**U.S. Department of Labor**

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter Of:

MICHAEL E. TIMMONS, CASE NO. 95-ERA-40

COMPLAINANT, DATE: June 21, 1996

v.

MATTINGLY TESTING SERVICES,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

DECISION AND ORDER OF REMAND

This case arises under Section 211, the employee protection provision, of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1994).[2/] Before this Board for review is the Recommended Decision and Order (R. D. and O.) issued on October 20, 1995, by the Administrative Law Judge (ALJ). The ALJ concluded that Complainant, Michael E. Timmons (Timmons), failed to establish that Respondent, Mattingly Testing Services (MTS), violated the ERA when it terminated him from his employment with MTS as a welding inspector and radiographer. A thorough review of the record, including the submissions filed before this Board by Timmons, indicates that the case must be remanded for a supplemental hearing and for

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[1/] On April 17, 1996, the Secretary of Labor delegated authority to issue final agency decisions under, *inter alia*, the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (1994), and the implementing regulations, 29 C.F.R. Part 24, to the newly created Administrative Review Board (ARB). Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996)(copy attached).

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

[2/] Section 211 of the ERA was formerly designated Section 210, but was redesignated pursuant to Section 2902(b) of the Comprehensive National Energy Policy Act (CNEPA) of 1992, Pub. L. No. 102-486, 106 Stat. 2776, which amended the ERA effective October 24, 1992.

application of the legal standards relevant to the parties' burdens under the 1992 Amendments to the ERA, *see* n.2 *supra.*

## DISCUSSION

### I. Evidentiary issues

On review before this Board, Timmons has submitted two affidavits and urges that these documents be admitted into evidence at this time and considered in reviewing this case. In the alternative, Timmons requests that the case be remanded for the taking of additional evidence before the ALJ. For guidance in disposing of Timmons' requests, we look to the regulations provided at 29 C.F.R. Part 24 regarding the investigation and adjudication of complaints filed under Federal employee protection provisions, the Rules of Practice and Procedure for the Office of Administrative Law Judges, found at 29 C.F.R. Part 18, and the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 18.1; *see also Nolder v. Kaiser Engineers, Inc.,* Case No. 84-ERA-5, Sec. Dec., June 28, 1985, slip op. at 5-6.

In accord with pertinent criteria provided by the foregoing authorities,[3/] the affidavit authored by James Simpkin (Simpkin) clearly constitutes newly discovered evidence that was in existence at the time of the hearing and of which Timmons was "'excusably ignorant.'" *See NLRB v. Jacob E. Decker and Sons*, 569 F.2d 357, 363 (5th Cir. 1978)(quoting *United States v. 41 Cases, More or Less,* 420 F.2d 1126, 1132 (5th Cir. 1970)), *cited in McDaniel v. Boyd Brothers Transportation,* Case No. 86-STA-6, Sec. Ord., Mar. 16, 1987, slip op. at 3-6; *see also* 29 C.F.R. § 18.54(c); Fed.R.Civ.P. 60(b)(2).

In his statement, Simpkin provides "new and material" evidence, *i.e.,* Simpkin indicates knowledge, which he possessed at the time of the hearing, that is supportive of a finding of retaliatory intent by MTS. Simpkin affidavit at 2-4; *cf. Bassett v. Niagara Mohawk Power Corp.*, Case No. 85-ERA-34, Sec. Dec., Sept. 28, 1993, slip op. at 5 n.3 (noting that evidence proffered post-hearing did not qualify as newly discovered).

The affidavit also indicates that Simpkin's testimony was "not readily available" when the case was before the ALJ. Simpkin affidavit at 3. Although Simpkin had reported the pertinent information to the Nuclear Regulatory Commission (NRC) prior to the hearing in this matter, he

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[3/] Section 18.54(c) provides that admission of evidence not timely submitted to the ALJ is limited to "new and material evidence [that] has become available which was not readily available prior to the closing of the record." 29 C.F.R. § 18.54(c). Rule 60(b)(2) provides relief based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Fed.R.Civ.P. 60(b)(2).

These provisions thus present similar standards, which have consistently been relied on to dispose of requests that the record be reopened in whistleblower cases pending before the Secretary. *See, e.g., Ake v. Ulrich Chemical, Inc.,* Case No. 93-STA-41, Sec. Dec., Mar. 21, 1994, slip op. at 3.

had done so on a confidential basis only, because of his previous personal association with the owner of MTS. Simpkin affidavit at 2-3. After a decision was rendered by the ALJ adverse to Timmons, Simpkin contacted Timmons and informed him of the evidence that he could provide pertinent to this case. Simpkin affidavit at 3-4.

It is also significant that neither the Respondent's Pre-Hearing Statement of Position nor the Respondent's Supplement to Pre-Hearing Statement of Position lists Simpkin among the witnesses having knowledge pertinent to this case. *See* Respondent's [8/3/95] Pre-Hearing Statement of Position at 2; Respondent's [8/7/95] Supplement to Pre-Hearing Statement of Position at 1. In addition, there is no mention of Simpkin contained in the investigative reports of record. *See* CX 2, 5-7. Under these circumstances, Timmons could have become aware of Simpkin's potential as a witness only through extensive discovery. A review of the record indicates that the parties were not afforded an opportunity for such discovery.

In the Notice of Hearing and Pre-Trial Order issued on July 26, 1995, the ALJ noted that the ERA and pertinent regulations provide a relatively brief time frame for investigation and adjudication of complaints by the Department of Labor. Notice of Hearing at 1. The Notice also states, "The short time frame . . . indicates that the usual, often lengthy, discovery proceedings are not available." *Id.* In a similar vein, the ALJ stated at hearing, without further explanation, that the hearing would be limited to one day. T. 193.[4/]

The statute and regulations do contain provisions concerning the time within which the Department of Labor's investigation and adjudication of ERA complaints should be completed. 42 U.S.C. § 5851(b)(2); 29 C.F.R. §§ 24.4, 24.5, 24.6. Such provisions have been construed as directory, rather than mandatory or jurisdictional, however, *Thomas v. Arizona Public Service Co.,* Case No. 89-ERA-19, Sec. Dec., Sept. 17, 1993, slip op. at 16 n.8, and should not interfere with the full and fair presentation of the case by the parties, in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 554(c), (d), 556(d). Moreover, the full and fair presentation of the case by the parties is crucial to serving the ERA purpose of protecting employees from retaliation for acting on their safety concerns, *see English v. General Electric Co.,* 496 U.S. 72 (1990); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984). The importance of safety in the handling of radioactive materials cannot be gainsaid; there is a crucial public interest at stake when issues of non-compliance with safety regulations arise. *See Hoffman v. Fuel Economy Contracting,* Case No. 87-ERA-33, Sec. Ord., Aug. 4, 1989, slip op. at 4; *see also Rose v. Sec'y of Labor*, 800 F.2d 563, 565 (6th Cir. 1986)(Edwards, J., concurring, describing nuclear technology as "one of the most dangerous" ever invented).

Particularly in view of the limits placed on discovery by the pre-hearing order, it is clear that the Simpkin testimony was "not readily available" prior to hearing. *See Thomas,* slip op. at 21-22 n.10 (admitting evidence that qualified as "not readily available"); *cf. Ake v. Ulrich*

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[4/] The following abbreviations are used herein for references to the record: Hearing Transcript, T.; Complainant's Exhibit, CX; Respondent's Exhibit, RX; ALJ's Exhibit, ALJX.

*Chemical, Inc.*, Case No. 93-STA-41, Sec. Dec., Mar. 21, 1994, slip op. at 3 (holding that movant had not demonstrated that evidence was "not readily available"); *McNally v. Georgia Power Co.,* Case Nos. 85-ERA-27, 85-ERA-29, 85-ERA-30, 85-ERA-31, 85-ERA-32, Sec. Dec., Sept. 8, 1992, slip op. at 3 n.2 (holding that movant had not demonstrated that evidence was "not readily available").

Simpkin's testimony thus qualifies for post-hearing admission. The record indicates that not only was the parties' preparation for hearing abbreviated but, as discussed further *infra*, the presentation of evidence at hearing was also unfairly rushed. *See English v. General Electric Co.,* Case No. 85-ERA-2, Under Sec. Remand Ord., May 9, 1986. In addition, MTS must be provided a meaningful opportunity to respond to the Simpkin allegations. *See* Administrative Procedure Act, 5 U.S.C. § 556(d); *Land v. Consolidated Freightways*, Case No. 91-STA-28, Sec. Ord., May 6, 1992, slip op. at 5-8 and cases cited therein; *see also* 29 C.F.R. § 18.803(a)(29) (Hearsay exceptions; availability of declarant immaterial; written statements of lay witnesses). Consequently, and on the additional grounds discussed *infra*, this case must be remanded to the ALJ. On remand, the parties must be provided an opportunity for discovery and presentation of evidence pertinent to the issues contained within the Simpkin affidavit. *See generally* 5 U.S.C. §§ 554(c),(d), 556(d).

Timmons authored the other affidavit that has been submitted for admission into evidence. The Timmons affidavit presents a possible explanation for the discrepancies between the results of Timmons' inspection of the bridge girders for Roscoe Steel and the re-inspection findings of his supervisor. Attached to the affidavit is an excerpt from the American Welding Society Bridge Welding Code, which is published in conjunction with the American Association of State Highway and Transportation Officials. Timmons affidavit, exhibit A.

Although the Timmons affidavit contains material evidence not previously included in the record, neither the affidavit nor other record materials demonstrate that such information was not readily available, or that Timmons was excusably ignorant of it, prior to hearing. *See* 29 C.F.R. § 18.54(c); *Jacob E. Decker and Sons,* 569 F.2d at 363; *see generally Ake*, slip op. at 3; *McDaniel,* slip op. at 3-6. As discussed in the foregoing analysis and *infra*, however, the ALJ improperly limited the parties' pre-hearing preparation and the presentation of evidence at hearing. It is also significant that some statements contained in the Timmons affidavit are related to the allegations presented in the Simpkin affidavit. *Compare* Timmons affidavit at 2-3 *with* Simpkin affidavit at 2-4. We therefore conclude that post-hearing admission of evidence relevant to the issues addressed in the Timmons affidavit is appropriate, as the conduct of the proceedings before the ALJ interfered with the overall presentation of the Complainant's case.[5/]

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[5/] Such circumstances are distinguishable from those in which a specific item of evidence or segment of testimony has been erroneously excluded by the ALJ. In the circumstances of this case, statements and rulings by the ALJ throughout the hearing reflect the arbitrary nature of the one day limitation placed on the hearing and its detrimental effect on the full and fair presentation of this case by the parties, as is required by the APA. *Cf. Bass v. Hoagland*, 172 F.2d 205, 208-09 (5th Cir. 1949), *cert. denied*, 338 U.S. 816 (1949)(within context of Rule 60(b)

(continued...)

*See* discussion of relevancy*, infra; see* Fed.R.Civ.P. 60(b)(4), (6); *see also V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 225 (10th Cir. 1979); *see generally Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 244 (1944)(stating that public interests involved in a patent suit provide support for re-opening of case), *cited in Plaut v. Spendthrift Farm, Inc.,* 115 S.Ct. 1447 (1995)(noting that Rule 60(b) is based in "the courts' own inherent and discretionary power . . . to set aside a judgment whose enforcement would work inequity."). Accordingly, on remand the parties must also be provided an opportunity to adduce evidence relevant to the factual issues addressed in the Timmons affidavit.[6/]

The time constraints placed on the proceedings before the ALJ directly interfered with the parties' opportunity for a full and fair presentation of the case at hearing. In conducting the hearing, the ALJ erred in repeatedly limiting testimony and refusing to admit documentary evidence on relevancy grounds. T. 27-28, 115-22, 140-41, 244, 294. These rulings appear to be related to the one day limitation that was placed on the hearing and the apparently rushed nature of the proceedings that resulted. *See*, *e.g.,* T. 234; *see also* APA discussion *supra*. As background for the examination of these erroneous rulings and in the interest of avoiding the repetition of error on remand, the following principles concerning the evaluation of evidence of retaliatory intent in cases arising under the ERA are noted.

As is frequently the case in whistleblower complaints, notwithstanding the Simpkin affidavit, Timmons' allegations of retaliatory intent are founded upon circumstantial evidence. In such cases, the determination of whether retaliatory intent has been established requires careful evaluation of all evidence pertinent to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. *See Frady v. Tennessee Valley Authority,* Case Nos. 92-ERA-19, 92-ERA-34, Sec. Dec., Oct. 23, 1995, slip op. at 7-10; *see also Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980)(in employee discrimination cases, "[t]he presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive"), *quoted in Mackowiak,* 735 F.2d at 1162. As noted by the United States Supreme Court in an employment discrimination case arising under Title VII of the Civil Rights Act of 1964, there will rarely be "eyewitness" testimony concerning an employer's mental processes. *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 716 (1983). Fair adjudication of a complaint such as this thus requires full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken.[7/]

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[5/] (...continued)
analysis, distinguishing judgment that is void because reached without due process of law from a judgment based on a "mere procedural error.")

[6/] It is also noted that the contents of the American Welding Society Bridge Welding Code may be subject to the taking of official notice under Section 18.201. *See* 29 C.F.R. § 18.201.

[7/] Section 18.401 defines "relevant evidence" as "evidence having any tendency to make the (continued...)

Antagonism toward activity that is protected under the ERA may manifest itself in many ways, *e.g.,* ridicule, openly hostile actions or threatening statements, or, in the case of a whistleblower who contacts the NRC, simply questioning why the whistleblower did not pursue corrective action through the usual internal channels. *See Smith v. Esicorp, Inc.,* Case No. 93-ERA-0016, Sec. Dec., Mar. 13, 1996, slip op. at 23-27; *Harrison v. Stone & Webster Engineering Group,* Case No. 93-ERA-44, Sec. Dec., Aug. 22, 1995, slip op. at 8-9; *Mandreger v. Detroit Edison Co.,* Case No. 88-ERA-17, Sec. Dec., Mar. 30, 1994, slip op. at 19-22; *Pillow v. Bechtel Const., Inc.,* Case No. 87-ERA-35, Sec. Dec., July 19, 1993, slip op. at 22. In addition, deliberate violations of NRC regulations suggest antagonism toward the NRC regulatory scheme and thus may provide support for an inference of retaliatory intent. *See Nichols v. Bechtel Const. Co.,* Case No. 87-ERA-0044, Sec. Dec., Oct. 26, 1992, slip op. at 16-17 (discussing nuclear plant supervisor's disregard of safety procedures as a basis for drawing inference of retaliatory intent toward whistleblower), *aff'd sub nom. Bechtel Const. Co. v. Sec'y of Labor,* 50 F.3d 926 (11th Cir. 1995)*; cf. Moon v. Transp. Drivers, Inc.,* 836 F.2d 226, 229-30 (6th Cir. 1987)(relying on employer's encouraging of safety complaints in concluding that complaint filed under employee protection provision of Surface Transportation Assistance Act, 49 U.S.C. § 31105, lacked merit); *Gibson v. Arizona Public Service Co.,* Case Nos. 90-ERA-29, 90-ERA-46, 90-ERA-53, Sec. Dec., Sept. 18, 1995, slip op. at 7 (relying on employer's "pervasive policy encouraging safety complaints" in concluding that whistleblower complaint lacked merit).

When disciplinary action, including termination from employment, is involved, the past practice of the employer in similar situations is relevant to determining whether there has been disparate treatment, which may provide highly probative evidence of retaliatory intent.[8/] *See Lockert v. United States Dept. of Labor,* 867 F.2d 513, 516, 517 (9th Cir. 1989); *DeFord v. Sec'y of Labor*, 700 F.2d 281, 287 (6th Cir. 1983); *Dysert v. Westinghouse Electric Corp.,* Case No. 86-ERA-39, Sec. Dec., Oct. 30, 1991, slip op. at 5-6 and cases cited therein*; Johnson v. Old Dominion Security,* Case Nos. 86-CAA-03, 86-CAA-04, 86-CAA-05, Sec. Dec., May 29, 1991, slip op. at 18.

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[7/] (...continued)
existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 29 C.F.R. § 18.401. Section 24.5(e)(1)provides:

> *Evidence*. Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be Applied. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious.

[8/] A complainant is not required, however, to establish disparate treatment in comparison with other employees, or other whistleblowers, in order to establish retaliatory intent. *See DeFord v. Sec'y of Labor,* 700 F.2d 281, 286 (6th Cir. 1983).

Furthermore, a complete understanding of the testimony of the witnesses, including testimony regarding technical procedures, is necessary for the drawing of pertinent inferences and the resolution of conflicts in that testimony. *See generally Zinn and Morris v. University of Missouri,* Case Nos. 93-ERA-34, 93-ERA-36, Sec. Dec., Jan. 18, 1996, slip op. at 3 and cases cited therein (adopting findings of fact rendered by ALJ). In the instant case, a proper understanding of the testimony of the witnesses concerning relevant technical procedures requires at least a superficial understanding of the fields of radiography and welding inspection.

The ALJ thus erred in refusing, on relevancy grounds, to hear testimony concerning the technical aspects of the handling of radioactive isotopes at MTS and concerning the technical aspects of bridge girder inspection. *See* T. 27-28, 115-22. Similarly, the ALJ erred in refusing to hear testimony regarding the quality standards and practices prevailing at MTS prior to Timmons' termination and regarding MTS compliance or non-compliance with NRC safety regulations prior to its investigation by the NRC.[9/] T. 118, 140-41, 244, 294.[10/]

The case must therefore be remanded for a supplemental hearing before the ALJ. Such hearing will provide the parties an opportunity to conduct discovery and adduce evidence relevant to the issues addressed in the Simpkin and Timmons affidavits. In addition, to rectify the erroneous rulings limiting evidence on the foregoing issues, the parties will be allowed to conduct discovery and adduce evidence relevant to those issues.[11/] *See generally Lockert,* 867 F.2d at 517 (addressing broad discretion of Secretary in remanding case to ALJ).

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[9/] The ALJ did not err, however, in refusing to hear testimony concerning corrective measures that MTS has taken *since* Timmons' termination in order to comply with the findings of the NRC,
T. 111-12, 115, as such evidence would not be pertinent to the mindset of MTS deciding officials at the time that Timmons was terminated. Evidence of related action, corrective or otherwise, taken by MTS following initiation of the NRC investigation but *prior* to Timmons' termination is relevant to the issue of the mindset of MTS deciding officials at the pertinent time and may be adduced on remand.

[10/] The ALJ may nonetheless exclude evidence that is "unduly repetitious," as provided under Section 24.5(e)(1). 29 C.F.R. § 24.5(e)(1); *see* n.4 *supra; see also* 5 U.S.C. § 556(d); 29 C.F.R. § 18.403.

[11/] Although the hearing need not be conducted in a rigid and overly formal manner, the ALJ should not hesitate to apprise the witnesses of basic standards of conduct during examination by counsel, *e.g.,* that it is not the role of the witness to object on relevancy grounds to a question, or a line of questioning, being posed by counsel. *See* 29 C.F.R. §§ 18.611 (Mode and order of interrogation and presentation), 18.36 (Standards of conduct), 18.37 (Hearing room conduct); *cf.* T. 255 (Bruno), 276-78 (Kutt). It is noted that Mark and Suzanne Mattingly, the owner of MTS and his wife, appeared without legal counsel at hearing. T. 4-5. In those circumstances, it is appropriate for the party, when being examined as a witness, to raise such objections.

The ALJ also erred in refusing to admit two NRC investigative reports that were proffered by Timmons at hearing, on relevancy grounds. T. 193-94; *see* CX 5, 6; *see also* T. 15, 118-19.[12/] This evidence is pertinent to the question of retaliatory animus among MTS managers as these NRC reports document knowing, deliberate violations of NRC regulations by MTS management. *See generally Nichols*, slip op. at 16-17. The ALJ's ruling excluding these two exhibits is therefore reversed.

II. Pertinent legal standards

To prevail in this proceeding, Timmons must establish, by a preponderance of the evidence, that MTS terminated him, at least in part, based on his protected activity. *See Carroll v. United States Dept. of Labor,* 78 F.3d 352 (8th Cir. 1996); *Thomas,* slip op. at 20 (citing *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993)). Pursuant to the CNEPA amendments to the ERA, if Timmons carries his burden, MTS may avoid liability only by establishing, by clear and convincing evidence, that Timmons would have been terminated in the absence of the protected activity. *See* Section 211(b)(3)(D) of the ERA, 42 U.S.C. § 5851(b)(3)(D); *Johnson v. Bechtel Const. Co.*, Case No. 95-ERA-11, Sec. Dec., Sept. 28, 1995, slip op. at 2; *Dysert v. Florida Power Corp.,* Case No. 93-ERA-21, Sec. Dec., Aug. 7, 1995, *appeal docketed Dysert v. Sec'y of Labor,* No. 95-3298 (11th Cir. Sept. 28, 1995); *Yule v. Burns International Security Serv.,* Case No. 93-ERA-12, Sec. Dec., May 24, 1995, slip op. at 7-13; *see generally Grogan v. Garner*, 498 U.S. 279 (1991)(discussing higher clear and convincing evidence standard in comparison with preponderance of the evidence standard within context of Section 523(a) of the Bankruptcy Code, 11 U.S.C. § 523(a)). On remand, the ALJ must render appropriate findings based on the supplemented record as a whole, consistent with the foregoing legal standards and in accord with pertinent APA requirements. *Cf.* R. D. and O. at 2 (summarizing parties' burdens without discussing the standard of proof for each).[13/]

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[12/] As indicated by the ALJ, T. 15, complainants are not required to establish actual violations of NRC regulations by employers to establish discriminatory treatment under the ERA. *See Diaz-Robainas v. Florida Power & Light Co.,* Case No. 92-ERA-10, Sec. Dec., Jan. 19, 1996, slip op. at 11-12 nn.7, 8 and cases cited therein. As indicated *supra*, however, it does not necessarily follow that the results of an ensuing NRC investigation would be irrelevant to the issue of retaliatory intent.

[13/] At the close of the hearing, MTS indicated that it had acquired evidence since its termination of Timmons that would provide support for the termination. T. 300 (S. Mattingly). Evidence of legitimate grounds for termination that is acquired by an employer after the decision to terminate will not defeat a discrimination complaint, although such evidence is relevant to the issue of damages for which an employer is liable. *McKennon v. Nashville Banner Publishing Co.,* 115 S.Ct. 879 (1995); *see Smith and Fitzpatrick v. Tennessee Valley Authority*, Case No. 89-ERA-00012, Sec. Ord., Mar. 17, 1995, slip op. at 2-6.

## ORDER

Accordingly, this case is remanded to the ALJ for further proceedings consistent with this opinion.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member