter dated February 27, 2001 that its denial of membership did not prevent him from using the union's hiring hall to seek employment. CX 21D.

activity, which is not evident in this record, any liability would be imputed to their employer. *Lissau v. Southern Food Services, Inc*, 159 F.3d 177, 181 (4th Cir. 1999).

Case No. 01-CAA-11

Culligan filed a complaint on April 4, 2001 alleging that AHL had further retaliated against him in violation of the environmental statutes by using "hardball litigation tactics" in litigating his first claim against AHL before the ALJ. CX 8. The ALJ recommended dismissal of this latest claim because it failed to state a cause of action. R. D. & O. at 22-23.

The 2001 complaint seems to request that the ALJ reconsider the numerous rulings she made in the course of discovery prior to the hearing. Such a request is not cognizable under the whistleblower protection provisions of the environmental statutes. *See Rockefeller v. U.S. Dept. of Energy*, ARB Nos. 99-002. 99-063. 99-067, 99-068, ALJ Nos. 98-CAA 10, 98-CAA-11, 99-CAA-1, 99-CAA-4, 99-CAA-6, slip op. at 11 (ARB Oct. 31, 2000) (the ARB has no subject matter jurisdiction over a claim that is grounded not on retaliation for protected activities but on fraud and unethical conduct arising in the course of the litigation of a previous complaint); *see also* 29 C.F.R. §18.1(a); Rule 12(b)(1), Federal Rules of Civil Procedure.

While sanctions may be imposed in cases of discovery abuse and inappropriate legal maneuvers, there is no legal basis for filing a subsequent whistleblower complaint to raise such issues or seek reconsideration of an ALJ's orders. Furthermore, after review of the procedural record, we find that the ALJ acted within her discretion in disposing of the multitudinous motions filed below. Culligan's 2001 complaint is thus also frivolous. We, accordingly, dismiss it.

AHL's motion to strike

Lastly, we address AHL's motion to strike the brief Culligan's counsel, Edward A. Slavin, Jr., submitted in support of his appeal. AHL argues that Slavin's opening brief is "a 30-page parade of insults" that attacks the personal integrity and professional ability of the ALJ and AHL's employees. AHL's Motion to Strike at 1-4.

After reviewing Slavin's Petition for Review, Opening Brief and Motion for Summary Reversal, and Rebuttal Brief and Response to AHL Motion to Strike, we are struck not only by his use of intemperate and denigrating language but also by his lack of legal argument addressing the necessary elements of a whistleblower complaint. The initial petition requesting review accuses the Department of Labor of "delay and desuetude" in enforcing whistleblower protections, and charges the Respondents with "mendacity and animus."

Slavin's opening brief is a panoply of gratuitous excoriation and high-blown opinions that obfuscate his discussion of the ALJ's recommended decision. Each of his assertions of error in the R. D. & O. could have been expressed without the addition of

adjectives that have no place in a legal document purporting to assist Culligan in his appeal of the adverse decision.

To describe the ALJ's credibility determinations as "illogical, patronizing, and incredible," and to accuse her of ignoring "most of the relevant evidence," engaging in "half-baked, biased analysis," and issuing a "curiously one-sided" decision are personal invective, not legal argument. To state that a recommended decision resembles "Orwellian groupthink," follows the "standard corporate defense du jour," and "recalls another era when too many southern judges had closed minds and violated civil rights" does not assist the ARB in determining whether to uphold the ALJ's decision.

Finally, Slavin's rebuttal brief continues his diatribe against the ALJ and Respondents, but does not address the grounds of AHL's motion to strike his initial brief, except to call it "extravagantly animus-ridden and emotional" and suggest that it is designed to silence and censor Culligan. Rebuttal Brief at 1-2.

While we will not penalize Culligan for his counsel's inappropriate pleadings by dismissing his petition for review, we grant AHL's motion and strike Slavin's initial brief because he has violated his "professional obligation to demonstrate respect for the courts." *Williams v. Lockheed Martin Corp.*, ALJ Nos. 98-ERA-40, 98-ERA-42; ARB Nos. 99-054, 99-064, slip op. at 5-6 (Sept. 29, 2000). *Accord* ABA Model Rules of Professional Conduct, Preamble, Rules 3.5 and 8.2 (1999). Inasmuch as Slavin has used similar invective in briefing other cases before the ARB, we will not offer him any further opportunity to address the merits of Culligan's appeal.[15] *Cf. Pickett v. Tennessee Valley Authority*, ALJ Nos. 99-CAA-25, 00-CAA-09, ARB Nos. 00-076, slip op. at 4 (Nov. 2, 2000) ARB permits counsel to correct his professional lapse by deleting all personally disparaging remarks from his opening brief and resubmitting it). *See also Slavin v. Office of Administrative Law Judges*, ARB No. 03-077, ALJ No. 03-CAA-12 (ARB Aug. 22, 2003); *Rockefeller v. U.S. Dept. of Energy*, ARB No. 00-039, ALJ No. 99-CAA-21 (ARB May 30, 2001); *Moore v. U.S. Dept. of Energy*, ARB No. 00-038, ALJ No. 99-CAA-15 (ARB Jan. 30, 2001).

CONCLUSION

We have thoroughly examined the record and find that the ALJ's recitation of the facts is accurate, thorough, and fair. The evidence supports her findings of fact and she has articulated the proper legal framework, as augmented by our discussion of subject matter jurisdiction. We conclude that there is no subject matter jurisdiction because Culligan's alleged activities did not further the purposes of the environmental statutes or

[15] Additionally, we deny, without further comment, Slavin's Motion to Order Full Relief against the union because it chose not to file a reply brief in response to the ARB's February 4, 2003 order setting a briefing schedule.

assist in their administration or enforcement. Assuming the existence of such jurisdiction, we **ADOPT** the ALJ's conclusion that Culligan failed to prove by a preponderance of the evidence that AHL retaliated against him for engaging in activities protected by the environmental acts, and therefore **DISMISS** Culligan's three complaints.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge