U.S. Department of Labor

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

In the Matter of:

EDWIN A. MELENDEZ, **ARB CASE NO. 96-051**

COMPLAINANT, **ALJ CASE NO. 93-ERA-00006**

v. **DATE: July 14, 2000**

EXXON CHEMICALS AMERICAS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Valorie W. Davenport, Esq., Robert Fugate, Esq., *Houston, Texas*

For the Respondent:
F. Walter Conrad, Esq., Teresa S. Valderrama, Esq., *Baker & Botts, L.L.P. Houston, Texas*

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C. §7622 (1988), and the Toxic Substances Control Act (TSCA), 15 U.S.C. §2622 (1988) (hereinafter "the environmental acts"). Complainant Edwin A. Melendez charges Exxon Chemicals Americas, Respondent, with having discharged him from employment and otherwise having discriminated against him in retaliation for his having engaged in protected activity, in violation of the employee protection provisions of the environmental acts.[1/]

Before the Board for review are rulings by the Administrative Law Judge (ALJ) in which the ALJ concluded that Melendez's complaint was timely filed, but that on the merits, Melendez failed to establish that Respondent Exxon had engaged in retaliatory conduct in violation of the employee

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[1/] Although the complaint in this case also cited the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851, *see* Complainant's Exhibit 1, Melendez proceeded before the Administrative Law Judge on remand under the CAA and the TSCA *only*. Sept. 14, 1994 Hearing Transcript at 56-7; *see* Complainant's Post-hearing Brief at 10.

protection provisions of the environmental acts. Based on our review of the record and the arguments of the parties, we affirm the ALJ's determination of timeliness but conclude, pursuant to the pertinent requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A) (1994), that the case must be remanded for further proceedings before the ALJ. The instant action raises various issues related to charges of retaliatory employment action taken in violation of the whistleblower provisions of the CAA and the TSCA. For the reasons discussed in this decision, the Board concludes that the evidentiary record does not provide an adequate basis on which to render a final determination regarding these issues. Consequently, the ALJ's Recommended Decision and Order Dismissing Complaint (R.D.O.) is vacated, and this matter is remanded to the ALJ for further proceedings consistent with this Decision and Order of Remand.

Procedural History

The complaint in this case was previously before the Secretary, on review of the October 7, 1993 Recommended Decision and Order in which the ALJ recommended dismissal of the complaint as untimely filed. On March 21, 1994, the Secretary issued a Decision and Order of Remand, directing the ALJ to clarify the evidence relevant to the timeliness of filing issue and to render further findings consistent with pertinent regulatory and decisional law. Sec'y Decision and Order of Remand at 2, 10. At the hearing held on remand concerning the timeliness issue, the ALJ ruled that Complainant had timely filed a whistleblower complaint with the Department of Labor (DOL) by letter dated May 15, 1992. May 17, 1994 HT at 62-63. On June 2, 1994, the ALJ issued an order to this effect. June 2, 1994 Order.[2/] Following a hearing on the merits of the complaint in September and October 1994, the ALJ issued the R.D.O. in which he concluded that Melendez had failed to establish that Exxon had engaged in retaliatory conduct against Melendez in violation of the employee protection provision of either the CAA or the TSCA.

[2/] The following abbreviations are used herein for references to the record evidence: HT, Hearing Transcript; CX, Complainant's Exhibit; RX, Respondent's Exhibit; Dep., Deposition. Unless otherwise indicated, HT refers to the transcript of the hearing held on September 14-16, 19-21 and October 11-13, 1994. As noted by the ALJ, R.D.O. at 13 n.1, the transcript of the October 13, 1994 proceedings erroneously duplicates the use of page numbers 2021 through 2130, which are properly included in the October 12, 1994 transcript. In the interest of clarity in referring to pages numbered 2021 through 2130, we have therefore identified the volume in which the pages are found. For references to the briefs filed by the parties before this Board, the following abbreviations are used: Melendez' Brief in Opposition of the Recommended Decision and Order Dismissing Claim of Administrative Law Judge Kerr, Comp. Brief; Exxon's Brief in Response to Complainant's Opposition to the Decision and Order of the Administrative Law Judge, Resp. Brief; Melendez' Rebuttal to Exxon, Comp. Reply Brief. Although not referred to in this decision, Exxon's Notice of Record Errors, dated May 10, 1996, and Melendez' Response to Exxon's Notice of Record Errors, dated May 24, 1996, have been fully considered in the rendering of this decision.

Before the Board for review and final determination is the ALJ's Order of June 2, 1994 and the R.D.O. issued December 7, 1995. The Board has jurisdiction of this case pursuant to 42 U.S.C. §7622(b)(2) and 15 U.S.C. §2622(b)(2), as implemented at 29 C.F.R. §§24.1, 24.6 (1995).[3/]

Introductory Overview

The central focus of this legally complex case is Melendez' concern that exposure to airborne chemicals at Exxon's Baytown Olefins Plant (BOP), where he worked for approximately twelve years, adversely affected the functioning of his liver. It is Melendez' contention that Respondent Exxon, in retaliation for Melendez having engaged in activities related to his health concern that are protected under the TSCA and the CAA, took a number of personnel actions against Melendez, over an approximate 18-month period beginning in early 1991, that ended in his termination from employment in April of 1992. Comp. Brief at 7-16, 19-24; *see* R.D.O. at 24.

As limited as is the evidentiary record that is now before the Board, it nevertheless indicates that, over a period of years leading up to his termination in 1992, Melendez engaged in activities arising from his health concern that are also related to the environmental protection purposes of the TSCA and the CAA. Indeed, the relationship between the actions that Melendez took regarding his concern about the potential impact on his health because of chemical exposure at the BOP and the environmental protection purposes of the TSCA and the CAA is a common thread running through the events that are at issue in this case. As we discuss in the body of this decision, it is a matter of well settled case law that actions that serve the environmental protection purposes of the TSCA, the CAA and similar environmental statutes may begin with an employee's personal health concern.

Notwithstanding, the ALJ premised his conduct of the hearing on the mistaken view that Melendez' health concern posed an occupational health issue that was solely relevant to the Occupational Safety and Health Act (OSHA) and not to the environmental acts.[4/] *See, e.g.,* HT at 376-77. The ALJ failed to appreciate the full scope and coverage of the whistleblower protection afforded under the TSCA and the CAA. As a result, the ALJ erroneously excluded evidence concerning activities engaged in by Melendez related to his exposure and health concerns that may

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[3/] Since the time that this appeal was filed, the Secretary's authority to issue final agency decisions under the employee protection provisions of the environmental acts, and similar statutes enumerated at 29 C.F.R. §24.1(a), was delegated to this Board. 61 Fed. Reg. 19978 (1996).

[4/] Melendez also filed with the Department of Labor a complaint under the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. §651, *et seq.* In the Secretary's Decision and Order of Remand issued on March 21, 1994, which is summarized *infra,* the Secretary held that the ALJ did not have jurisdiction to adjudicate the OSHA complaint. Secretary's Decision and Order of Remand at 8. The Secretary's remand order noted the confusion concerning the scope of the complaint that Melendez had filed under the environmental acts. *Id.* at 1-2 n.1; 7-8. This confusion does not appear to have been resolved by the Secretary's remand order, as it is also apparent in the ALJ's conduct of the hearing on the merits of the complaint in September and October 1994, and the ALJ's resulting recommended decision and order.

well qualify for protection under the TSCA and/or the CAA.[5/] Not only did the ALJ erroneously exclude evidence relevant to whether Melendez in fact engaged in protected activity under the two environmental acts, he excluded evidence relevant to the question of whether personnel actions cited by Melendez constituted retaliation by Exxon for having engaged in such protected activity. The ALJ thus severely restricted Melendez' presentation of his case, which in turn has produced an evidentiary record that fails to address certain dispositive issues.

In addressing the exclusion of evidence relating to whether Melendez engaged in protected activities under the environmental acts, we especially focus on the ALJ's refusal to allow Melendez to submit evidence and to adduce testimony concerning his health concerns, beginning with his activities pertinent to the record-keeping requirements of Section 8(c) of the TSCA, 15 U.S.C. §2607(c). As we discuss in detail in this decision, the fact that the medical evidence was inconclusive regarding whether or not Melendez' liver condition was caused by chemical exposure at the BOP placed that condition in the category of health effects of uncertain etiology that are the focus of Section 8(c) of the TSCA. *See* discussion at IV.B.3.b., *infra*.

Similarly, we address the ALJ's exclusion of evidence concerning Melendez' health concern as it relates to his exposure to fugitive plant emissions in the BOP process area while he was a flare loss technician. Such chemical plant fugitive emissions, which have been found to significantly contribute to air pollution by the Environmental Protection Agency, are subject to regulation under the CAA. *See* authorities cited at IV.B.4., *infra*.

In the circumstances presented in this case, the determination of which of Melendez' various activities qualified for whistleblower protection was a crucial first step in the retaliatory intent analysis. Only ***after*** Melendez' protected activities are identified can the question of whether those activities gave rise to retaliatory intent on the part of Exxon's BOP decision-makers be properly analyzed. However, without first determining whether the specific activities that Melendez had engaged in qualified for protection under the environmental acts, the ALJ concluded that none of the personnel actions cited by Melendez was retaliatory. R.D.O. at 24-25, 29-30. In so doing, the ALJ committed reversible error -- error that was further compounded by the ALJ's exclusion of evidence relevant to the question of whether Exxon ***retaliated*** against Melendez for having engaged in activities protected under the TSCA and the CAA. Simply put, the ALJ could not, under the circumstances of this case, answer the question of whether or not the personnel actions cited by Melendez were retaliatory without first correctly determining whether the actions engaged in by Melendez, particularly with regard to his health concern, were protected activities. The ALJ's failure to properly evaluate Melendez' concerns under the environmental acts has thus resulted in reversible error.

In order to provide a full and fair opportunity for the parties to present evidence and argument on the dispositive issues, this case must be remanded for further hearing. Although the

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[5/] Although the question of whether Exxon actually committed violations of OSHA is not at issue in this proceeding, certain activities undertaken by Melendez that are clearly related to occupational health issues under the OSHA may also constitute activity protected under the TSCA and the CAA, as addressed in the protected activity discussion *infra*.

necessity to further extend the lengthy history of this case is regrettable, we have sought to provide clear, comprehensive guidance for the ALJ in this decision.

Factual Background

Although, for the reasons we discuss *infra*, review of the ALJ's factual findings would be premature at this point, the following facts concerning Melendez' work history at the BOP and his concerns regarding exposure to hydrocarbons at the job site appear to be uncontroverted. We will rely on these facts to provide a framework for the discussion to follow.

Melendez began work at the BOP in 1980 as a manufacturing technician operating furnaces. HT at 168-69, 180, 404 (Melendez); CX 197 (Leon dep.) at 114-15. From 1983 through early 1991, Melendez worked as a flare loss technician taking samples of chemicals from pipes that carried the chemicals to the flare for burning. HT at 183-200 (Melendez), 1485-1504 (Smith); CX 197 (Leon dep.) at 114-17. Commencing in 1991, Melendez was subjected to at least four personnel actions that Melendez contends were in retaliation for his having engaged in activities protected under the whistleblower protection provisions of the CAA and the TSCA: (1) In February 1991, Melendez was transferred from his position as a flare loss technician in the Process Operations Department to a toolroom technician position in the Mechanical Department. HT at 450, 879 (Melendez), 1711 (Fischer); RX 68 (Ulczynski dep.) at 106-07. (2) In 1991, Melendez was required to participate in fire training and work permits training. HT at 460-61, 662-68 (Melendez), 1571-72 (Fischer), 1976-79, 2009 (Vacek); RX 19. Melendez had previously objected to hydrocarbon exposure in some aspects of fire training and been afforded an exemption and/or not required to participate in fire training in 1987-90. CX 15,77; *see* HT at 1568-69, 1720-21 (Fischer). The field demonstration segment of work permits training is conducted in the BOP process area, where fugitive emissions escape from plant pipelines. HT at 1097-1103 (Melendez), 2195-97 (Maier); RX 68 (Ulczynski dep.) at 94-95, 100-06, 114. Melendez contends that the 1991 fire training requirement, as well as the work permits training requirement, was imposed in retaliation for Melendez' raising of concerns regarding hydrocarbon exposure. Comp. Brief at 13-14. (3) On January 17, 1992, Melendez was placed on a one-day decision-making leave day (DML), during which Melendez was required to decide whether he wanted to continue working at the BOP. RX 19; HT at 1789-94 (Fischer). Management advised Melendez that the DML day was imposed because of his refusal to complete work permits training and because of Melendez' unauthorized departure from the plant on January 13, 1992, after raising concerns about hydrocarbon exposure in the tool room.[6/] RX 19. (4) Finally, Melendez complains of the termination of his employment by BOP management on April 16, 1992, which management justified on the basis of the DML and "insubordination." HT at 2071 (10/13/94 vol.)(Vacek); 2143-45, 2148 (Maier).

[6/] Fischer, Melendez' second-level supervisor while Melendez was working in the toolroom, testified that a decision-making leave day was a disciplinary action in which the employee is sent "home for a day with pay" and asked to "spend some time trying to decide whether they wanted to return to the job . . . ." HT at 1605. If the employee does wish to return, the employee is asked "to sign a letter to that effect at the end of that decision-making leave." *Id.* at 1606.

As we examine in detail in Part IV., *infra*, throughout his employment with Exxon, Melendez raised concerns about the impact his exposure to hydrocarbons (*e.g.,* from BOP fugitive emissions) had or might have on a liver condition that a BOP physician believed pre-existed Melendez' coming to work at the BOP, CX 76. Melendez also questioned whether harmful substances were being vented by Exxon in violation of applicable environmental standards. He repeatedly raised questions and sought information about whether his exposure to hydrocarbons at the BOP was adversely affecting his health by aggravating his liver problem.[7/] Moreover, Melendez repeatedly questioned managerial personnel concerning whether Exxon had properly documented his complaints regarding chemical exposure, and whether BOP management was withholding information relevant to the question of a causal link between his liver condition and his exposure to hydrocarbons at the BOP.

DISCUSSION

I. Standard of review

Pursuant to the Administrative Procedure Act (APA), this Board, as the designee of the Secretary, engages in a *de novo* review of the recommended disposition of the ALJ. *See* 5 U.S.C. §557(b) (1994); 29 C.F.R. §24.8 (1999)*; Stone & Webster Eng'g Corp. v. Herman,* 115 F.3d 1568, 1571-72 (11th Cir. 1997). *See generally Mattes v. United States Dep't of Agriculture,* 721 F.2d 1125, 1128-30 (7th Cir. 1983) (relying, *inter alia*, 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). The Board is thus not bound by the findings of fact rendered by the ALJ. *See, e.g., Martin v. Dep't of the Army,* ARB Case No. 96-131, July 30, 1999 (arising under analogous employee protection provision of the Safe Drinking Water Act, 42 U.S.C. §300j-9(i) (1994)). The ALJ, unlike the Board, has the opportunity to observe witness demeanor in the course of the hearing, however, and the Board may defer to an ALJ's credibility determinations that are based on such observation. *See OFFCP v. Goodyear Tire & Rubber Co.,* ARB Case No. 97-039, Aug. 30, 1999, slip op. at 16 n.13.

II. ALJ's findings of fact

As discussed in detail *infra*, the ALJ's erroneous exclusion of relevant testimony and documentary evidence requires remand of this case for further submission of evidence. Accordingly, review of those findings of fact for which the evidentiary basis is subject to change on remand would be premature. Another obstacle to our review of the findings of fact that have been rendered by the

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[7/] The record contains documents indicating that physicians engaged by Melendez had corresponded with BOP company physicians over a number of years regarding their concerns about the effects of Melendez' exposure to chemicals at the BOP. *See* n.20 *infra.* In addition, various BOP personnel testified that they were aware of Melendez' health problems and Melendez' belief that they were aggravated by chemical exposure at work. HT at 1421-23 (Cognata), 2169-71 (Maier); CX 197 (Leon dep.) at 148-53; CX 198 (Starcher dep.) at 289-90. Melendez testified that over the years his supervisors had occasionally responded to his complaints about not feeling well while working in the process unit area by temporarily placing him in an air-conditioned office to work. HT at 403-05.

ALJ is the ALJ's failure to resolve pertinent conflicts in the evidence.[8/] Both the TSCA and the CAA require that whistleblower complaints be decided by the Secretary "on the record after notice and opportunity" for a hearing. 15 U.S.C. §2622(b)(2)(A); 42 U.S.C. §7622(b)(2)(A). The APA requires that decisions rendered on the record provide the "findings and conclusions, and the basis therefor, on all the material issues of fact, law or discretion presented on the record . . . ." 5 U.S.C. §557(c)(3)(A) (1994); *see Lockert v. Sec'y of Labor,* 867 F.2d 513, 517 (9th Cir. 1989) (arising under Energy Reorganization Act, 42 U.S.C. §5851 (1988)). Consistent with the mandate of Section 557(c)(3)(A), the ALJ's findings of fact must provide an explanation for the resolution of conflicts in the evidence and must reflect proper consideration of evidence that could support contrary findings. *See NLRB v. Cutting, Inc.,* 701 F.2d 659, 667 (7th Cir. 1983); *see also* 29 C.F.R. §18.57(b) (summarizing contents of ALJ decisions). On remand, the ALJ must resolve pertinent conflicts in the evidence and render findings of fact relevant to the dispositive issues involved in this complaint.

III. Threshold procedural issue -- timeliness of the complaint -- the ALJ's Order of June 2, 1994

The environmental acts require that whistleblower complaints be filed within thirty days of the allegedly retaliatory action. 15 U.S.C. §2622(b)(1); 42 U.S.C. §7622(b)(1). As previously indicated, Melendez' employment was terminated on April 16, 1992.[9/] The Secretary's March 1994 remand order directed the ALJ to determine whether Melendez had filed a complaint no later than May 18, 1992. Sec'y Decision and Order of Remand at 10. The Secretary determined that the statutory thirty-day period ended on May 18, 1992, a Monday, rather than Saturday, May 16, 1992, through application of the provision found at 29 C.F.R. §18.4(a) (1992), which extends deadlines that fall on weekend days or Federal government holidays to the next business day.[10/] *Id.* at 8-9. The

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[8/] We have, however, reviewed the evidence of record and included references to that evidence as appropriate to illuminate the issues discussed in this decision. Such references to the evidence -- many of which highlight conflicts in the evidence that require resolution by the ALJ on remand -- do not indicate that this Board has found any particular facts irrefutably established by the record that is currently before us.

[9/] This case does not involve a question of when the termination action triggered the thirty-day filing period provided by the pertinent statutes. Melendez was advised of the termination and that action became effective on the same day, R.D.O. at 29. *See generally Prybys v. Seminole Tribe of Florida,* ARB Case No. 96-064, Nov. 27, 1996, slip op. at 5-7 (discussing date on which action accrued in case in which termination decision was communicated to complainant prior to the effective date of the termination) and cases there cited.

[10/] The time computation provision found at 29 C.F.R. §18.4(a) is contained within the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges of the DOL. 29 C.F.R. Part 18. Although Section 18.4(a) is thus not controlling in regard to the filing of the complaint with the DOL Employment Standards Administration, the regulations applicable to the processing of whistleblower complaints at 29 C.F.R. Part 24 do not contain a time computation provision. The Secretary and this Board have consistently looked to the regulations provided at 29 C.F.R. Part 18, along with the Federal Rules of Civil Procedure, for guidance in resolving procedural questions that arise in the processing of whistleblower complaints and which are not specifically addressed by the regulations at 29 C.F.R. Part 24. *See, e.g., High v. Lockheed Martin Energy Systems,* ARB Case No. 97-109, Nov.

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Secretary's remand order specifically noted that the record contained both a complaint letter dated May 15, 1992 -- generated by the law offices of Glenn Vickery & Associates -- and a complaint letter dated May 16, 1992 -- generated by the law firm of Shapiro and Watson. *Id.* at 8-10. The remand order further concluded, however, that the record and the ALJ's findings were incomplete with regard to the question of whether one or both of the letters had been mailed and, if so, on what date. *Id.* As the Secretary noted, pursuant to the applicable regulation at 29 C.F.R. §24.3(b) (1992), a whistleblower complaint filed by mail "shall be deemed filed as of the date of mailing." The Secretary's remand order directed the ALJ to determine whether one or both of the complaint letters dated May 15 and 16 had been filed no later than Monday, May 18, 1992. *Id.* at 10.

At the hearing held on remand regarding the timeliness of filing issue, Melendez sought to establish that the letter generated by the law offices of Glenn Vickery & Associates and dated May 15, 1992, had been mailed on that same date. May 17, 1994 HT at 1. To that end, Melendez presented the testimony of the attorney who signed the letter, Daniel Linebaugh.[11/] May 17, 1994 HT at 11-13, 27-37, 44, 46, 47-50.[12/] As noted in the Secretary's March 1994 remand order, the record already contained a copy of the May 15, 1992 complaint letter bearing a stamped date that indicated that it had been received in the Houston office of the DOL Employment Standards Administration (ESA) on May 19, 1992. Unmarked exhibit; Sec'y Decision and Order of Remand at 9.[13/] Based on the evidence indicating that the complaint letter had been received by the ESA

[10/](...continued)
13, 1997, slip op. at 4 and cases there cited; *see generally* 29 C.F.R. §18.1(a) (requiring application of FRCP to proceedings before the OALJ "in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation."). Application of the time computation provision of the Federal Rules of Civil Procedure would compel the same result as Section 18.4(a). *See* Fed. R. Civ. P. 6(a).

[11/] Linebaugh testified that he filed the complaint letter on Melendez' behalf "to preserve his action" but that Linebaugh's law firm "did not feel comfortable" accepting Melendez' case, and "encouraged him to seek counsel that handled these types of cases." May 17, 1994 HT at 28; *see id.* at 36, 61-62; Sec'y Decision and Order of Remand at 3.

[12/] On remand, Melendez did not offer evidence regarding the mailing of the Shapiro and Watson complaint letter dated May 16, 1992. *See* HT at 1, 11-13. Shapiro and Watson represented Melendez "until on or about March 5, 1993" when Valorie Davenport and Laura Sapsowitz were entered as Melendez' counsel in this complaint. Sec'y Decision and Order of Remand at 4 n.3.

[13/] The Secretary also noted that the record contained a photocopy of an envelope from Glenn Vickery & Associates, addressed to the Houston ESA office, "with a date stamp indicating mailing on May 15, 1992." *Id.* at 9. The Secretary observed that "[t]his copy of the complete complaint with envelope attached is not marked as an exhibit, but appears to be the most probative evidence for determining whether the May 15 complaint letter was timely filed with Wage and Hour." *Id.* The ALJ did not rule on the admissibility of the copy of the envelope in which the complaint was apparently mailed, however, because, at the time the hearing was held regarding the timeliness issue, the ALJ was unable to locate that piece of evidence. May 17, 1994 HT at 9-11. The record that is currently before this Board contains a copy of the envelope that was referred to by the Secretary. *See* Unmarked Exhibit accompanying transmittal letter of Nov. 29, 1993 from the ALJ. It is unnecessary for us to resolve the admissibility issue, however, as
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office in Houston on May 19, 1992, and Linebaugh's testimony that the complaint letter would have been filed by mail, rather than by courier or other form of hand delivery, the ALJ determined that the complaint letter had been mailed on May 15 and was thus timely filed. June 2, 1994 Order; May 17, 1994 HT at 62-63; *see* CX 14.

Exxon challenges the ALJ's reliance on Linebaugh's testimony, which Exxon urges is undermined by Linebaugh's acknowledgment that his secretary did not send the May 15, 1992 complaint letter by certified mail with return receipt service. Resp. Brief at 16 n.18. The ALJ's crediting of Linebaugh's testimony that the letter would have been mailed on May 15 implies that the ALJ also credited Linebaugh's explanation that the secretary's failure to send the letter by certified mail with return receipt service did not undermine Linebaugh's belief that the letter was nonetheless sent by regular mail on the date typed on the letter. Moreover, as the ALJ stated at the close of the timeliness hearing, HT at 62, his crediting of Linebaugh's testimony that the complaint letter was delivered by regular mail supports the conclusion that the letter was mailed no later than May 18, 1992, inasmuch as it was stamped as received at the DOL office on May 19, 1992, CX 14.

We thus conclude that the ALJ's ruling is amply supported by evidence of record and is in accord with the pertinent regulatory provisions found at 29 C.F.R. §§18.4(a), 24.3(b) (1992). We therefore agree with the ALJ's determination that Melendez' May 15, 1992 complaint letter was timely filed.

Exxon raises a second issue with regard to the timeliness of the complaint. Specifically, Exxon urges that Melendez has clearly failed to timely challenge the personnel actions preceding the April 16, 1992 termination, *viz.,* the February 1991 transfer to the toolroom, the imposition of the requirement that Melendez complete fire training in 1991, and the imposition of the DML day in January 1992. Resp. Brief at 16 n.18.

We agree with Exxon that Melendez did not timely challenge these earlier events, which precede the statutory thirty-day period, as ***independent*** causes of action. *See Diaz-Robainas v. Florida Power & Light Co.,* Case No. 92-ERA-10, Sec'y Dec., Jan. 19, 1996, slip op. at 21-22 and cases there cited. Even so, any adverse actions preceding the termination decision are clearly relevant to the question of Exxon's motive for terminating Melendez, for two reasons. First, previous incidents that were cited by Exxon decision-makers as contributing to the decision to terminate Melendez, HT at 2143-46 (Maier), are an integral part of the termination decision and must be evaluated accordingly. Second, previous incidents cited by Melendez as evidence of retaliatory intent that were not cited by the decision-makers as contributing to the termination decision must be evaluated in examining the mind-set of the decision-makers in reaching the termination

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[13/](...continued)
the ALJ's crediting of the Linebaugh testimony provided adequate evidentiary support for the ALJ's finding regarding the mailing of the Linebaugh letter.

decision.[14/] *See Odom v. Anchor Lithkemko/Int'l Paper,* ARB Case No. 96-189, Oct. 10, 1997, slip op. at 6 n.6[15/] and cases cited therein; *Diaz-Robainas*, slip op. at 21-22 and cases cited therein.

[14/] Of course, should the ALJ, on the basis of a fully developed evidentiary record on remand, determine that Melendez was terminated in violation of the environmental acts, then any adverse actions preceding the termination would become relevant to the question of whether Exxon, at some earlier point in time, engaged in a continuing violation of the environmental acts that culminated with Melendez' termination. *See Holtzclaw v. Kentucky Natural Resources and Environmental Protection Cabinet,* ARB Case No. 96-090, Feb. 13, 1997, slip op. at 3-4, *aff'd sub nom. Holtzclaw v. Sec'y of Labor,* 172 F.3d 872 (6th Cir. 1999) (table); *Webb v. Carolina Power & Light Co.,* ARB Case No. 96-176, Aug. 26, 1997, slip op. at 7; *Flor v. U.S. Dep't of Energy,* Case No. 93-TSC-0001, Sec'y Dec., Dec. 9, 1994, slip op. at 7-8 (discussing *Berry v. Board of Supervisors of L.S.U.,* 715 F.2d 971, 981 (5th Cir. 1983), and *English v. Whitfield*, 858 F.2d 957, 962 (4th Cir. 1988)); *see also Hendrix v. City of Yazoo City,* 911 F.2d 1102, 1103-05 (5th Cir. 1990) and cases there cited (addressing two categories of continuing violations). If so, damages should be assessed for a period beginning with the date that such course of conduct began. *See Carter v. Elec. Dist. No. 2*, Case No. 92-TSC-11, Sec'y Dec., July 26, 1995, slip op. at 14; *McCuistion v. Tennessee Valley Auth.,* Case No. 89-ERA-6, Sec'y Dec., Sept. 17, 1993, slip op. at 13-14. Otherwise, the period for which damages are recoverable begins no earlier than the date of Melendez' termination, April 16, 1992. *See Jones v. EG & G Defense Materials, Inc.,* ARB Case No. 97-129, Sept. 29, 1998, slip op. at 18-25.

[15/] In *Odom*, the Board examined personnel actions preceding the complainant's termination to determine whether those actions provided evidence of retaliatory animus "even though they were discrete incidents that occurred outside the limitations period, since they formed a basis in part for Odom's termination and 'shed light on the true character of matters occurring within the limitations period.'" *Odom*, slip op. at 6 n.6 (citing *Yellow Freight Sys., Inc. v. Reich,* 27 F.3d 1133, 1140-41 (6th Cir. 1994)); *McCuistion,* slip op. at 18 (citing *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989)).

IV. Activities subject to protection by the CAA and the TSCA

A. Role of protected activity in the retaliatory intent analysis

To establish that he was retaliated against in violation of the TSCA and CAA employee protection provisions, Melendez must establish by a preponderance of the relevant evidence that adverse action taken by Exxon was motivated, at least in part, by activity protected under the TSCA and/or the CAA. *See Simon v. Simmons Foods,* 49 F.3d 386, 389 (8th Cir. 1995), *aff'g Simon v. Simmons Industries, Inc.,* Case No. 87-TSC-2, Sec'y Dec., Apr. 4, 1994. Protection under the environmental acts is extended to a range of activities that further the respective purposes of those statutes.[16/] 15 U.S.C. §2622(a); 42 U.S.C. §7622(a). Pursuant to case law developed under the environmental acts and analogous whistleblower provisions covered by 29 C.F.R. §24.1(a), protection for activities that would otherwise qualify as furthering a statutory purpose is contingent

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[16/] Under the TSCA, an employee is protected if the employee:

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act;
> (2) testified or is about to testify in any such proceeding; or
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

15 U.S.C. §2622(a) (1988).

Under the CAA, an employee is protected if the employee:

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
> (2) testified or is about to testify in any such proceeding, or
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C. §7622(a) (1988).

We have cited the CAA and TSCA statutory provisions as codified during the 1991-92 timeframe when Melendez was engaged in the activities that are most pertinent to this case. Although both statutes were amended over the span of time during which Melendez' pertinent activities took place, those amendments do not include any material changes to the stated purposes of the respective statutes. *See* 15 U.S.C. §2601 (1994) (Findings, policy and intent); 42 U.S.C. §7401 (1994) (Congressional findings and declaration of purpose); *cf. Minard v. Nerco Delamar Co.,* Case No. 92-SWD-1, Sec'y Dec., Jan. 25, 1994, slip op. at 4-24 (tracking developments in statutory, regulatory and case law under Solid Waste Disposal Act in concluding that employee's belief regarding statutory requirements was reasonable).

on proof that the whistleblower held a reasonable belief that the employer was acting in violation of the statute. *See, e.g., Johnson v. Oak Ridge Operations Ofc., U.S. Dep't of Energy*, ARB Case No. 97-057, Sept. 30, 1999, slip op. at 10-12 and cases there cited; *see also* discussion of "reasonable belief" standard, *infra*.

In this case where the complaint is founded on circumstantial evidence, Melendez must establish by a preponderance of the evidence that he engaged in protected activity, that he was subjected to adverse action, that the Exxon personnel who recommended and/or decided to take the adverse action were aware of the protected activity at the time such decision was made, and were motivated, at least in part, by the protected activity in deciding to take the adverse action. *See Simon,* 49 F.3d at 389. As indicated by the ALJ, if Melendez establishes that retaliatory intent played a role in the termination decision, Exxon may nonetheless escape liability under the dual, or mixed, motive doctrine by establishing that it would have taken the action in the absence of the protected activity. *See Carroll v. United States Dep't of Labor,* 78 F.3d 352, 357 (8th Cir. 1996); R.D.O. at 29.

As previously noted, the ALJ did not identify which of Melendez' various activities he found qualified for coverage under the employee protection provisions of the TSCA and/or the CAA. *See* R.D.O. at 24-25, 29-30. Without first identifying the protected activities, the ALJ rendered the following findings in support of his conclusion that Melendez had failed to demonstrate that Exxon violated the employee protection provisions of the TSCA and/or the CAA. The ALJ determined that Exxon had a legitimate basis for its decision to terminate Melendez on April 16, 1992. R.D.O. at 29-30. The ALJ also found that Exxon had a legitimate basis for other related actions cited by Melendez in support of his complaint, *viz*., the imposition of the DML day -- on January 17, 1992 -- and the training requirements imposed on Melendez for the year 1991. R.D.O. at 25-26, 26-27, 29. With regard to Melendez' allegations concerning his transfer from the position of flare loss technician to the toolroom, the ALJ concluded that such transfer was not an adverse action and also found that questions raised by Melendez regarding the calculation of flare loss data did not contribute to the transfer decision. R.D.O. at 24-25. The ALJ also concluded, "Even if the evidence in this case had caused the Court to conclude that Respondent had a dual motive, the record contains sufficient evidence reflecting that Respondent would have taken the same disciplinary approach with reference to Complainant or any other employee engaged in insubordinate conduct." R.D.O. at 29 [citation omitted].

In view of the role of protected activities in the retaliatory intent analysis, identification of the activities that were engaged in that are statutorily protected is a crucial first step. The chronology of protected activities and personnel actions is also important, as temporal proximity between protected activity and the decision to take an adverse action is relevant to the determination whether such action was motivated by retaliatory intent. *Simon,* 49 F.3d at 389 (citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989)). Thus, as is hereinafter more fully discussed, the failure of the ALJ to first identify which of Melendez' activities qualified for protection makes it impossible to determine which of Exxon's actions taken against Melendez were taken for wholly legitimate reasons rather than in retaliation for Melendez having engaged in such activity. On remand, the ALJ should apply the following principles in determining which of Melendez' activities are protected by the TSCA and/or the CAA.

B. Summary of Melendez' activities that may qualify for protection and the range of activities protected by the environmental acts

1. *Summary of activities engaged in by Melendez*

The employee protection provisions of the CAA and the TSCA prohibit retaliation against employees for engaging in certain specified activities and "other action to carry out the purposes of" the respective statute. 15 U.S.C. §2622(a)(1988); 42 U.S.C. §7622(a)(1988). As we discuss in detail *infra* at Part V., the ALJ improperly excluded evidence relevant to activities that may qualify for protection under the environmental acts. Nonetheless, the incomplete record that is before us contains evidence of a wide range of activities that may qualify for protection in this case.[17/] The evidence before us indicates that, within the BOP, Melendez questioned the manner in which emissions data were being calculated for purposes of reporting to state and Federal agencies and questioned whether airborne pollutants were being vented by Exxon in violation of applicable environmental standards. HT at 371-72, 418-45, 641-48 (Melendez), 1404-11, 1460 (Cognata); *see* HT at 1511-16, 1547-50 (Smith); CX 40, 139; RX 22. The record also contains evidence indicating that Melendez contacted the Texas Air Control Board,[18/] the EPA and a local environmental activists' organization that was assisting in a community protest concerning BOP emissions. HT at 528-38, 573-78, 581-87, 815-45 (Melendez), 1229, 1234, 1241-42, 1253-55 (Abraham); *see* HT at 1617-18, 1796-98, 1879 (Fischer), 2102-06 (10/13/94 vol.)(Vacek), 2147 (Maier); CX 36, 39. The evidence also indicates that Melendez asked BOP management, orally and in writing, for specific emissions data. CX 40, 139; HT at 371-72 (Melendez), 1638-39, 1883-94 (Fischer).

In addition, evidence of record indicates that Melendez expressed his concerns, over a period of several years, to managerial personnel[19/] that exposure to hydrocarbons at the BOP was adversely affecting his health by further elevating his liver enzymes and contributing to more immediately apparent symptoms including nausea and headache.[20/] HT at 386-97, 402-08, 455-61, 461-66, 471-

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[17/] We reiterate that we are not rendering findings of fact in this decision, which would be premature in view of the incomplete evidentiary record that was developed below. On remand and in light of a supplemented evidentiary record and argument by the parties, the ALJ should apply the legal standards delineated *infra* for determining which activities Melendez has established actually qualify for protection under the environmental acts. Just as we summarized the undisputed facts for the purpose of providing factual background to focus our analysis of the issues in this remand opinion, *supra*, we summarize the range of activities reflected in the record before us in order to more clearly illustrate the unique role of Section 8(c) of the TSCA in the chemical industry and the whistleblower protection derived from it.

[18/] During the timeframe pertinent to this complaint, the Texas Air Control Board was an administering agency under the Texas State Implementation Plan submitted to the EPA under the CAA. 40 C.F.R. Part 52, Subpart SS (1991).

[19/] The terms "managerial staff" and "managerial personnel" are used in this decision to refer not only to supervisory personnel at the BOP but also to the safety coordinator, the industrial hygienist, human resources personnel and similar management support staff.

[20/] We note the following evidence that is relevant to the history of Melendez' liver condition. In an (continued...)

78, 845-67, 859-62, 888-92, 961-64, 969-71, 1073 (Melendez), 1568-87, 1685-86, 1693-96 (Fischer), 1972-73, 1984-99, 2104-08, 2111-12 (10/13/94 vol.)(Vacek), 2124, 2126-27, 2130-31, 2151-52, 2170-73 (10/13/94 vol.)(Maier); RX 66 (Malaer Ellis dep.) at 92-104, 119-20, 122-27; RX 68 (Ulczynski dep.) at 87-90, 94-95, 105, 114-16; RX 70 (Silkowski dep.) at 150-52, 161-64, 172-86, dep. exhs. 4, 5; RX 198 (Starcher dep.) at 289-90, 294-95, 325-26; CX 197 (Leon dep.) at 147-49; CX 15, 33, 34, 54, 77, 105, 106, 110, 134, 138,[21/] 140, 142, 162. In February 1992, Melendez contacted the OSHA regional office and initiated an inspection of the toolroom, after which OSHA officials required follow-up action by BOP managerial staff, although no citation was issued. RX 70 (Silkowski dep.) at 164-67; CX 198 (Starcher dep.) at 225-32, 239-40; *see* HT 2173-76 (Maier).

The record also contains evidence of both oral and written questioning of managerial personnel by Melendez concerning whether Exxon had documented his complaints regarding chemical exposure and whether BOP management was witholding information relevant to the question of a causal link between Melendez' liver condition and his exposure at the BOP. HT at

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[20/](..continued)
April 23, 1987 letter, Dr. Yarborough, the BOP physician at that time, advised Dr. Jablonski, an endocrinologist engaged by Melendez to evaluate his liver condition, that Dr. Yarborough and the BOP Industrial Hygiene Office would be working together to further evaluate Melendez' concern about exposure by taking periodic blood samples, reviewing the potential chemical exposures for his particular job assignment and monitoring his personal exposure at the workplace. CX 134. In a January 27, 1988 letter, to which laboratory test results were appended, Dr. Jablonski wrote Dr. Yarborough, expressing his concern about Melendez' elevated liver function and blood counts and noting that Melendez had undergone a liver biopsy which did not show evidence of structural liver disease. CX 33. In that letter, Dr. Jablonski also indicates his "concerns about potential toxic exposure in this patient." CX 33. Also in evidence is a February 26, 1988 review of Melendez' liver enzymes levels, both pre-employment at the BOP and over the years through February 10, 1988. CX 133. Finally, the record contains a July 11, 1988 letter from BOP physician, Dr. Stewart, to Dr. Scott, a physician to whom Dr. Stewart had referred Melendez for further evaluation. CX 76. Dr. Stewart's letter summarizes the history of Melendez' liver condition, and comments that Melendez had evidence of elevated liver enzymes at his pre-employment physical, which "suggest[s] a pre[-]existing condition," but also acknowledges that the symptoms that Melendez was experiencing in 1988 may represent an aggravation of such condition. CX 76 at 2. The letter also notes Dr. Jablonski's diagnosis of chemical hepatitis, which Dr. Stewart states "was made on the basis of one 10 day period away from the workplace during which the pts enzymes reportedly reverted to normal." CX 76 at 2. Various BOP personnel testified that they were aware of Melendez' health problems and Melendez' belief that they were aggravated by chemical exposure at work. HT at 1421-23 (Cognata), 2169-71 (Maier); CX 197 (Leon dep.) at 148-53. Starcher, the BOP safety officer, testified in deposition that Melendez had told him that he thought he had a health problem related to chemical exposure at the BOP; based on Starcher's observation of Melendez' skin discoloration, Starcher believed that Melendez was suffering from a liver ailment. CX 198 (Starcher dep.) at 289-90. Melendez also testified that he experienced allergic symptoms to some common airborne irritants. HT at 699-700. Melendez testified that, while working as a flare loss technician, he had advised his supervisors when he felt ill and they had accommodated his request to be temporarily placed in an air-conditioned office job, away from the process unit area. HT at 403-05.

[21/] *See* discussion *infra* regarding the ALJ's erroneous exclusion of various exhibits pertinent to Melendez' raising of health concerns at the BOP, including CX 138, a March 19, 1987 letter from the BOP industrial hygienist responding to Melendez' request for information regarding a possible link between chemicals being processed at the BOP and liver malfunctions.

380-82, 396, 407-12, 894-97, 945-53, 1063-67 (Melendez), 1563-64, 1576-77, 1707-09, 1712-13 (Fischer), 2125-31 (10/13/94 vol.), 2151-53, 2167-71 (Maier); RX 66 (Malaer Ellis dep.)[22/] at 119-22; CX 32, 35, 68, 140; CX 198 (Starcher dep.) at 169-71 and dep. exh. 7; RX 70 (Silkowski dep.) at 173-85 and dep. exhs. 4, 5. The record also indicates that Melendez questioned whether certain work and training situations posed a hazard to his health. *See, e.g.,* CX 15, 32, 54, 77, 142; HT at 459, 868, 870-71 (Melendez), 1568-69, 1570-72, 1574-77, 1585-86, 1726-35, 1749 (Fischer). Additionally, testimony and documentary evidence indicate that Melendez declined, in a meeting held by BOP managers on March 11, 1992, to discuss a harassment complaint that he had filed with the BOP Human Resources Office and in which he had relied, in part, on Section 8(c) of the TSCA, unless he could tape record the discussion or he could have his attorney present. CX 79; RX 38; HT at 2136-37 (Maier); *see also* HT at 1861-65, 1871 (Fischer, testifying that he told Melendez on March 13, 1992, to take the tape recorder home and not to bring it back to the BOP again).

Some, but not all, of the foregoing activities clearly fall into categories that have been held to constitute protected activity by the Secretary, this Board and the courts. To provide guidance on remand, we will first summarize those decisions. To provide further pertinent authority, we will also examine the purposes for which the TSCA and the CAA statutes were enacted. The purposes of the statutes are particularly significant in the application of two criteria to activities that may qualify for protection. First, the statutory purposes are relevant in determining whether an activity qualifies as "other action to carry out the purposes of the statute." 15 U.S.C. §2622(a)(3), 42 U.S.C. §7622(a)(3) (1988), *quoted in* n.16, *supra*. In addition, as we discuss *infra*, the statutory purposes are pertinent to determining whether OSHA-related activity also qualifies for coverage under the environmental acts.

2. *Summary of case law regarding types of activities protected*

The Secretary and this Board have consistently held that the raising of internal concerns to an employer as well as the filing of formal complaints with external entities are protected under the employee protection provisions referenced at Section 24.1(a).[23/] *See, e.g., Minard v. Nerco Delamar*

[22/] At the time pertinent to this complaint, Lori Malaer was a personnel analyst in the BOP Human Resources Office. RX 66 (Malaer Ellis dep.) at 38-9; *see* CX 32. At the time of her deposition, the former Ms. Malaer had married and changed her name to Ellis. RX 66 at 3. As Ms. Malaer Ellis is referred to in the record alternately as "Malaer" or "Ellis" we have used "Malaer Ellis" in the interest of clarity. *See* R.D.O. at 17.

[23/] Contrary to Exxon's argument, Resp. Brief at 25-26, internal complaints and steps that are preliminary to the filing of complaints with Federal or state environmental protection agencies are subject to protection under the employee provisions of the environmental protection acts. The conclusion that internal complaints qualify as protected activities has been upheld by several United States Courts of Appeals. *See Clean Harbors Environmental Services v. Herman*, 146 F.3d 12, 20 (1st Cir. 1998); *Bechtel Construction Co. v. Sec'y of Labor,* 50 F.3d 926, 932-33 (11th Cir. 1995); *Passaic Valley Sewerage Comm'rs v. Department of Labor,* 992 F.2d 474 (3d Cir. 1993), *cert. denied,* 510 U.S. 964; *Jones v. Tennessee Valley Authority,* 948 F.2d 258, 264 (6th Cir. 1991); *Couty v. Dole,* 886 F.2d 147 (8th Cir. 1989); *Kansas Gas & Elec. Co. v. Brock,* 780 F.2d 1505, 1513 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Mackowiak*

(continued...)

Co., Case No. 92-SWD-1, Sec'y Dec., Jan. 25, 1994, slip op. at 4 n.4 and cases cited therein. In addition, the employee protection provisions of the TSCA and the CAA have consistently been interpreted by the Secretary and this Board to cover the raising of concerns and the filing of complaints regarding reasonably perceived violations or potential violations of the respective statute. *See Johnson v. Oak Ridge Operations Ofc., U.S. Dep't of Energy,* ARB Case No. 97-057, Sept. 30, 1999, slip op. at 10-12 and cases there cited; *Sutherland v. Spray Systems Environmental,* Case No. 95-CAA-1, Sec'y Dec., Feb. 26, 1996; discussion of "reasonable belief" standard, *infra*. It is also well established that the protection afforded whistleblowers who raise concerns regarding statutory violations is contingent on meeting the aforementioned "reasonable belief" standard rather than proving that actual violations have occurred. *See Diaz-Robainas v. Florida Power & Light Co.,* Case No. 92-ERA-10, Sec'y Dec., Jan. 19, 1996, slip op. at 11 n.7 and cases cited therein.

Furthermore, the Secretary and this Board have repeatedly held that the raising of employee safety and health complaints, including the filing of complaints under OSHA, constitutes activity protected by the environmental acts when such complaints touch on the concerns for the environment and public health and safety that are addressed by those statutes. *See, e.g., Jones v. EG&G Defense Materials, Inc.,* ARB Case No. 97-129, Sept. 29, 1998, slip op. at 7, *aff'd on recon.*, Dec. 24, 1998
(arising under the CAA, the TSCA and the Resource Conservation and Recovery Act, 42 U.S.C. §6971 (1994)); *Scerbo v. Consolidated Edison Co. of New York,* Case No. 89-CAA-2, Sec'y Dec., Nov. 13, 1992, slip op. at 4-5 (CAA).[24/] In addition, an employee's refusal to enter or to remain in

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[23/](.. .continued)
v. University Nuclear Systems, Inc., 735 F.2d 1159, 1163 (9th Cir. 1984); and *Consolidated Edison Co. v. Donovan,* 673 F.2d 61 (2d Cir. 1982). In *Brown & Root, Inc. v. Donovan,* 747 F.2d 1029, 1036 (5th Cir. 1984), the United States Court of Appeals for the Fifth Circuit did hold that internal complaints were not protected by the employee protection provision of the Energy Reorganization Act, 42 U.S.C. §5851 (1982), then in effect. The Secretary has not extended that holding beyond cases that arise within the Fifth Circuit and which are subject to the ERA provisions in effect prior to October 24, 1992, when ERA amendments providing express coverage of internal complaints took effect, *see* 42 U.S.C. §5851(a)(1)(A), (B) (1994). *Carson v. Tyler Pipe Co.,* Case No. 93-WPC-11, Sec'y Dec., Mar. 24, 1995, slip op. at 6-7; *Bivens v. Louisiana Power & Light,* Case No. 89-ERA-30, Sec'y Dec., June 4, 1991, slip op. at 4-5; *see Lopez v. West Texas Utilities,* Case No. 86-ERA-25, Sec'y Dec., July 26, 1988, slip op. at 5-6; *see generally Stone & Webster Engineering Corp. v. Herman,* 115 F.3d 1568 (11th Cir. 1997) (holding that the legislative history of the ERA amendments "makes clear that Congress intended the amendments to codify what it thought the law to be already" but which Congress recognized, in view of the *Brown & Root* decision, "required explication"). In this case arising under the CAA and the TSCA in the Fifth Circuit, we will follow the Secretary's approach and construe both external and internal complaints as protected under those acts. On remand, the ALJ must apply the body of case law developed by the Secretary and this Board concerning internal protected activities.

[24/] For further guidance on remand, we provide the following citations: *See Williams v. TIW Fabrication & Machining, Inc.,* Case No. 88-SWD-3, Sec'y Dec., June 24, 1992, slip op. at 1-4 (SWDA); *Wagoner v. Technical Products, Inc.,* Case No. 87-TSC-4, Sec'y Dec., Nov. 20, 1990, slip op. at 8-11 (TSCA); *see also Fabricius v. Town of Braintree,* ARB Case No. 97-144, Feb. 9, 1999 (employee who filed OSHA complaint regarding asbestos in workplace also engaged in activity protected by the Clean Air Act when he left worksite
(continued...)

a work area may be protected if based on a good faith, reasonable belief that working conditions are unsafe or unhealthful, provided that the employee has brought the employee's concern to the employer's attention, and the employer fails to respond appropriately, through corrective action and/or explanation. *Pensyl v. Catalytic, Inc.,* Case No. 83-ERA-1, Sec'y Dec., Jan. 13, 1984, slip op. at 7.

Finally, the gathering of evidence in support of a whistleblower complaint, including the gathering of evidence by means of tape recording, is a type of activity that has been held to be covered by the employee protection provisions referenced at 29 C.F.R. §24.1(a). *See, e.g., Mosbaugh v. Georgia Power Co.,* Case Nos. 91-ERA-1/11, Sec'y Dec., Nov. 20, 1995, slip op. at 7-8; *cf. BSP Trans, Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 48-49 (1st Cir. 1998) (holding that complainant's photocopying of company documents was not protected because complainant had not raised a safety-related concern to management that such documents could be said to support).

3. *Examination of the purposes of the TSCA and the CAA*

As previously noted, the TSCA and the CAA employee protection provisions provide coverage for specified activities and for "other action to carry out the purposes" of the respective statute. 15 U.S.C. §2622(a)(3); 42 U.S.C. §7622(a)(3). Furthermore, under the well settled body of case law previously cited, protection will be extended under the environmental acts to employee health and safety complaints, including the filing of OSHA complaints, when those complaints touch on the concerns for the environment and public health and safety that are the focus of the environmental acts. *See, e.g., Jones v. EG&G Defense Materials, Inc.,* ARB Case No. 97-129, Sept. 29, 1998, slip op. at 7, *aff'd on recon.*, Dec. 24, 1998.

For guidance regarding the purposes of the TSCA and the CAA, we begin by examining each statute. *See Consumer Product Safety Comm. v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980); *Poulos v. Ambassador Fuel Oil Co.,* Case No. 86-CAA-1, Sec'y Dec., Apr. 27, 1987, slip op. at 4-11. For more detailed guidance regarding the requirements imposed on chemical plants under the TSCA and the CAA, we look to the implementing regulations promulgated by the EPA Administrator.[25/] *See id.; Minard,* slip op. at 5-17. As noted in the overview passage *supra,* Melendez' activities that may qualify for protection based on their relationship to the unusual record-keeping requirements imposed on chemical processors, manufacturers and distributors by Section 8(c) of the TSCA, 15 U.S.C. §2607(c), play a particularly significant role in this case. Accordingly, and in view of the unique recordkeeping requirements of Section 8(c) of the TSCA, we also examine

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[24/](.. .continued)
to inquire at building inspector's office regarding asbestos); *cf. Foley v. J.C. Maxxwell, Inc.,* Case No. 95-STA-11, Sec'y Dec., July 3, 1995, slip op. at 3 (OSHA complaint not related to the STAA); *Johnson v. Old Dominion Security,* Case Nos. 86-CAA-3/4/5, Sec'y Dec., May 29, 1991, slip op. at 13 n.8 (complaints confined to PCB contamination of the workplace not covered by CAA).

[25/] A concise description of BOP operations are provided in a letter to Melendez' physician from BOP physician Dr. Stewart, who states that the BOP's "primary process involves heating liquid and gaseous hydrocarbons in furnaces, thus producing olefins such as ethylene and propylene." CX 76.

the TSCA legislative history, which provides helpful insights concerning the intent of Congress in enacting that provision.

The CAA states, in pertinent part, that its purpose 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. §7401(b)(1) (1988). *See generally Texas v. Environmental Protection Agency,* 499 F.2d 289, 293 n.1 (5th Cir. 1974) (addressing control of hydrocarbon emissions in air quality plan). The TSCA states that its primary purpose is to assure that technological innovation and commerce in hazardous "chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment." 15 U.S.C. §2601(b)(3) (1988); *see Rollins Environmental Services, Inc. v. Parish of St. James*, 775 F.2d 627, 632-33 (5th Cir. 1985). To that end, the TSCA authorizes not only the control of chemical substances but also authorizes the development of data to provide a basis for evaluating the hazards posed by particular chemicals. The chemical risk assessments that are developed under the TSCA are also relied on by the EPA in determining the controls to be set on specific chemicals under the CAA. *See* 53 Fed. Reg. 51698, 51707 (1998) (EPA, 40 C.F.R. Part 704, final rule).

a. *The development of chemical risk data under the TSCA*

Several provisions of the TSCA address the collection, development and use of chemical risk data. 15 U.S.C. §§2601(b)(1) ("the development of such data should be the responsibility of those who manufacture and those who process such chemical substances and mixtures"), 2603(b)(3) (providing authority for EPA to require testing of chemical substances by manufacturers, processors and distributors), 2607(a) (providing authority for EPA to require firms to record and report, *inter alia*, "[a]ll existing data concerning the environmental and health effects" of particular chemical substances), 2607(b) (requiring EPA to publish an inventory of chemical substances manufactured and processed in the U.S.), 2607(c) (requiring covered firms to maintain records of allegations of significant adverse reactions, including allegations by employees), 2607(d) (requiring covered firms to submit lists of health and safety studies either conducted by, known to, or reasonably ascertainable by those entities), 2607(e) (requiring covered firms to immediately communicate to EPA information indicative of a substantial health or environmental risk posed by a particular substance), 2609 (research, development, collection, dissemination, and utilization of data), 2614(3)(A) (acts prohibited by the TSCA include the failure or refusal to establish or maintain records as required by the Act or implementing regulations).

The legislative history of the TSCA provides further insight into the concern among supporters of the legislation regarding the lack of knowledge available to government agencies, consumers of chemical products and the public at large with regard to the potentially adverse effects of some chemical substances. For example, in opening debate on a forerunner of the bill that was ultimately enacted, Senator Tunney described the purpose of the TSCA as providing "protection against environmental threats from chemical substances which are occurring now and those which have yet to become manifest." 119 Cong. Rec. 24,492 (1973). In advocating passage of the TSCA bill in 1976, the House sponsor stated, "While society reaps enormous benefits from chemicals, we are learning that chemicals can also do tremendous harm. For example, contamination by polychlorinated biphenyls-PCB's-has resulted in closing some of our major water systems . . .[and

has been linked] to human cancer . . . ." 122 Cong. Rec. 33,039 (1976) (remarks of Rep. Murphy). A co-sponsor of the bill in the Senate noted, "[T]he public has a right to expect that the vast array of chemicals that have become an intrinsic part of our daily life have been carefully scrutinized to determine whether they are safe." 122 Cong. Rec. 8283 (1976) (remarks of Sen. Magnuson). In support of the bill that was enacted later that year, Senator Pearson addressed the growing body of knowledge regarding the adverse effects of some chemical substances and noted, "The National Cancer Institute has recently estimated that 60 to 90 percent of all cancers occurring in this country result from environmental contaminants." *Id.* at 8284. Senator Pearson also commented on the "hot spots for cancer" near chemical plants thus, "[E]xcess bladder, lung, liver and other cancers among males are all concentrated in those counties of the United States where the chemical industry is most concentrated." *Id.* On the date of passage of the TSCA legislation by both houses of Congress, Rep. Murphy summarized, "The testing authorities in the bill will enable us to find out about the chemical substances and mixtures which are already out in the environment as well as those which are just coming on to the market." 122 Cong. Rec. 33,040 (1976).

The TSCA legislative history also demonstrates a parallel concern about the failure of chemical manufacturers, processors and distributors to develop and disseminate information regarding the risk posed by exposure to particular chemical substances. The Senate Report cites testimony before the Commerce Committee Subcommittee on the Environment attesting to the suppression of data regarding, *inter alia*, a possible link between chemical exposure experienced by industrial workers and "unusually high lung cancer rates." S. Rep. No. 698, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S.C.C.A.N. 4496. In commenting on bill provisions requiring the submission of testing data from the industry, Senator Tunney stated, "Hearings before the Commerce Committee in the last Congress raised substantial doubt that certain members of the chemical industry had released critical health data to regulatory agencies, to their own workers, or to the public in a timely fashion. This data might have revealed the carcinogenic potential of vinyl chloride." 121 Cong. Rec. 3780 (1975). In supporting passage of the TSCA bill in 1976, Senator Hartke emphasized the need for the development of data regarding the effects of chemical exposure by noting that "not only do the workers not know and the general public not know, but in many cases the manufacturers and distributors and business people do not know" the risks posed by exposure to some chemicals. 122 Cong. Rec. 8285 (1976).

b. *The recordkeeping requirements of Section 8(c) of the TSCA*

Section 8(c) of the TSCA requires firms or individuals that manufacture, process or distribute chemical substances or mixtures to "maintain records of significant adverse reactions to health or the environment, as determined by the Administrator by rule, alleged to have been caused by the substance or mixture. Records of such adverse reactions to the health of employees shall be retained for a period of 30 years from the date such reactions were first reported to or known by the person maintaining such records." 5 U.S.C. §2607(c) (1988); *see* 40 C.F.R. §717.15(d) (1991).[26/]

[26/] We have cited the edition of the Code of Federal Regulations that was in effect during the 1991-92 timeframe, when most of the activities that may qualify for protection occurred, to illustrate the purposes of the TSCA. In analyzing the issue of whether Melendez held a reasonable belief that Exxon was acting (continued...)

The implementing regulations define "significant adverse reactions" as "reactions that may indicate a substantial impairment of normal activities, or long-lasting or irreversible damage to health or the environment." 40 C.F.R. §717.3(i) (1991). The term "allegation" is defined by regulation as "a statement, made without formal proof or regard for evidence, that a chemical substance or mixture has caused a significant adverse reaction to health or the environment." 40 C.F.R. §717.3(a) (1991).[27/] Allegations may be made "by any person, such as an employee of the firm, individual consumer, a neighbor of the firm's plant . . . ." 40 C.F.R. §717.10(c) (1991). Consistent with the purpose of Section 8(c) to foster the development of data concerning previously unidentified risks, "Firms are not required to record significant adverse reactions that are *known* human effects as defined in §717.3(c)." 40 C.F.R. §717.12(b) (1991) (emphasis added). Unlike some other TSCA provisions, the Section 8(c) requirement is not restricted to specific chemicals designated by the EPA Administrator. *See* 15 U.S.C. §2607(c); *cf.* 15 U.S.C. §2607(a), (b) (providing authority for designation of chemicals subject to regulation under those provisions by the Administrator).

Section 8(c) thus mandates the retention of information regarding the *possibility* of a causal nexus between exposure and adverse effect where such links have not been previously established by scientific means.[28/] The causal links suggested by Section 8(c) allegations play a significant role in the development of risk assessment data under the TSCA by providing a preliminary basis on which decisions to conduct research into such causal relationships may be based. *See* 63 Fed. Reg. 42554, 42555 (1998) (Forty-Second Report of the TSCA Interagency Testing Committee to the Administrator; Receipt of Report and Request for Comments); *see also* U.S. EPA Office of Compliance Monitoring, Office of Pesticides and Toxic Substances, Recordkeeping and Reporting Rules TSCA Sections 8, 12 and 13, Enforcement Response Policy, May 15, 1987, ELI-Number AD-501 (available on LEXIS, Envirn library, TSCA file) (Section 8(c) allegations are important to EPA risk assessments because such information "involves patterns of effects and generally involves

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[26/](. . .continued)
in violation of the TSCA and/or the CAA when he engaged in the activities that may qualify for protection, *see* discussion *infra,* the ALJ may also consider the regulations implementing those statutes. *See Minard v. Nerco Delamar Co.,* Case No. 92-SWD-1, Sec'y Dec., Jan. 25, 1994, slip op. at 4-24 (analyzing "reasonable belief" regarding violations of the Solid Waste Disposal Act within the context of an evolving statutory and regulatory scheme).

[27/] Section 717.20 of the implementing regulations does not require the alleger to specify the chemical substance or mixture believed to have caused the adverse effect. Rather, the regulation provides that an allegation may alternatively cite an article that contains the specific substance, "a company process or operation in which substances are involved," or "an effluent, emission or other discharge from a site of manufacturing, processing or distribution of a substance." 40 C.F.R. §717.10(b)(2)(iii-v) (1991); *see* 48 Fed. Reg. 38178, 38181 (1983) (Notice, 40 C.F.R. Part 717, final rule; explaining that EPA retained the articles, processes or emissions categories because employees, consumers and plant neighbors "may not know the name of a specific chemical or mixture . . . .").

[28/] As indicated in the summary regarding Melendez' liver condition, *supra* at n.20, any link between Melendez' liver condition and hydrocarbon exposure had been neither medically confirmed nor denied, CX 33, 76, 77, 106; RX 68 (Ulczynski dep.) at 100; *see* HT at 274-87, 399-401 (ALJ, counsel discussion); *see also* CX 197 (Leon dep.) at 155-57 (testimony regarding developing knowledge concerning the effects of exposures to some chemicals).

human effects."); H.R. Rep. 1679, 94th Cong., 2d Sess. 21-23, *reprinted in* 1976 U.S.C.C.A.N. 4511-13 (discussing Section 8 of S.3149, Reporting and retention of information).

In contrast to allegations filed by employees under Section 8(c) of the TSCA,which are based on the alleger's belief that a "significant adverse effect" arose from workplace exposure, the recordability of illnesses and injuries under OSHA is contingent on a determination that the illness or injury *is* work-related. 29 U.S.C. §657(c)(2) (1988);[29/] *see* 29 C.F.R. §1904.12(c) (1991); *see also Amoco Chemicals Corp.,* 1986 OSAHRC LEXIS 108, 12 OSHC (BNA) 1849, 1986 OSHD (CCH) ¶27,621 (addressing standard to which employer is to be held in determining whether to record illness as occupationally-related). Workplace data gathered under OSHA -- including employee exposure and medical records that are required to be maintained for a period of thirty or more years -- are also used in research concerning the contribution of workplace exposure to occupational disease.[30/] *See* 53 Fed. Reg. 38140 (1988) (final rule, 29 C.F.R. Part 1910, access to employee exposure and medical records). Nonetheless, the TSCA requirement that allegations be recorded under Section 8(c) is unique in its reliance on the unsubstantiated beliefs of employees, consumers and plant neighbors.

Finally, we note that Congress was fully aware of the role of OSHA when it enacted the TSCA, and obviously it intended Section 8(c) records to provide an independent means of documenting employee health concerns that could be related to workplace chemical exposure. The Conference Committee Report states:

> The Committee is concerned that any allegations of risks or other information presented to the Administrator by employees of the chemical industry receive proper attention by EPA. The situation that existed with respect to the Kepone plant at Hopewell, Va., whereby an employee complaint to the Department of Labor allegedly was insufficiently attended to, should not occur. EPA should respond properly to complaints received in the context of this authority, and the Comptroller General may be asked by the committee to oversee EPA's procedures with respect to employee complaints.

H.R. Rep. 1679, 94th Cong., 2d Sess. 22-23, *reprinted in* 1976 U.S.C.C.A.N. 4512-13. In support of the need for legislation to mandate the development of chemical risk data, sponsors of the TSCA and predecessor bills referred to the sometimes fatal risks to which employees in the chemical

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[29/] Section 8(c)(2) of OSHA requires, in pertinent part, "employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job." 29 U.S.C. §657(c)(2) (1988).

[30/] OSHA requires employers to maintain records concerning "employee exposures to potentially toxic materials or harmful physical agents," as defined by rules promulgated by the Secretary under 29 U.S.C. §655. 29 U.S.C. §657(c)(3) (1988); *see also, e.g.,* 62 Fed. Reg. 1494 (1997) (final rule, OSHA regulations for exposure control and monitoring of methylene chloride, 29 C.F.R. Parts 1910, 1915 and 1926); 29 C.F.R. Part 1910, Occupational Safety and Health Standards, Subpart Z, Toxic and Hazardous Substances (1991).

industry were exposed and the tragic fact that employee death records had been a primary source of information regarding the health hazards posed by certain chemicals. 122 Cong. Rec. 8284-85 (1976) (remarks of Sen. Hartke); 121 Cong. Rec. 3780 (1975) (remarks of Sen. Tunney). Unlike other TSCA provisions that require the collection and development of technical data, Section 8(c) utilizes the medically unsubstantiated health concerns of chemical industry employees as a starting point for scientific determinations concerning the risks to the public that are the focus of the TSCA.

Congressional recognition of the crucial role that could be played by the chemical industry employee in data collection is also reflected in the Section 8(c) requirement that employers maintain records of employee allegations of significant adverse reactions to chemicals for a period of thirty years, in contrast to the five-year recordkeeping requirement for allegations from other individuals. 15 U.S.C. §2607(c). The thirty-year provision also reflects recognition that such records should be maintained for an extended period of time as it may take many years for the adverse effects of some chemicals to fully manifest themselves. The Joint Statement of the House Conference Committee observed, "Some very serious neurological disorders, for instance, at first present what appear to be trifling symptoms." H.R. Rep. 1679, 94th Cong., 2d Sess. 81, *reprinted in* 1976 U.S.C.C.A.N. 4566. The value of Section 8(c) records in tracking allegations over the course of an employee's possibly lengthy history of chemical exposure is obvious.

Fundamental to the concept of whistleblower protection is the principle that employees typically possess substantial knowledge concerning an employer's operations.[31/] As observed in the report of the House Committee on Interstate and Foreign Commerce that accompanied the CAA employee protection provision, which was enacted in 1977, "The best source of information about what a company is actually doing is often its own employees." H.R. Rep. 95-294, *reprinted in* 1977 U.S.C.C.A.N. 1404 (Rep. of Comm. on Interstate and Foreign Commerce that accompanied the CAA employee protection provision), *cited in Poulos v. Ambassador Fuel Oil Co.*, Case No. 86-CAA-1, Sec'y Dec., Apr. 27, 1987, slip op. at 7 n.3. A chemical plant employee is in a position to not only provide input regarding the possible physical effects of chemical exposure at the plant but also to raise questions concerning an employer's compliance with Section 8(c) of the TSCA.

4. *Links between Melendez' health-related activities and the purposes of the TSCA and the CAA*

At hearing, Exxon repeatedly objected to the questioning of witnesses or the introduction of documentary evidence that was related to Melendez' concerns about exposure to chemicals at the BOP, on the ground that the health concerns that Melendez had raised related only to OSHA and were irrelevant to Melendez' complaint under the environmental acts. *See* n.40, *infra.* As our review of the TSCA and its implementing regulations demonstrate, Exxon's position on this issue lacks merit. Melendez' pursuit of information concerning BOP records that he believed could shed light on the cause of his liver condition relates to a primary purpose of the TSCA, *i.e.,* the development and study of data relevant to the identification of risks to health and the environment that may be posed by particular chemical substances. Furthermore, an employee's questioning of

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[31/] *See Stefan Rutzel, Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing,* 14 Temp. Envtl. L. & Tech. J. 1, 2 (1995).

management regarding the documentation of his or her complaints about health problems that the employee believes are related to chemical exposure is linked directly to the records that are required to be kept under Section 8(c). The concerns raised by Melendez with BOP managerial staff in regard to company records concerning his history of chemical exposure thus relate directly to the collection of data that is mandated by the TSCA.[32/]

In addition, during the approximate eight-year period that Melendez worked as the BOP flare loss technician, Melendez frequently worked in an outdoor area of the plant complex, where he was exposed to fugitive emissions, *i.e.,* those escaping from the pipelines prior to reaching the flare to be burned. HT at 602-14 (Melendez); RX 68 (Ulczynski dep.) at 102-03, 105; CX 197 (Leon dep.) at 67-98, 114-17, 148-49, dep. exh. 2 (plant layout); CX 179. Fugitive emissions are considered in gauging the total emissions rate for a stationary source under the CAA. *See* 40 C.F.R. §51.24 (1986)

[32/] The testimony of BOP managerial staff suggests that BOP procedures for addressing and/or documenting health and safety issues at the time pertinent to this complaint were informal, unwritten and typically contingent on *ad hoc* direction by management. The plant industrial hygienist Silkowski testified that the determination of whether injuries would be investigated was made on an *ad hoc* basis by first-line supervision, and Silkowski repeatedly emphasized the dominant role of first-line and second-level supervisors in addressing employee health and safety issues at the BOP, RX 70 (Silkowski dep.) at 75-78, 80-83, 145, as did Starcher, the BOP Safety Officer, CX 198 at 127, 132-33, 137-39, 187, 202-07, 243-53. Fischer nonetheless testified that the documentation of chemical exposures at the BOP was not his "area of expertise." HT at 1703. In the course of his deposition, Silkowski reviewed several incident reports that were signed by supervisory personnel but questioned the reliability of those reports. RX 70 at 133-44, 157-62. At hearing, Melendez proffered a document prepared by BOP management, identified as CX 154, that provides guidelines for reporting and follow-up on incidents involving injury or illness. HT at 2108-12. Vacek testified that he was unsure whether those guidelines had been adopted by BOP management. HT at 2109-10 (10/12/94 vol.). Personnel specialist Malaer Ellis testified that the Human Resources Office would not be advised "in all cases" if a request for a transfer had been made based on health related reasons and also would not be advised in all cases if an employee's transfer had been initiated by line management for health-related reasons. RX 66 at 112-13.

In addition, the record that is currently before us provides no indication -- other than the notice to plant employees that had been issued by the BOP manager, Doug Walker, CX 13, in August 1991, which advised the employees of their right to make allegations under Section 8(c) of the TSCA -- that the managerial staff acknowledged its role under Section 8(c) or explained to Melendez why a record of his belief that his liver condition arose from exposure to chemicals processed or manufactured at the plant had not been preserved. *See generally* 40 C.F.R. §§717.15(a) (providing alternative sites at which firms may elect to maintain Section 8(c) records), 717.10(d) ("EPA intends that firms should, to the maximum practical extent, provide allegers with information regarding the ultimate disposition of their allegations. For example, firms could provide a brief notice to the alleger stating that a record was created . . . , or that a record was not created and briefly explain the reasons why not."); 48 Fed. Reg. 38178, 38189 (1983) (40 C.F.R. Part 717, final rule, stating that the EPA "expects companies to educate their line supervisory personnel regarding oral allegations so that a worker who wishes to make such allegation does not have to seek out some unknown or far removed company official in order to have his allegation heard."). Silkowski testified that Melendez' written request for chemical exposure information was unusual. RX 70 at 174; *see id.* at 173-186. In determining whether inquiries that Melendez made to management regarding exposure-related records constitute activity related to the TSCA, the ALJ must consider the evidence of record, including the foregoing testimony, concerning the BOP lines of authority through which Melendez could direct his inquiries regarding Section 8(c) records.

(redesignated §51.166 eff. Dec. 8, 1986, 51 Fed. Reg. 40656, 40659 (1986)). *See generally* 49 Fed. Reg. 43202 (1984) (addressing the role of fugitive emissions in determining whether an entity qualifies as a "major" source under the CAA).

Moreover, EPA findings regarding the significant contribution of fugitive emissions to air pollution were the impetus for the establishment of an advisory committee in 1989. Notice, 56 Fed. Reg. 9315-9316 (1991). That committee was charged with responsibility for developing a proposal "for regulation of fugitive emissions of volatile organics from equipment leaks (pumps, valves, etc.) associated with chemical production process units. . ." which "account for roughly one-third of total organic emissions from chemical plants." *Id.*

Thus, depending on the extent to which the concerns raised by Melendez about his exposure to chemicals at the BOP are linked to plant emissions, his pursuit of information from BOP records and reports regarding that exposure may well fall within the CAA purpose of protecting air quality. *Cf. Scerbo v. Consolidated Edison Co. of New York,* Case No. 89-CAA-2, Sec'y Dec., Nov. 13, 1992, slip op. at 4-5 (complainant's internal and external OSHA complaints touched on public safety and health, the environment and compliance with the CAA and thus were covered by the latter); *Aurich v. Consolidated Edison Co., of New York*, Case No. 86-CAA-2, Sec'y Dec., Apr. 23, 1987, slip op. at 2-5 (complaints about asbestos solely within the workplace are not covered by CAA but complaints about workplace asbestos that may be emitted to the ambient air are covered by CAA).

The ALJ should apply the foregoing principles when determining whether activities engaged in by Melendez that were evidently related to Melendez' personal concerns about chemical exposure were also related to the purposes of the TSCA and/or the CAA. Before turning to the "reasonable belief" requirement for establishing protected activity, we reiterate that it is not necessary for Melendez to establish violations of the environmental acts and implementing regulations in order to establish that his activities that are related to the purposes of those statutes are protected. *See, e.g., Diaz-Robainas v. Florida Power & Light Co.,* Case No. 92-ERA-10, Sec'y Dec., Jan. 19, 1996, slip op. at 11 n.7 and cases cited therein. Consequently, the question of whether Exxon was acting in compliance with the TSCA and/or the CAA is not before us. Rather, the question of whether Melendez held and acted on a reasonable belief that Exxon was violating the TSCA and/or the CAA, under the guidelines we now examine, is determinative of which of Melendez' activities that could otherwise qualify for protection are indeed protected under these statutes.

C. Reasonable belief standard and bias allegation

1. *Reasonable belief standard*

Pursuant to case law developed under the employee protection provisions referenced at 29 C.F.R. §24.1(a), coverage for Melendez' activities that otherwise qualify for protection under the environmental statutes is contingent on proof that those activities were based on Melendez' actual belief that Exxon was acting in violation of the TSCA and/or the CAA and that such belief was reasonable. *See, e.g., Minard v. Nerco Delamar Co.,* Case No. 92-SWD-1, Sec'y Dec., Jan. 25, 1994, slip op. at 7-16 and cases there cited. Although the ALJ found, in effect, that Melendez' actions were premised on his actual belief that Exxon had committed violations of these

environmental statutes, the ALJ failed to determine whether Melendez' protected activities were based on a reasonable perception of such violations. R.D.O. at 29-30.

2. *The ALJ's relevant findings and the bias allegation*

Specifically, the ALJ concluded that:

> Melendez is a very sincere individual who believes that his health was compromised by conditions at Respondent's plant, even though his opinion is not supported by conclusive medical evidence. Complainant also believes that Respondent may have been releasing improperly chemicals into the atmosphere or reporting such emissions, even though the method of calculating flare loss was beyond his responsibility and competence.

R.D.O. at 29-30. Relevant to this finding, Melendez challenges the ALJ's refusal to allow Melendez to testify or submit other evidence relevant to the technical merits of Melendez' concerns regarding "on-purpose" venting and "back-mixing" calculations of BOP emissions data. Comp. Brief at 27-29. Melendez also argues that the ALJ's allowing Exxon to submit evidence on this technical subject, along with the ALJ's questioning of Melendez' technical competence, demonstrates "unfair bias against the competency of blue collar workers." Comp. Brief at 27-28.

3. *Exxon's challenges to the reasonable belief standard*

Relevant to the reasonable belief standard, Exxon urges that Melendez' activities were not protected because Melendez acknowledged that he did not know what specific TSCA and CAA requirements were applicable to the BOP; thus, Exxon urges, Melendez has not established that he was acting in good faith. Resp. Brief at 23-24. Exxon also asserts that Melendez must prove that his activities were "grounded in a sincere 'desire to inform the public about violations of laws and statutes, as a service to the public as a whole,' . . . ." Resp. Brief at 23 (quoting *Wolcott v. Champion International Corp.,* 691 F.Supp. 1052, 1059 (W.D.Mich. 1987)).

a. *Rejection of Exxon's argument regarding whistleblower's knowledge of the statutory and regulatory requirements of the environmental acts*

Pertinent case law indicates that the reasonableness of a whistleblower's belief regarding statutory violations by an employer is to be determined on the basis of "the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience." *Minard*, slip op. at 7 n.5 (quoting work refusal standard from *Pensyl v. Catalytic, Inc.,* Case No. 83-ERA-1, Sec'y Dec., Jan. 13, 1984, slip op. at 7). A survey of decisions issued by the Secretary and this Board in which the *Minard* standard has been applied also reveals that, whether or not the term "good faith" has been used, the whistleblower has been required to have actually held a belief that there were pertinent statutory violations at the time he or she engaged in the activity subject to whistleblower protection. *See, e.g., Oliver v. Hydro-Vac Services, Inc.,* Case No. 91-SWD-00001,

Sec'y Dec., Nov. 1, 1995, slip op. at 9-13.[33/] According to the foregoing precedent, Melendez' belief that Exxon was acting in violation of the TSCA and the CAA must be scrutinized under both subjective and objective standards, *i.e.,* he must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in Melendez' circumstances having his training and experience.

In support of its argument that Melendez' lack of knowledge of the specific requirements of the TSCA and CAA precludes protection under those statutes, Exxon relies on the definition of "good faith" applicable to the Fair Labor Standards Act (FLSA), 29 U.S.C. §201, *et seq.* The "good faith" standard cited by Exxon is provided by the Portal-to-Portal Act, 29 U.S.C. §260, as a defense that may be raised by an employer against imposition of a liquidated damages penalty for violations under the FLSA. *See Donovan v. Kaszycki & Sons Contractors, Inc.,* 599 F.Supp. 860, 871 (S.D.N.Y. 1984). The "good faith" defense requires that the employer demonstrate "at least an honest intention to ascertain what the Fair Labor Standards Act requires and to comply with it." *Id.* Exxon's reliance on the "good faith" definition applicable to the FLSA suggests that Exxon is advocating that whistleblower protection be contingent on an employee's having independently researched the question of compliance before raising the issue with an employer. The obvious distinction between the purposes of the Portal-to-Portal Act provision cited by Exxon and the employee protection provisions invoked in this proceeding militate against Exxon's argument.

The requirement that an employer become knowledgeable regarding the applicable provisions of the FLSA before it takes action as an employer subject to that statute serves the FLSA's purpose to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" in covered industries. 29 U.S.C. §202 (1994). A requirement that employees independently ascertain the specific requirements of environmental legislation applicable to the facility where they work before discussing compliance issues with their employers would not serve the interest of encouraging "employees to come forward with complaints of health hazards so that remedial action may be taken." *Simon v. Simmons Industries, Inc.,* Case No. 87-TSC-2, Sec'y Dec., Apr. 4, 1994, slip op. at 4 and cases there cited, *aff'd sub nom. Simon v. Simmons Foods, Inc.,* 49 F.3d 386 (8th Cir. 1995)*; see Poulos v. Ambassador Fuel Oil Co.,* Case No. 86-CAA-1, Sec'y Dec., Apr. 27, 1987, slip op. at 4-11.

Frequently, an employee raises a safety concern internally in the course of discussing with his supervisors whether a particular practice is consistent with applicable environmental legislation. *See Passaic Valley Sewerage Comm'rs v. Reich*, 992 F.2d 474, 478-80 (3d Cir. 1993); *see also Oliver*, slip op. at 2-9 (whistleblower was protected despite his inability to specify controlling regulations). Whether such discussion leads to a satisfactory resolution of the employee's concern or not, the dialogue serves the interest of facilitating an exchange of information regarding

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[33/] For further guidance regarding the reasonable belief issue on remand, we note the following decisions: *Crosby v. Hughes Aircraft Co.,* Case No. 85-TSC-2, Sec'y Dec., Aug. 17, 1993, slip op. at 25-30 (pre-*Minard* case; whistleblower's belief held not to be reasonable); *Smith v. Catalytic, Inc.,* Case No. 86-ERA-12, Sec'y Dec., May 28, 1986, slip op. at 3 (pre-*Minard* case remanded for determination regarding whether complainant's belief was reasonable).

compliance with the environmental statute at issue. *See Carter v. Electrical Dist. No. 2,* Case No. 92-TSC-11, Sec'y Dec., July 26, 1995, slip op. at 23 and cases there cited. *See generally Bechtel Const. Co. v. Sec'y of Labor,* 50 F.3d 926, 931 (11th Cir. 1995) (in case arising under the Energy Reorganization Act (ERA), court stated that the Secretary properly "characterized questioning one's supervisor's instructions on safety procedures as 'tantamount to a complaint'"). The issue of a whistleblower's personal compliance with the statute has been addressed by both the TSCA and the CAA, which exclude from protection employees who, acting not at the direction of their employers, deliberately cause a violation of the respective statute. 15 U.S.C. §2622(e); 42 U.S.C. §7622(g). *See generally Fields v. Florida Power Corp.,* ARB Case No. 97-070, Mar. 13, 1998 (applying analogous provision under the ERA to hold complainants' action not protected by the statute), *aff'd sub. nom Fields v. Dep't of Labor ARB,* 173 F.3d 811 (11th Cir. 1999), *cert. denied,* 120 S.Ct. 932 (2000). There has been no suggestion that Melendez acted in violation of the environmental statutes in the instant case.

b. *Rejection of Exxon's argument regarding whistleblower motivation*

Exxon's *Wolcott* argument, that Melendez must prove that his activities were "grounded in a sincere 'desire to inform the public about violations of laws and statutes, as a service to the public as a whole'. . .," Resp. Brief at 23, is similarly unpersuasive. In *Wolcott*, the court was construing the Michigan Whistleblowers Protection Act, Mich. Comp. Laws §15.361, *et seq.,* which excludes from protection allegations that are known by the whistleblower to be false, Mich. Comp. Laws §15.362. 691 F.Supp. at 1052; *see Melchi v. Burns International Security Servs.,* 597 F.Supp. 575, 583 (E.D.Mich. 1984).[34/] By establishing the *Minard* requirement that the whistleblower actually believe that the employer was acting in violation of the environmental statute at issue, the Secretary addressed the concern that protection under the whistleblower provisions cited at 29 C.F.R. §24.1(a) not be extended to knowingly false reports. In addition, the *Minard* requirement that the whistleblower's belief be scrutinized under an objective standard provides a further safeguard against the abuse of whistleblower status under the environmental acts.

We also find no support in the language of the environmental statutes or the interpretation of similar enactments for the conclusion that, once a whistleblower has formed a belief that meets the *Minard* standard, subsequent whistleblowing action must be scrutinized to determine whether such action has been motivated by a desire to inform the public. Beginning with an examination of the language of the TSCA and the CAA, we note that the only limitation on protected activity provided by those statutes, as previously noted, concerns whistleblowers who voluntarily violate the acts themselves. 15 U.S.C. §2622(e); 42 U.S.C. §7622(g). Consistent with this lack of limitation of protection for whistleblowing activities, the Secretary repeatedly held that coverage of activities

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[34/] In *Melchi*, the court explained the basis for the interpretation of the Michigan whistleblower statute as imposing a requirement that the whistleblower have a subjective good faith belief that an employer had committed violations of applicable law. The court noted that the pertinent provision of the Michigan Whistleblowers' Protection Act, Mich. Comp. Laws §15.362, excluded from coverage allegations made by a whistleblower who "knows that the report is false." *Melchi*, 597 F.Supp. at 583. The court reasoned that, "By precluding protection to those acting in bad faith, the legislature clearly implied that only those acting in good faith are entitled to protection." *Id.*

under the employee protection provisions is not contingent on the nature of the whistleblower's motivation. *See, e.g., Oliver*, slip op. at 14; *Carter,* slip op. at 23.

In the *Oliver* decision, the Secretary rejected an argument regarding whistleblower motivation that was also based on *Wolcott.* In addition to concluding that the *Oliver* case was factually distinguishable from *Wolcott*, the Secretary concluded that the exclusion of whistleblower motivation from the protected activity determination was consistent with case law developed under other Federal whistleblower protection statutes. *Oliver*, slip op. at 15-17 (citing *Berube v. GSA*, 30 M.S.P.R. 581, 596 (1986), *vacated on other grounds*, 820 F.2d 396 (Fed. Cir. 1987) and *Gores v. Dep't of Veterans Affairs,* 68 M.S.P.R. 100, 114 n.4 (1995)).[35/] A review of decisions by Federal agencies and courts interpreting similar statutes provides further support for this conclusion.[36/] *See, e.g., Bump v. Dep't of the Interior,* 69 M.S.P.R. 354, 1996 MSPB LEXIS 42 (1996) (arising under the whistleblower provision of the Civil Service Reform Act (CSRA), 5 U.S.C. §2302(b)(8)(1994)).

As previously noted, the Secretary based the *Minard* standard on the decision in *Pensyl,* a case arising under the ERA in which the Secretary had established the criteria for determining

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[35/] Subsequent to issuance of the Secretary's decision in *Oliver*, the Merit Systems Protection Board decision in *Gores* was reversed, on other grounds. *Gores v. Dep't of Veterans Affairs*, 132 F.3d 50 (Fed. Cir. Nov. 4, 1997)(table), 1997 WL 687386. The court reversed the MSPB decision in *Gores* based on the court's conclusion that substantial evidence did not support the Board's finding that the whistleblower had reasonably believed that he was disclosing violations of law, pursuant to 5 U.S.C. §2302(b)(8). 1997 WL 687386, **2. The *Gores* court did not address the MSPB ruling concerning whistleblower motivation. *See also Horton v. Dep't of the Navy,* 66 F.3d 279, 282-83 (Fed. Cir. 1995)(affirming MSPB holding that whistleblower's motivation could not deprive whistleblower of protection under Section 2302(b)(8), 60 M.S.P.R. 397, 402-03 (1994)).

[36/] Many of the whistleblower statutes enacted by the states require that protected activity be scrutinized under a good faith or reasonable belief standard and/or contain a prohibition against allegations that are known to be false. *See, e.g.,* Alaska Stat. §39.90.110 (1999); Hawaii Rev. Stat. §378-62 (Bender 1999); Mass. Gen. Ann. Laws Ch. 149, §185 (West 1999); N.H. Stat. Ann. §275-E:2 (1999); N.C. Gen. Stat. §126-85 (Bender 1999); Ohio Rev. Code Ann. §4113.52 (West 1999); R.I. Gen. Laws §27-54-7 (1999); Tex. Gov't Code §554.001 (1999). Various court decisions construing state whistleblower laws confuse the issue of the basis for the belief that wrongdoing has occurred with the issue of the whistleblower's motivation for acting on that belief. *See, e.g., LaFond v. General Physics Services Corp.,* 50 F.3d 165, 176 (2d Cir. 1995) (construing Connecticut whistleblower protection statute, Conn. Gen. Stat. §31-51m, as denying coverage when employee knows report is false, and remanding for reconsideration of finding that complainant's "'sole and admitted purpose in notifying public bodies of suspected violations of law was to obtain the Act's protection when it became clear that his extortionate scheme had failed and his job would be in jeopardy if he were found out'"). As stated by the Texas Supreme Court, in *Wichita County v. Hart,* 917 S.W.2d 779 (Tex. S.Ct. 1996), "no clear consensus has emerged from other courts on the issue of whether motivation is relevant to 'good faith.'" 917 S.W. 2d at 784-86. The *Wichita County* court ultimately construed the statutory provision at issue, which extended protection to "a public employee who in good faith reports a violation of law . . . ," Tex. Gov't Code § 554.002(a), as requiring examination of only the whistleblower's belief, not his or her motivation, under a subjective/objective standard virtually identical to that adopted by the Secretary in *Pensyl* and *Minard. Id.*

whether a work refusal qualified for statutory protection. Like the ERA employee protection provision, the CAA and TSCA provisions trace their origins to the anti-discrimination provisions of the Coal Mine Health and Safety Act of 1969 (CMHSA), Dec. 30, 1969, Pub. L. 91-173, Title I, §110(b), 83 Stat. 753, and the National Labor Relations Act (NLRA), Act of June 23, 1947, ch. 120, Title I, §101, 61 Stat. 140. *See* S. Rep. No. 848, 95th Cong., 2d Sess., *reprinted in* 1978 U.S.C.C.A.N. 7303, quoted in *Pensyl*, slip op. at 4 (regarding CAA and Water Pollution Control Act); 122 Cong. Rec. 8286-88 (1976) (debate between Sens. Tunney and Helms regarding TSCA bill S.3149);[37/] *see also Passaic Valley Sewerage Comm'rs,* 992 F.2d at 479 (discussing parallels between whistleblower provisions of various environmental protection acts, the NLRA and mine safety legislation). *See generally Munsey v. Federal Mine Safety and Health Review Comm.,* 595 F.2d 735, 742-44 (D.C. Cir. 1978) (discussing NLRA as model for CMHSA anti-retaliation provision). A review of the case law construing the whistleblower provisions of the CMHSA and its successor statute, the Federal Mine Health and Safety Act of 1977, Nov. 9, 1977, Pub. L. 95-164, Title I, §101, 91 Stat. 1290, codified at 30 U.S.C. §815(c)(1) (1994), and the anti-discrimination provision of the NLRA, 29 U.S.C. §158(a)(4) (1994), provide no support for the conclusion that the whistleblower's motivation is germane to the issue of whether particular activities are to be afforded protection. *See Simpson v. Federal Mine Safety and Health Review Comm.,* 842 F.2d 453, 458 (D.C. Cir. 1988) (stating that legislative history of the mine safety act "unequivocally supports" the view that work refusal is protected when miner has a reasonable, good faith belief that working conditions are hazardous); *Baker v. Dep't of the Interior,* 595 F.2d 746, 749-50 (D.C. Cir. 1978) (rejecting holding of Interior Board of Mine Operations Appeals that miner must have had intent to contact federal authorities when he made internal safety complaints to invoke whistleblower protection); *General Nutrition Center, Inc.,* 221 N.L.R.B. 850 (1975) (employees whose departure from work to visit the regional NLRB office was motivated by concern about cold conditions under which they were required to work were protected under Section 8(a)(4));*Virginia-Carolina Freight Lines,* 155 N.L.R.B. 447 (1965) (truck driver who advised his employer that he was going to NLRB over pay dispute was protected); *cf. Iowa Beef Packers, v. NLRB,* 331 F.2d 176 (8th Cir. 1964) (refusing to

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[37/] At the time of the Senate debate referred to above, the bill before the Senate, S.3149, contained one section that included all employee protection provisions. S. Rep. 1302, 94th Cong., 2d Sess., 29-30, *reprinted in* 1976 U.S.C.C.A.N. 4519-20. Following action by the House Conference Committee, these employee protection provisions were separated into two sections, Sections 23 and 24. H.R. Rep. 1679, 94th Cong., 2d Sess. 99-100, *reprinted in* 1976 U.S.C.C.A.N. 4584-85. Sen. Helms' challenge in the March 26, 1976 session did not address the whistleblower provisions of Section 23, but only Section 23(f), the provision authorizing investigations by the EPA and hearings before the EPA in cases in which an employee believed that the employee had suffered, or been threatened with, a loss or interruption of employment "because of the results of any rule or order issued under" the TSCA. That provision was designated as Section 24 under the bill that was passed on September 28, 1976 and enacted into law on October 11, 1976, Pub. L. 94-469. In responding to the challenge to Section 23(f), Sen. Tunney stated that the source of the employee protection provision was the analogous section in the Water Pollution Control Act (WPCA). Cong. Rec. at 8287. Sen. Tunney's remarks suggest that other employee protection provisions contained in Section 23 of the version of the bill before the Senate on March 26, 1976, including the provision now codified at 15 U.S.C. §2622, were modeled on the analogous WPCA provision, codified at 33 U.S.C. §1367(a)-(d). The employee protection provision enacted into law as Section 23 of Pub. L. 94-469, 90 Stat. 2044, represents an essentially unrevised version of the whistleblower provision that was before the Senate on March 26, 1976. *See* H.R. Rep. 1679, 94th Cong., 2d Sess. 99-100, *reprinted in* 1976 U.S.C.C.A.N. 4584-85.

enforce NLRB order for back pay and reinstatement in favor of discharged employee who had given deliberately false testimony in NLRB proceeding).

We thus conclude that the reasonable belief standard adopted by the Secretary in *Minard* and *Oliver* is consistent with the statutory language of the TSCA and CAA employee protection provisions, with the legislative history of those enactments, and with case law interpreting similar whistleblower legislation. We therefore reject Exxon's argument that we depart from the *Minard/Oliver* standard.

4. *Rejection of Melendez' allegation of bias*

As Melendez contends, Comp. Brief at 27-29, the ALJ did err in excluding evidence relevant to the reasonable belief issue. *See, e.g.,* HT at 874-78 (exclusion of CX 105, discussed in n.40, *infra)*. Nonetheless, neither those errors nor the ALJ's statement that "the method of calculating flare loss was beyond [Melendez'] responsibility and competence," R.D.O. at 29-30, demonstrates prejudgment by the ALJ of the issues in the case.[38/] *See Seater v. Southern California Edison,* ARB Case No. 96-013, Sept. 27, 1996, slip op. at 2-4 and cases there cited. Melendez' "responsibility and competence" are instead factors that are relevant to the *Minard* reasonable belief standard discussed above. *See Minard,* slip op. at 7 n.5. On remand, the ALJ must determine whether Melendez has established that the activities that he engaged in that would otherwise qualify for protection under the CAA and/or the TSCA were based on a reasonable belief that Exxon was acting in violation of those statutes. In other words, if an activity that Melendez engaged in is found to fall within the range of activities that are expressly identified or otherwise defined by the environmental acts and the pertinent case law previously discussed, the question of whether the activity actually qualifies for protection will be resolved based on whether Melendez reasonably believed that Exxon was acting in violation of the TSCA and/or the CAA when he engaged in the activity.

V. Exclusionary errors regarding evidence of protected activity

At hearing, the ALJ erred in excluding evidence regarding Melendez' internal activities that may qualify for protection under the environmental acts and evidence relevant to the BOP managers' knowledge or reaction to such activities. Some of these errors resulted from the failure to recognize activities that may qualify for protection under the environmental acts and failure to recognize evidence that may be relevant to the reasonable belief standard.[39/] *See, e.g.,* HT at 2040-41 (10/13/94

[38/] The Rules of Practice and Procedure for the Office of Administrative Law Judges provide for the filing of a motion for disqualification with the presiding ALJ and a responsive ruling by the judge. 29 C.F.R. §18.31(b). This procedure ensures the development of a complete record regarding any allegation of bias below.

[39/] The parties' stipulation that the ALJ did not have jurisdiction "to hear or receive evidence on any violations by this Respondent of Section 11C of OSHA," HT at 114-15, is consistent with the Secretary's ruling regarding the ALJ's lack of jurisdiction to decide an OSHA complaint, Sec'y Decision and Order of Remand at 8. As previously noted in this decision, the ALJ did not recognize the distinction between the Secretary's conclusion that the ALJ did not have jurisdiction to adjudicate the merits of an OSHA complaint

(continued...)

vol.) (refusing to allow Melendez to cross-examine Vacek regarding BOP exposure/illness/injury reporting procedures). As previously noted, both the TSCA and the CAA require that whistleblower complaints be decided "on the record after notice and opportunity" for a hearing. 15 U.S.C. §2622(B)(2)(A); 42 U.S.C. §7622(b)(2)(A). As discussed by the Secretary within the context of an analogous statute, the pertinent provisions of the APA require that each of the parties be provided a full and fair opportunity for the presentation of arguments and facts. *Land v. Consolidated Freightways,* Case No. 91-STA-28, Sec'y Ord. of Rem., May 6, 1992, slip op. at 6 (arising under the Surface Transportation Assistance Act, citing 5 U.S.C. §§554(c), (d)). As also noted by the Secretary in the *Land* decision, each party has the right to present "oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. §556(d), *quoted in Land*, slip op. at 6. On remand, Melendez must be provided adequate opportunity to present the evidence relevant to his activities that may qualify for protection under the TSCA and the CAA and relevant to the corresponding reactions of BOP managerial personnel that he was previously denied.[40/] Exxon must be provided adequate opportunity to respond to such evidence. *See Yellow Freight System, Inc. v. Martin,* 954 F.2d 353 (6th Cir. 1992); *English v. General Electric Co.,* Case No. 85-ERA-2, Sec'y Rem. Ord., May 9, 1986, slip op. at 1-2.

The ALJ also applied the Federal Rules of Evidence to this proceeding, which is contrary to the regulatory mandate applicable to the adjudication of whistleblower complaints under 29 C.F.R. Part 24. *See, e.g.,* HT at 28, 2072-74. The prohibition against the application of formal rules of evidence in the adjudication of whistleblower complaints under Part 24, which is found at Section 24.6(e)(1) of the current version of Title 29 of the Code of Federal Regulations, is consistent with the standard generally applicable to the admissibility of evidence in non-jury, administrative hearings.[41/] *See Fugate v. Tennessee Valley Auth.,* Case No. 93-ERA-0009, Sec'y Dec., Sept. 6,

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[39/](...continued)
and the well established principle, discussed *supra*, that the filing of OSHA complaints may constitute activity protected under the environmental acts. *See, e.g.,* HT at 376-77.

[40/] We note the following exclusionary errors as examples: HT at 874-78 (excluding CX 105, 9/91 personal physician's recommendation that Melendez be excused from fire training), 985-87 (excluding evidence of OSHA complaints filed by Melendez), 1364-65 (excluding CX 138, which is a March 19, 1987 letter from the BOP industrial hygienist to Melendez, in which the hygienist responds to Melendez' request for information regarding a possible link between chemicals being processed at the BOP and liver malfunctions),1945-54 (excluding Silkowski's 4/7/92 report to Fischer regarding Melendez' raising of beryllium copper health hazard posed by toolroom hammers), 2040-41 (interrupting cross-examination of Vacek regarding BOP procedures for reporting exposure/illness/injury), 2048-53 (interrupting cross-examination of Vacek relevant to work refusal on 1/13/92), 2076-78 (interrupting cross-examination of Vacek relevant to re-scheduling of 4/6/92 medical appointment and to beryllium copper splinter issue), 2247 (interrupting cross-examination of McLain regarding familiarity of BOP managers with Abraham of Texans United), 2281-82 (interrupting cross-examination of McLain regarding BOP procedures for recording exposures under the TSCA). The foregoing list is illustrative rather than inclusive. On remand, the parties should specify any further exclusions of evidence to be re-examined by the ALJ.

[41/] The provision currently found at Section 24.6(e)(1) was previously codified at 29 C.F.R. 24.5(e)(1). (continued...)

1995, slip op. at 3-4 (citing *Builders Steel Co. v. Comm'r of Internal Rev.,* 179 F.2d 377 (8th Cir. 1950)); K.C. Davis, Administrative Law, 2d Ed., Vol. 3, Ch. 16, Evidence (1980). When the general rules of practice for DOL administrative hearings found at Part 18 of Title 29 and the regulations promulgated under particular programs, such as the regulations at 29 C.F.R. Part 24, are in conflict, the programmatic regulations are controlling. *See* 29 C.F.R. §§18.1(a), 18.1101(c). The Secretary and this Board have stated that, under the *Builders Steel* principle, the ALJ as a general rule should refrain from excluding evidence on a technical basis but should consider factors relevant to reliability and probative value in determining the weight to be accorded contested evidence. *See, e.g., Asst. Sec'y and Ciotti v. Sysco Foods of Phila.,* ARB Case No. 98-103, July 8, 1998, slip op. at 6. On remand, the ALJ should apply the foregoing principles in determining evidence admissibility.

In ruling on the relevancy of evidence on remand, the ALJ must apply a standard consistent with the broad range of circumstantial evidence that may be probative of the question of retaliatory intent. *See Seater*, slip op. at 4-8 (construing controlling regulation regarding relevancy at 29 C.F.R. §24.5(e)(1) (1995), in relationship with directory regulation at 29 C.F.R. §18.403 and mandate of Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d)). The standard provided by Section 24.6(e)(1) regarding the exclusion of only such evidence as is "immaterial, irrelevant or unduly repetitious," incorporates the standard provided by Section 7(c) of the APA, 5 U.S.C. §556(d), and differs from the analogous provision found in the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, at 29 C.F.R. §18.403. *See Seater*, slip op. at 6 n.8.[42/] On remand, the ALJ must also re-examine the exclusion of evidence that he found to be cumulative, *see, e.g.,* HT at 407-12,[43/] in view of the foregoing standard, and he must provide the parties an opportunity to respond accordingly.[44/]

[41/](.. .continued)
See 63 Fed. Reg. 6613 (1998) (Dep't of Labor, 29 CFR Part 24, Final Rule).

[42/] As stated by the Board in the *Seater* decision, "The mandate of Section 24.5(e)(1) is consistent with the nature of the evidence presented in a circumstantial evidence case of retaliatory intent, some of which may appear to be of little probative value until the evidence is considered as a whole . . . ." *Seater*, slip op. at 6 n.8.

[43/] The ALJ excluded the September 6, 1991 memorandum from Melendez to Maier that is identified as CX 35, apparently because he believed it to be cumulative and because he did not recognize the significance of the document under the TSCA. HT at 407-12, 884-86. The memorandum provides more detail than does the pertinent testimony regarding Melendez' activity in filing his first written request with Maier for information regarding the basis for his transfer to the toolroom, an action that may qualify for protection under the TSCA. *See* HT at 407-08. In determining whether documentary evidence is "unduly repetitious," the ALJ should be mindful of the potential significance of such evidence in the corroboration or contradiction of witness testimony.

[44/] The ALJ's general reference to the BOP managers' knowledge that Melendez "may have been the employee who filed an OSHA complaint," R.D.O. at 27, does not cure Melendez' lack of opportunity to adduce evidence relevant to the issue of retaliatory animus related to that and similar activities. It is impossible to anticipate what the testimony of the various supervisory personnel who were called as

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VI. Retaliatory intent issues

A. Summary of points addressed

As previously noted, Melendez' case focuses on four personnel actions taken by Exxon:

1. Transferring Melendez from the flare loss technician position to the toolroom;
2. Requiring Melendez to participate in training programs that exposed, or could have exposed, Melendez to airborne hydrocarbons;
3. Placing Melendez on decision-making leave;
4. Terminating Melendez' employment.

Comp. Brief at 7-16, 19-24; *see* R.D.O. at 24. We previously discussed the relevance of the managerial actions preceding Melendez' termination, within the discussion of the timeliness of the complaint, at Part III. To reiterate, any of those actions, although not timely challenged by Melendez as independently actionable, is relevant to the retaliatory intent analysis under either of the following rationales:

> 1) If the previous action were cited by Exxon as contributing to the termination decision, it is an integral part of the termination decision and must be evaluated accordingly.
> 2) If the previous action was not cited by the decision-makers as a factor in reaching the termination decision, it must be evaluated to determine whether, as urged by Melendez, it provides evidence that the decision-makers were motivated by retaliatory intent in reaching the decision.

See Odom v. Anchor Lithkemko/Int'l Paper, ARB Case No. 96-189, Oct. 10, 1997, slip op. at 6 n.6 and cases cited therein; *Diaz-Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Sec'y Dec., Jan. 19, 1996, slip op. at 21-22 and cases cited therein.

[44/](..continued)
witnesses by Exxon would have been had the ALJ allowed Melendez to cross-examine those witnesses regarding their reaction to all of Melendez' activities that may be found on remand to qualify for protection under the environmental acts. Moreover, as the record in this case currently stands, it does not support the conclusion that this is a case involving a nominal level of protected activity and overwhelming evidence of a legitimate basis for the challenged actions so as to compel a decision in favor of the employer under a mixed, or dual, motive analysis. *Cf. Lockert v. United States Dep't of Labor,* 867 F.2d 513, 517 (9th Cir. 1989) (upholding dismissal of complaint filed by whistleblower whose safety complaints were not remarkable, who had previously been absent without contacting the employer for three days and who was terminated following violation of company rule against leaving one's work area without permission); *Straub v. Arizona Public Service Co.,* Case No. 94-ERA-37, Sec'y Dec., Apr. 15, 1996 (dismissing complaint of employee who engaged in minimal, unremarkable protected activity and who was terminated based on egregious misconduct in violation of written company policy).

We begin our analysis of the retaliatory intent issue by summarizing the essential points of the discussion that follows. The ALJ concluded that both grounds articulated by Exxon for terminating Melendez' employment -- the prior DML discipline and Melendez' "flagrant and deliberate disobedience" -- were legitimate, non-retaliatory, bases for the termination action. Both grounds must be assessed in light of the decision the Board has reached.

As previously noted, the DML was based on (1) Melendez' refusal to complete the 1991 work permits training, and (2) Melendez' unauthorized departure from the plant in January 1992. However, neither of these underlying events has been properly analyzed, based on a fully developed evidentiary record, to determine whether it constituted protected activity. If these acts do qualify for protection, then the DML would not provide a legitimate basis for Melendez' termination.

For similar reasons, the second basis articulated by Exxon for Melendez' termination must be reevaluated, particularly in light of the "provocation doctrine." Because of the ALJ's failure to fully comprehend the nature of Melendez' protected activity, especially under Section 8(c) of the TSCA, his conclusion that Melendez' refusal to attend a meeting ordered by management constituted "flagrant and deliberate disobedience" fails to account for evidence relevant to the provocation doctrine. That doctrine is brought into play by Melendez' contention that he had become an increasingly demoralized and frustrated employee due to an inability to gain a satisfactory response from management to concerns raised and actions taken that may qualify for protection under the environmental acts. In the alternative, the termination decision must be evaluated in light of all relevant evidence concerning past practice at the BOP as well as any findings regarding further protected activity that are rendered on remand. At the same time, Melendez' reliance on prior personnel actions (*e.g.,* the transfer to the tool room and the requirement that Melendez take fire training) must be reassessed -- upon a fully developed record -- for evidence of retaliatory animus even though not cited by Exxon as contributing to the termination decision.

B. Retaliatory intent analysis

As previously noted, to prevail in this case, Melendez must establish by a preponderance of the evidence that Exxon decision-makers were motivated, at least in part, to take the challenged adverse actions by protected activity. *See Simon v. Simmons Foods,* 49 F.3d 386, 389 (8th Cir. 1995), *aff'g Simon v. Simmons Industries, Inc.,* Case No. 87-TSC-2, Sec'y Dec., Apr. 4, 1994. On remand, in light of a supplemented record and the arguments of the parties, the ALJ should evaluate all the events that are at issue in determining whether Melendez has met his burden of proof, in accordance with pertinent case law and other authority.

Relevant to the question whether retaliatory animus played a role in the termination decision, the ALJ found that, at the time the termination decision was made, management knew that Melendez had expressed concerns that he was experiencing health problems that he believed were linked to exposure at the BOP, that Melendez had requested copies of BOP documents pertaining to plant emissions and Melendez' chemical exposure, that Melendez had visited a State of Texas environmental protection agency, had been in contact with a local environmental activist, had engaged an attorney, and that Melendez "may have been the employee" who had initiated an OSHA inspection of the toolroom area. *Id.* The ALJ concluded that the record did not demonstrate

retaliatory animus towards Melendez. R.D.O. at 29. In support of that conclusion, the ALJ stated that management's discussions in March and April 1992 with Melendez to explore the possibility that Melendez could be reassigned from the toolroom to a different position at the BOP demonstrated a lack of hostility "about Complainant's concerns." R.D.O. at 29.

In addition to the fact that the ALJ was not focused on all of Melendez' "concerns" that may qualify for protection under the environmental acts, the ALJ's conclusion that the record demonstrates a lack of hostility "about Complainant's concerns" fails to take into consideration case law holding that hostility toward whistleblower activity may manifest itself in a variety of ways. The most obvious of these are personally hostile statements made, or actions taken, by managerial personnel. *See, e.g., Harrison v. Stone & Webster Engineering Group,* Case No. 93-ERA-44, Sec'y Dec., Aug. 22, 1995, slip op. at 8-9, *aff'd sub nom. Stone & Webster Engineering Corp. v. Herman,* 115 F.3d 1568 (11th Cir. 1997). Retaliatory animus may also manifest itself, however, in more subtle ways and in the absence of overtly hostile conduct. Evidence of managerial practices that effectively interfere with the raising of statutorily protected concerns will provide support for a finding of antagonism toward statutory requirements and those who act in reliance on such requirements. *Compare Talbert v. Washington Public Power Supply System,* ARB Case No. 96-023, Sept. 27, 1996, slip op. at 8 (faulting employees who fail to follow the internal chain-of-command in raising a safety or health concern is inconsistent with whistleblower provisions and indicative of hostility) *and Nichols v. Bechtel Const. Co.,* Case No. 87-ERA-0044, Sec'y 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) *with Moon v. Transp. Drivers, Inc.,* 836 F.2d 226, 229-30 (6th Cir. 1987) (citing employer's receptivity to safety complaints in concluding that complaint filed under employee protection provision of the STAA lacked merit) *and Gibson v. Arizona Public Service Co.,* Case Nos. 90-ERA-29/46/53, Sec'y Dec., Sept. 18, 1995, slip op. at 7 (citing employer's "pervasive policy encouraging safety complaints" in concluding that whistleblower complaint lacked merit).[45/]

[45/] Relevant evidence in the record that is before us includes Maier's testimony regarding his March 1992 response to Melendez' September 30, 1991 written harassment complaint, which cited Section 8(c) of the TSCA, HT at 2136-37, 2164-67. Other evidence of supervisory reaction to Melendez' activities that may qualify for protection under the environmental acts includes the testimony of Fischer concerning the basis for his conclusion that Melendez' information requests had become burdensome as of March 1992, HT at 1883-94. The ALJ should also consider the evidence regarding the BOP "open door" policy for raising concerns to a higher level at the plant, CX 198 (Starcher dep.) at 133-34, 269-73; CX 197 (Leon dep.) at 191-92, in conjunction with Maier's testimony that, before an employee went to the second-level supervisor, the employee should seek the first-line supervisor's "permission," HT at 2197-98. The ALJ should also evaluate Melendez' testimony regarding the issue of whether Silkowski acted in a manner consistent with BOP stated policy for recording allegations pursuant to Section 8(c) of the TSCA. HT at 949; *see* CX 13, 14. The ALJ should also consider the testimony of managerial staff indicating that requests for health related data such as those made by Melendez were quite rare at the BOP. CX 198 (Starcher dep.) at 181; RX 70 (Silkowski dep.) at 174-76; *see* RX 70 at 175-86 (Silkowski, testifying that he discussed Melendez' 10/29/91 written request for personnel exposure monitoring results and material safety data sheets regarding composition of substances with his supervisor and BOP legal counsel before responding).

The ALJ also failed to apply the proper legal standard for determining whether an action was adverse to Melendez' interests for purposes of a retaliatory intent analysis. *See* R.D.O. at 24-25. Both the CAA and the TSCA prohibit discrimination "with respect to [the employee's] compensation, terms, conditions or privileges of employment . . . ." 15 U.S.C. §2622(a); 42 U.S.C. §7622(a). In addition to reciting the preceding statutory language, the implementing regulation describes prohibited conduct as that which "intimidates, threatens, restrains, coerces, blacklists, discharges or in any other manner discriminates against any employee . . . ." 29 C.F.R. 24.2(b). In rejecting comments calling for abandonment of the preceding regulatory language when the Part 24 regulations were amended in 1998, the Assistant Secretary for Occupational Safety and Health stated, "The [Section 24.2(b)] language is simply a fuller statement of the scope of prohibited conduct, which encompasses discrimination of any kind with respect to the terms, conditions or privileges of employment." 63 Fed. Reg. 6614, 6616 (1998). A review of the pertinent body of law developed by the Secretary, this Board and the courts reveals that, consistent with Section 24.2(b), a wide range of unfavorable personnel actions have been held to constitute adverse action within the context of employment discrimination complaints. *See, e.g., Nathaniel v. Westinghouse Hanford Co.,* Case No. 91-SWD-2, Sec'y Dec., Feb. 1, 1995, slip op. at 13-14. The question of whether such action was motivated by retaliatory intent is not relevant to the threshold issue of whether the action is adverse. *Diaz-Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Sec'y Dec., Jan. 19, 1996, slip op. at 6. In determining whether the toolroom reassignment and the 1991 work permits training and fire training requirements constitute adverse actions on remand[46] the ALJ must apply the foregoing authority and other pertinent precedent.[47]

The ALJ must also revisit the question of whether the DML day was imposed as a legitimate management decision, in light of the supplemented record and the arguments of the parties on remand, and according to pertinent case law. Fischer and Maier testified that the decision to impose a DML day was made on January 15, 1992, based on two factors, *viz.,* that Melendez had refused to take work permits training as required for 1991 and that he had departed the plant on the morning of January 13, 1992, without authorization. R.D.O. at 26-27, 29; *see* HT at 1605-08 (Fischer), 2129-30 (10/13/94 vol.), 2132-33 (Maier); RX 19, 20. The ALJ credited management's explanation and concluded that Melendez had failed to complete the work permits training in 1991 "primarily because he did not want to." R.D.O. at 27. The ALJ also concluded that, if Melendez "had a

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[46] Exxon does not dispute that the DML discipline, as well as Melendez' termination, constitutes an adverse personnel action. Resp. Brief at 16. For further guidance on remand concerning the toolroom reassignment issue, we note the following holdings: *DeFord v. Sec'y of Labor,* 700 F.2d 281, 287 (6th Cir. 1983) (transfer to "far less attractive and prestigious" position constituted adverse action); *Jenkins v. U.S. Environmental Protection Agency,* Case No. 92-CAA-6, Sec'y Dec., May 18, 1994, slip op. at 14-16 (transfer from "challenging, technical work that . . . required interaction with the regulated community and the public" to an isolated, non-technical position constituted adverse action). We also note the following relevant evidence: HT at 775-77, 2309 (Melendez), 1414, 1418-19 (Cognata), 2131-32, 2134-35 (Maier).

[47] In examining whether the work permits training and/or the fire training requirement imposed in 1991 constituted unfavorable personnel action, the ALJ should apply the following case law: *Studer v. Flowers Baking Co.,* Case No. 93-CAA-00011, Sec'y Dec., June 19, 1995, slip op. at 4 (training frequently provides a professional opportunity that is beneficial to the employee); *Thomas v. Arizona Public Service,* Case No. 89-ERA-19, Sec'y Dec., Sept. 17, 1993, slip op. at 8-14 ("demeaning" training challenged as discriminatory).

legitimate health concern regarding the work permit module," Melendez could have completed the written portion of that training and not the field exercise, and that Melendez "should have discussed this matter with his supervisor or a company physician." *Id.* Regarding the January 13, 1992 incident, the ALJ determined that "[i]rrespective of whether Complainant was just angry or angry and ill, he did not follow the established procedure for obtaining permission to leave . . . ." *Id.* at 26.[48/] In support of his conclusion that Melendez had not established that the 1991 fire and work permit training requirements were retaliatory, the ALJ relied on his finding that all other BOP manufacturing technicians had been required to take the same training. *Id.* at 25-26.

The ALJ's analysis of the bases for the DML discipline does not reflect consideration of all relevant evidence in the record as it now stands or of applicable legal principles. Furthermore, Melendez challenges the ALJ's crediting of Exxon's explanation that Melendez' departure from the BOP on January 13, 1992 was unauthorized, in addition to contending that the 1991 work permits and fire training requirements were retaliatory. Comp. Brief at 14-16. The two incidents cited by management in support of the DML discipline must thus be examined in light of Melendez' arguments to determine whether the DML day discipline was legitimately imposed or not. *See Odom v. Anchor Lithkemko/Int'l Paper,* ARB Case No. 96-189, Oct. 10, 1997, slip op. at 6 n.6 (quoted in pertinent part at n.15, *supra*) and cases cited therein.

Melendez' arguments concerning the 1991 training requirements and his departure from the BOP on January 13, 1992, focus primarily on his concerns about ill health effects that he believed were caused by exposure to chemicals at the BOP. Melendez argues that his reluctance to complete the work permits training, as well as fire training, and his January 13 departure from the BOP were the result of his concern about exposure to hydrocarbons. Comp. Brief at 11-16. With regard to the work permits training, Melendez specifically urges that he believed that the training required his participation in a field demonstration, which was to be conducted in the process unit area of the BOP. Comp. Brief at 13-14; *see* HT at 1097-1103 (Melendez). Concerning his departure from the plant on January 13, 1992, Melendez asserts that he had become ill when he arrived in the toolroom that morning and found rod-out tools had been cleaned in the toolroom, leaving fumes from the plant chemicals on the tools and from the solvent used to clean them. Comp. Brief at 9, 14-17; *see* HT at 472-73, 969-71 (Melendez), 1984-99 (Vacek); CX 39, 142. Melendez also denies that he failed to follow company procedure when he left the BOP on January 13, urging that his contacts with Silkowski, the BOP industrial hygienist, and with Vacek and Fischer, his immediate and second-level supervisors, before his departure were consistent with acceptable BOP practice. Comp. Brief at 14-17; Reply Brief at 10; *see* CX 39. Melendez also contends that management was aware of his exposure concerns related to the work permits training and the January 13, 1992 incident when it imposed the DML day discipline. Comp. Brief at 11-15. In addition to citing hearing testimony in support of this contention, Melendez also relies on the September 30, 1991 harassment complaint

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[48/] The testimony of Vacek, Fischer and Melendez regarding the events of January 13, 1992, is essentially in agreement. The evidence concerning the issue of whether Melendez asserted to his supervisors that day that he was ill, as well as angry and frustrated by what he viewed as a lack of responsiveness to his health concerns, is in conflict. *See* R.D.O. at 5-6, 8, 12-13. The ALJ failed to provide a basis for his resolution of this conflict against Melendez, R.D.O. at 26, and must do so on remand. *See NLRB v. Cutting, Inc.*, 701 F.2d 659, 667 (7th Cir. 1983).

that he filed with Fischer and the BOP Human Resources Office, CX 32.[49/] In that complaint, Melendez referred to his health history, to the exercise of his rights under Section 8(c) of the TSCA, and challenged the requirement that he "participate in training such as Fire Training." *Id.*

On remand, the ALJ should determine whether Melendez' failure to take work permits training by the December 31, 1991 deadline qualifies as a protected work refusal under *Pensyl v. Catalytic, Inc.,* Case No. 83-ERA-1, Sec'y Dec., Jan. 13, 1984, slip op. at 7. In determining whether Melendez reasonably believed that the work permits training would expose him to a health hazard, the ALJ must consider the relevant testimony of BOP managerial personnel concerning precautions that they believed were appropriate in response to Dr. Pruett's recommendation that Melendez be removed from the process unit area.[50/] *See Pensyl,* slip op. at 7. The ALJ must also evaluate the testimony pertinent to the question of whether or not Melendez had reasonably misunderstood that he was required to participate in the field demonstration at the time that he refused to engage in the work permits training.[51/] In determining whether Melendez properly communicated any health-

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[49/] Documentary evidence and managerial testimony indicate that the complaint was addressed to the Human Resources Office and was also submitted to Fischer. CX 32; HT at 1576-77 (Fischer). As of January 17, 1992, when the DML day discipline was imposed, Melendez' September 30, 1991 complaint had not been responded to by either the Human Resources Office or Fischer. HT at 2136-37, 2164-67 (Maier). It was ultimately responded to in a meeting held on March 11, 1992 by BOP managerial staff with Melendez, HT at 2164-67, after Melendez filed a written inquiry regarding the status of management's investigation of the complaint, CX 36.

[50/] The record that is now before us contains the deposition testimony of Leon, CX 197, Ulczynski, RX 68, and Hopkins, CX 196, that pertains to the gravity of Dr. Pruett's recommendation that Melendez be removed from the BOP process unit area. During cross-examination of Maier by Melendez' counsel, the following exchange occurred:

> Q. With regard to Exxon's policy as it related to safety, if an employee is placed in an unsafe, unhealthy situation, is it his responsibility to remove himself from that situation?
> JUDGE KERR: Yes, ma'am?
> MS. VALDERRAMA: Asked and answered, I think.
> JUDGE KERR: Yes, and we're talking about Mr. Melendez' perception and not an individual who has objectively been placed in an unsafe situation.

HT at 2198-99. As with any finding of fact, any findings rendered by the ALJ regarding the reasonableness of Melendez' concerns about exposure to chemicals at the BOP must be supported by evidence of record. *See* 5 U.S.C. §557(c)(3)(A); 29 C.F.R. §18.57(b).

[51/] On direct examination, Fischer testified that the instructions for the work permits training module, RX 8, indicated that the field demonstration segment was not required for employees, like Melendez, whose jobs did not require the writing of work permits, HT at 1587-93, thus suggesting that Melendez should have known, from a review of the training materials that he did not have to engage in the field demonstration. Fischer's testimony on this issue must be evaluated in light of the pertinent language included in the training

(continued...)

related concerns about work permits training to BOP managerial personnel under the *Pensyl* standard, the ALJ should examine Melendez' September 30, 1991 harassment complaint, CX 32, along with other pertinent evidence. In addition, if the ALJ concludes that the *Pensyl* work refusal doctrine does not apply, he must evaluate the conflicting evidence relevant to the question of whether the BOP had an established policy regarding the steps to be followed by employees in leaving the plant, then analyze Melendez' conduct on January 13, 1992, and management's decision to impose the DML in light of his findings. *See Shulman v. Clean Harbors Environmental Services,* ARB Case No. 99-015, Oct. 18, 1999, slip op. at 10; *Fabricius v. Town of Braintree,* ARB Case No. 97-144, Feb. 9, 1999, slip op. at 4.

Also relevant to the ALJ's analysis on remand is the principle that evidence concerning the past practice of the employer in similar situations may establish, or refute, a finding that retaliatory intent played a role in a challenged employment action. *See DeFord v. Sec'y of Labor*, 700 F.2d 281, 287 (6th Cir. 1983).[52/] This is true although, as discussed by the court in *DeFord*, it is not necessary for the whistleblower to establish disparate treatment in order to prevail in a retaliation complaint because an employer may discriminate in a similar manner against others engaged in protected activity. *DeFord,* 700 F.2d at 286. The ALJ thus erred in relying solely on his finding that all manufacturing technicians had been required to take the fire and work permits training in 1991 as dispositive of Melendez' contention that management's handling of the 1991 training requirements demonstrated retaliatory animus. On remand and in light of a fully developed record, the ALJ should also re-examine Melendez' argument that a change in management's approach to his request for an exemption from the fire training requirement in 1991 indicates hostility toward Melendez' raising of concerns about airborne hydrocarbons. Comp. Brief at 11-13.

As previously noted, the ALJ credited management's explanation for the termination decision and characterized Melendez' failure to attend the committee meeting on April 6, 1992, as "flagrant and deliberate disobedience." R.D.O. at 29. Pertinent to Melendez' contention that he had been given more responsibilities by Vacek on April 6 than he could reasonably be expected to fulfill, Comp. Brief at 19-21; *see* HT at 735-45, the ALJ concluded that Melendez could have attended "at least part" of the committee meeting. R.D.O. at 28.

The ALJ's analysis is flawed because it does not take into consideration the role of all the activities that Melendez engaged in that may qualify for protection -- particularly under Section 8(c) of the TSCA -- and whether managerial reaction to those activities demonstrates retaliatory animus. In addition, the retaliatory intent analysis does not reflect consideration of Melendez' related

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[51/](.. .continued)
module identified as RX 8 and Vacek's testimony that, after Melendez' return from the DML day discipline, Vacek had to direct an inquiry to the training officer to determine whether Melendez was required to participate in the field demonstration, HT at 1976, 2009, 2094-97 (10/12/94 vol.); *see* HT at 2195-97 (Maier).

[52/] For further guidance on remand, we cite the following decisions: *Lockert v. United States Dep't of Labor,* 867 F.2d 513, 516, 517 (9th Cir. 1989); *Fabricius v. Town of Braintree,* ARB Case No. 97-144, Feb. 9, 1999, slip op. at 4; *Dysert v. Westinghouse Electric Corp.,* Case No. 86-ERA-39, Sec'y Dec., Oct. 30, 1991, slip op. at 5-6 and cases there cited.

argument that actions that he took that are characterized by Exxon as insubordinate were prompted by concerns about his health which, Melendez contends, were heightened by BOP management's response and, at times, lack of response to Melendez' expressions of concern. Comp. Reply Brief at 10; *see* Comp. Brief at 13-15; CX 32. We have already discussed Melendez' argument as it relates to the *Pensyl* work refusal doctrine, in connection with the 1991 training requirements and Melendez' departure from the BOP on January 13, 1992. Melendez' argument also requires that the ALJ determine whether one or more of the events cited by Exxon as grounds for disciplinary action may qualify as intemperate acts subject to defense under the justifiable provocation doctrine. That doctrine, in essence, mandates that "an employer may not rely on employee conduct that it has unlawfully provoked as a basis for disciplining an employee." *NLRB v. Vought Corp.,* 788 F.2d 1378, 1383-84 (8th Cir. 1986).[53/] On remand, the parties must be allowed to adduce further evidence and offer additional argument regarding the applicability of the justifiable provocation doctrine. In addition, in examining the question of retaliatory intent in relation to the termination decision, the ALJ must address Melendez' argument that he was treated differently from other BOP employees who had failed to attend committee meetings. Comp. Brief at 19, 21; *see DeFord,* 700 F.2d at 287; RX 68 (Ulczynski dep.) at 137-54; RX 69 (Gilliam dep.) at 125-26; CX 198 (Starcher dep.) at 183-86; *cf. Lockert v. United States Dep't of Labor*, 867 F.2d at 517 (termination of whistleblower upheld because the complainant's safety complaints were not unusual, employer had warned complainant about violating the employer's clear cut rule against leaving the work area, and the complainant had been absent without contacting the employer for three days).

The ALJ must also evaluate the evidence in accordance with general principles applicable to an employment discrimination complaint that is founded on circumstantial evidence. The recent decision of the United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.,* 120 S.Ct. 2097 (2000), *rev'g* 197 F.3d 688 (5th Cir. 1999) contains a comprehensive discussion of the parties' burdens under the framework provided by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), a case arising under Title VII of the Civil Rights Act of 1964 that has been regularly applied to Part 24 whistleblower cases by the Secretary, this Board and the United States Courts of Appeals, *see, e.g., Kahn v. U. S. Sec'y of Labor,* 64 F.3d 271, 277 (7th Cir. 1995). We note two basic principles that have frequently been relied on by the Secretary and this Board in whistleblower cases that are quoted in *Reeves*. First, as stated in *St. Mary's Honor Center v. Hicks*, 450 U.S. 502 (1993), to find discrimination established, "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *St. Mary's Honor Center*, 450

[53/] For further guidance on remand, we note the following decisions: *Dunham v. Brock,* 794 F.2d 1037, 1041 (5th Cir. 1986); *NLRB v. M & B Headwear Co.,* 349 F.2d 170 (4th Cir. 1965), *cited in Moravec v. HC & M Transportation,* Case No. 90-STA-44, Sec'y Dec., Jan. 6, 1992, slip op. at 14-15 (arising under analogous provision of the Surface Transportation Assistance Act, currently codified at 49 U.S.C. §31105); *NLRB v. R.C. Can Co.,* 340 F.2d 433, 435-36 (5th Cir. 1965). In a recent decision upholding the application of the provocation doctrine by the National Labor Relations Board under Section 7 of the NLRA, 29 U.S.C. §157, the United States Court of Appeals for the Fifth Circuit summarized the body of case law thus, "Flagrant conduct of an employee even though occurring in the course of Section 7 activity may justify disciplinary action by the employer. Not every impropriety does, however, because the employee's right to engage in concerted activity permits some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect." *Mobil Exploration and Producing U.S. v. NLRB,* 200 F.3d 230, 242-43 (5th Cir. 1999).

U.S. at 519, *quoted in Reeves*, 120 S.Ct. at 2108. The second guideline that we believe is particularly instructive is the observation of the Court in *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711 (1983), that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes" for purposes of proving intentional discrimination. *Aikens*, 460 U.S. at 716, *quoted in Reeves*, 120 S.Ct. at 2105-06. Finally, we note the guidance provided by the United States Court of Appeals for the Eighth Circuit in *Ellis Fischel State Cancer Hosp. v. Marshall,* a case which arose under the whistleblower protection provision of the Energy Reorganization Act of 1974,"[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." 629 F.2d 563, 566 (8th Cir. 1980).

In sum, the ALJ must re-visit the retaliatory intent issue on remand, based on a supplemented evidentiary record, the parties' arguments, and his remand findings concerning protected activity.

ORDER

Accordingly, the case is remanded to the Administrative Law Judge for further proceedings consistent with this opinion.

SO ORDERED.[54/]

E. COOPER BROWN
Member

Paul Greenberg, Chair, concurring:

I concur with the result reached in the Decision and Order of Remand (Remand Order), but write separately because I feel that it overreaches in certain respects.

Timeliness – I agree fully with the holding that Melendez' whistleblower complaint was timely filed. Remand Order at 7-10. The ALJ's findings on this issue clearly are supported by the record and applicable law.

ALJ's exclusion of evidence – I also agree that the ALJ incorrectly precluded Melendez from introducing some evidence that may relate to Melendez' concerns about Exxon Chemicals' compliance with the unique recordkeeping requirements of Section 8(c) of the Toxic Substances Control Act (TSCA), as well as Exxon Chemicals' general compliance with the Clean Air Act (CAA). Remand Order at 20-23, 31-32. The ALJ interpreted too narrowly the range of activities that may be protected under the TSCA and CAA, relying on a discussion in the Secretary's earlier

[54/] Board Member Cynthia L. Attwood took no part in the consideration of or the decision in this case.

1994 Decision and Order of Remand in this case. As the Secretary correctly noted then, Labor Department administrative law judges – like this Board – have no jurisdiction over complaints under the Occupational Safety and Health Act, 29 U.S.C. §660(c)(1)(OSHA). *See* [Secretary's] Dec. and Ord. of Rem. (Mar. 21, 1994) slip op. at 8. However, it does not follow – as the ALJ seems to have assumed – that concerns about possible violations of the Occupational Safety and Health Act and concerns about violations of the environmental statutes are mutually exclusive. This is particularly true in connection with the recordkeeping requirements of TSCA §8(c), which require employers to "maintain records of significant adverse reactions to health or the environment . . . alleged to have been caused by . . . [a chemical] substance or mixture." 15 U.S.C. §2607(c).

Inasmuch as the recordkeeping requirements of the TSCA apply to data that originate from any source, *including data concerning significant health effects on employees*, there is plainly the potential for overlap between TSCA and OSHA complaints. Under some circumstances, there may be a similar nexus between CAA and OSHA concerns. The ALJ's exclusion of evidence relating to what he viewed solely as OSHA matters prevented Melendez from introducing evidence that may be material to Melendez' claim that Exxon Chemicals engaged in unlawful discrimination under the environmental statutes. I therefore agree with my colleague that the record in this matter is incomplete. On remand, Melendez and Exxon Chemicals must be given an opportunity to develop a complete record in this regard.

Analysis of protected activities – Finally, I join my colleague in urging the ALJ to determine, as a threshold consideration, which of Melendez' actions constituted protected activity under the environmental statutes. Remand Order at10-12. Even in cases in which the ALJ or this Board ultimately conclude that no unlawful discrimination took place, the preliminary step of evaluating the protected or non-protected status of the actions that prompted the complaint is procedurally useful, helping to focus the discrimination inquiry.[55/]

With regard to the rest of the Remand Order, I simply note that we are vacating the ALJ's prior recommended decision, and directing him to issue a new decision in the case after completing the evidentiary record. In deciding any whistleblower case, an ALJ must engage in a studied review of the record and a careful assessment of the legal arguments raised by the parties. Rather than issue extensive directives to the ALJ, in this instance I would leave the drafting of a new recommended decision to his sound discretion, based upon the record before him and the arguments of the parties. I therefore decline to join my colleague in those aspects of the Remand Order not specifically addressed in this concurrence.

PAUL GREENBERG
Chair

[55/] Of course, it generally would not be necessary to explore the "protected activity" question in cases where no adverse action has occurred. However, it is undisputed in this case that Melendez suffered an adverse action, *i.e.*, he was discharged.