In the Matter of:

BRENDA W. SHELTON,

COMPLAINANT,

v.

OAK RIDGE NATIONAL LABORATORIES;
LOCKHEED MARTIN ENERGY SYSTEMS, INC.;
MARTIN MARIETTA TECHNOLOGIES, INC.;
LOCKHEED MARTIN CORPORATION; and
U.S. DEPARTMENT OF ENERGY,

RESPONDENTS.

ARB CASE NO. 98-100

ALJ CASE NO. 95-CAA-19

DATE: March 30, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:

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

For Respondents:
E. H. Rayson, Esq. and John C. Burging, Jr., Esq., *Kramer, Rayson, Leake, Rodgers, & Morgan, Knoxville, Tennessee*
Robert E. James, Esq., *Oak Ridge Operations Office, U.S. Department of Energy, Oak Ridge, Tennessee*

FINAL DECISION AND ORDER

I. INTRODUCTION

This case arises under the Clean Air Act, 42 U.S.C.A. §7622 (West 1995) ("CAA"), the Toxic Substances Control Act, 15 U.S.C.A. §2622 (West 1998) ("TSCA"), the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §9610 (West 1995) ("CERCLA"), the Solid Waste Disposal Act, 42 U.S.C.A. §6971 (West 1995) ("SWDA"), and

[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

the Safe Drinking Water Act, 42 U.S.C.A. §§300j-9(I) (West 1991) ("SDWA") (collectively, the "environmental acts") and the Energy Reorganization Act, 42 U.S.C.A. §5851 (West 1995) ("ERA").[2/] By this Order, and for the reasons set forth herein, we dismiss the complaint. The relevant facts follow.

II. BACKGROUND

Complainant Brenda Shelton is employed by Respondent Lockheed Martin Energy Systems, Inc. ("LMES"), as a senior health physics technician at LMES' Oak Ridge National Laboratory.[3/] As a health physics technician, Shelton is responsible for ensuring that personnel are protected from radiation exposure. In 1991, Shelton observed that an employee named C.D. (Bud) Varnadore was situated in an office that she believed contained hazardous and radioactive waste. Shelton advised Varnadore that this was not an appropriate place for his office and LMES eventually moved him to another location.

Varnadore later filed a whistleblower complaint against LMES. As part of the Varnadore litigation, Shelton's co-worker, Shar Hollis, gave a deposition in which she made statements regarding an incident in August 1991 between Shelton and Shelton's second line supervisor, Ron Mlekodaj. Mlekodaj read the deposition, mistakenly assumed that the deponent was Shelton rather than Hollis, and took offense at what he believed were mischaracterizations of statements he made during the August 1991 incident. As a result, Mlekodaj harbored negative feelings toward Shelton. Mlekodaj played a limited role in LMES' decision to issue her an Oral Reminder several years later.[4/]

However, Shelton's problems with her supervisors did not begin with Mlekodaj and, in fact, predate her activities with regard to Varnadore. According to Shelton, her problems date back to at least 1987 when she accepted a position as a janitor.[5/] Since that time, Shelton has complained that her supervisors have given her unfair job assignments and held her to a different standard than her co-workers. Shelton concedes that some of her supervisors did not care for her personality and, in fact, the record shows that a number of them considered her boisterous, abrasive, verbally abusive, and difficult to supervise.

[2/] These statutes generally prohibit employers from discriminating against or otherwise taking action against an employee because the employee reported concerns regarding nuclear or environmental safety.

[3/] The Oak Ridge National Laboratory is government-owned. LMES operates the facility under a contract with Respondent Department of Energy ("DOE"). LMES is a wholly-owned subsidiary of Lockheed Martin Corporation ("LMC"). All corporate respondents in this case will be referred to collectively as the "Lockheed Respondents."

[4/] Because we determine that Shelton was not subject to adverse action, we need not decide the extent to which Mlekodaj's negative feelings about Shelton were the result of Shelton's protected activity and the extent of Mlekodaj's limited involvement in the decision to issue the Oral Reminder.

[5/] LMES initially hired Shelton as a clerk typist, but Shelton later accepted a position as a janitor so that she could work in the afternoons and attend college during the day.

In 1992, LMES assigned Shelton to assist the Instrumentation and Controls Division ("I&C"). One of her duties was to "green tag" instruments, a process for determining that instruments are free of contamination. On February 10, 1995, technician Clay Carpenter, approached Shelton and asked her to green tag some instruments. Shelton agreed. However, when Carpenter asked her where he should take the instruments, she exploded in a tirade of verbally abusive and profane language that lasted several minutes. Carpenter and another technician, William Roberts, had similar experiences with Shelton later that same day. Both technicians complained to their supervisors about Shelton's behavior, and LMES began investigating the incident.

As part of the investigation, LMES officials sat down with Shelton and asked her for her version of the events in question. Shelton, acting in a manner that witnesses described as "hostile," responded to the inquiry by tossing some papers across the table at the LMES officials. The papers turned out to be a workplace diversity complaint that she had prepared under the apparent assumption that no disciplinary action could be taken against her while her diversity complaint was pending. In the complaint, Shelton conceded that she used abusive language, blamed her behavior on stress, and essentially accused I&C of blowing the incident out of proportion. Inasmuch as Shelton's verbal abuse of her supervisors and co-workers was a recurring problem, and considering her hostile attitude during the investigation, LMES determined that formal disciplinary action was necessary. Therefore, on February 23, 1995, LMES issued her an "Oral Reminder" **S** the lowest step of formal discipline under LMES' disciplinary procedures. The Oral Reminder directed Shelton to refrain from using abusive and profane language.

On March 5, 1995, Shelton filed a complaint with the Administrator of the Department of Labor's Wage and Hour Division ("Administrator") asserting that the Oral Reminder was issued in retaliation for her involvement in the *Varnadore* case. Shelton identified the culpable parties as the Lockheed Respondents, DOE, the Oak Ridge National Laboratories ("ORNL"), and Dr. Wilbur Shultz, a former manager at ORNL who retired in late 1994. The Administrator investigated the complaint and determined that issuance of the Oral Reminder was retaliatory and that the Lockheed Respondents were liable. However, the Administrator found no evidence to support a finding that DOE or Dr. Shultz were responsible parties.

Shelton disagreed that DOE and Dr. Shultz were blameless in this matter. Therefore, she appealed the Administrator's decision by filing a timely request for a hearing with the Office of the Chief Administrative Law Judge ("OCALJ"). The Lockheed Respondents also sought to appeal the Administrator's decision; although they served copies of their request for hearing on the Administrator and all parties in the case, they failed to serve the request on OCALJ within five days as required by 29 C.F.R. §24.4(d) (1995).[6/] When Shelton discovered that the request

---

[6/] At the time Shelton filed her complaint, §24.4(d)(3)(i) stated:

> If on the basis of the investigation the Administrator determines that the alleged violation has occurred, the notice of determination shall include an

(continued...)

for hearing had not been served on OCALJ, she filed a motion for default judgment arguing that the decision of the Administrator automatically became final as a result of the Lockheed Respondents' failure to file a request for hearing with OCALJ within the five-day time limit. In their opposition, the Lockheed Respondents stated that, as far as they knew, their request for hearing had been timely forwarded to OCALJ and every party in the case and the Administrator. The Lockheed Respondents urged the Chief ALJ to apply principles of equitable tolling to this case and conclude that service on the Administrator is an equitable basis for satisfying the requirement for service on the OCALJ.

The Chief ALJ agreed that principles of equitable tolling applied to the time period for requesting a hearing under §24.4(d). Specifically, the Chief ALJ stated:

> Respondents timely notified every relevant party to this proceeding that it appealed the Administrator's decision except this Office. Thus the parties had an opportunity to prepare and respond to this appeal . . . every party knew full well of Respondents' intentions and proceeded with the matter as if the appeal was, in fact, filed with this office. Respondents made a clerical mistake that affected nothing but the initial processing of the case in this office. Thus, the facts of this case are distinguishable from other cases where no evidence has been provided to excuse an untimely filing.

Therefore, the Chief ALJ accepted Respondent's appeal, denied Shelton's request for default judgment, and referred the matter to an Administrative Law Judge ("ALJ") for a hearing.[7/]

Following a hearing, the ALJ found that, although Shelton had raised a number of claims against the Lockheed Respondents, they boiled down to just two: 1) her claim that the Oral Reminder was issued in retaliation for her participation in the *Varnadore* case and related matters, and 2) her claim, raised for the first time during the hearing, that the Oral Reminder was issued in retaliation for exposing I&C's repeated failure to repair an air monitor.[8/] After considering all of the evidence and testimony of record, the ALJ concluded that the Lockheed Respondents established by clear and convincing evidence that they would have taken the same

---

[6/](...continued)

> appropriate order to abate the violation, and notice to the respondent that the order shall become the final order of the Secretary unless within five calendar days of its receipt the respondent files with the Chief Administrative Law Judge a request . . . for a hearing.

[7/] Once this matter was before the ALJ, Shelton again raised her argument that the Administrator's decision became final when the Lockheed Respondents failed to file a timely request for hearing with OCALJ. The ALJ found no reason to disturb the OCALJ's decision on this issue.

[8/] As to Shelton's other claims, the ALJ found them either interrelated with or inseparable from these two claims, lacking in substance, not actionable under the ERA or the environmental acts, and/or time barred.

unfavorable personnel action against Shelton even if she had not participated in the *Varnadore* case or exposed deficiencies in I&C. Therefore, by Order issued March 10, 1998 ("RD&O"), the ALJ recommended that the complaint be dismissed. This appeal followed.

III. JURISDICTION

We have jurisdiction pursuant to 29 C.F.R. §24.8.

IV. STANDARD OF REVIEW

Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions. *See* 5 U.S.C.A. §557(b) (West 1996). As a result, the Board is not bound by the conclusion of the ALJ, but retains complete freedom to review factual and legal findings *de novo. See Masek v. Cadle Co.,* ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000).

V. DISCUSSION

A. THE ALJ DID NOT ERR IN DETERMINING THAT §24.4(d) WAS SUBJECT TO EQUITABLE TOLLING.

On appeal, Shelton reiterates her view that the Administrator's decision became final when the Lockheed Respondents failed to file a timely request for hearing with OCALJ and argues that the Chief ALJ's decision to the contrary is erroneous as a matter of law. At the outset, we note that Shelton herself filed a timely cross-request for hearing with OCALJ on "all issues and remedies in her March 5 complaint."[9/] Pursuant to §24.4(d), the decision of the Administrator does not become final if the complainant requests a hearing on the complaint. In light of Shelton's request for a hearing, even if we were to agree that the Lockheed Respondents' request for hearing was barred due to untimely filing, we would not conclude that the Administrator's decision became final. In any event, even if Shelton had not requested a hearing, the time limitation in 29 C.F.R. §24.4(d) is subject to principles of equitable tolling, and the ALJ did not err in applying those principles to this case.

Both the Secretary and this Board have held that the time limit for filing a request for hearing is not a jurisdictional prerequisite. *See Crosier v. Westinghouse Hanford Company*, 92-CAA-3 (Sec'y, Jan. 12, 1994); *Degostin v. Bartlett Nuclear, Inc*., ARB No. 98-042, ALJ No. 98-ERA-7 (ARB May 4, 1998); *Staskelunas v. Northeast Utilities Company*, ARB No. 98-035, ALJ No. 98-ERA-7 (ARB May 4, 1998). In determining whether to waive a procedural limitations period, we have expressly held that we will be guided by the principles of equitable tolling including, but not necessarily limited to, a situation where a party has "raised the precise statutory claim in issue but has mistakenly done so in the wrong forum." *Gutierrez v. Regents of the University of California,* ARB No. 99-116, ALJ No. 98-ERA-19 (ARB Nov. 8, 1999).

[9/] Letter to Acting Chief Judge John Vittone from Edward A. Slavin, Jr., dated June 26, 1995.

Here, Respondents filed a request for hearing with the Administrator, but not the OCALJ. Although the request was not filed in the appropriate office (*i.e.* forum), it was nevertheless timely filed with the Administrator who is part of the Department of Labor.

Additionally, tolling the time limitation is not prejudicial to Shelton's case. In order to determine whether tolling would be prejudicial, the primary inquiry is whether the delay hampered Shelton in litigating her case on the merits. *See United States v. $57,960.00*, 58 F. Supp. 2d 660 (D.S.C. 1999). Here, all parties proceeded under the assumption that the request had been filed with the OCALJ and it was only later that anyone discovered that the filing was defective. Shelton has not alleged that the Lockheed Respondents' untimely filing, in any way, affected her ability to present evidence or testimony. Therefore, we agree with the ALJ that equitable tolling of the time limit was appropriate in this case.

B. SHELTON HAS NOT SHOWN THAT SHE WAS SUBJECTED TO AN ADVERSE ACTION.

To prevail on a whistleblower claim under the environmental acts or the ERA, Shelton must show that she engaged in protected activity and that Respondent took an "adverse employment action" or "unfavorable personnel action" against her based on that protected activity. *See Berkman v. U.S. Coast Guard Academy,* ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9 (ARB Feb. 29, 2000); *Carroll v. Bechtel Power Corp.*, No. 91-ERA-46, slip op. at 11, n.9 (Sec'y Feb. 15, 1995), *aff'd sub nom. Carroll v. Dep't of Labor,* 78 F.3d 352 (8th Cir. 1996).

Thus, one of the central questions before the ALJ was whether the Oral Reminder constituted an adverse action. Relying on *Helmstetter v. Pacific Gas and Electric*, 86-SWD-2 (Sec'y Sept. 9, 1992), the ALJ determined that the Oral Reminder was an adverse action because it is "the first step in a course of disciplinary action that could ultimately lead to her removal." RD&O at 41. The Lockheed Respondents point out that, since *Helmstetter*, a number of courts have considered whether certain acts are adverse actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000 *et seq.* ("Title VII"). According to the Lockheed Respondents, courts have declined to construe an act as an adverse action under Title VII unless it has some tangible job consequence. Because, in their view, the Oral Reminder had no tangible job consequence, the Lockheed Respondents urge us to revisit the issue in *Helmstetter*, adopt the analysis used by courts in Title VII cases, and then conclude that the Oral Reminder simply does not rise to the level of an adverse action. We turn now to consider the Secretary's decision in *Helmstetter*.

In *Helmstetter*, the complainant asserted that his employer had engaged in unlawful discrimination by issuing him a disciplinary letter. The ALJ recommended dismissing the complaint, in part, because it was not an adverse action. The Secretary disagreed explaining as follows:

> Anyone considering Complainant for a different position within PG&E during the time the letter was in complainant's file would

> have been able to see it, according to PG&E's Division of Human Resources Manager.
>
> * * * *
>
> Since the letter potentially diminished Complainant's chances for advancement, it was adverse. Although, as the ALJ noted, Complainant was not fired or demoted as a result of the disciplinary letter, such drastic action is not required to render a disciplinary letter adverse. For example, in *Self v. Carolina Freight Carriers Corp*., case No. 89-STA-9, Final Dec. and Order, Jan. 12, 1990, slip op. at 14, warning letters that "served to progress [the c]omplainant toward suspension and discharge" adversely affected him even though the letters did not result in suspension or discharge.

The Secretary and this Board often have been guided by cases decided under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000 *et seq*.("Title VII"), where the language used in Title VII is similar to that used in the employee protection provisions of the whistleblower statutes. *See Hobby v. Georgia Power Company*, ARB Nos. 98-166/169, ALJ No. 90-ERA-30, slip op. at 16 and 26 (ARB Feb. 9, 2001). The employee protection provisions of the CAA, TSCA, SDWA, and the ERA all state "[n]o employer may discharge or otherwise discriminate . . . with respect to . . . compensation, terms, conditions, or privileges of employment."[10/] Because Title VII utilizes virtually the same language in describing prohibited discriminatory acts and shares a common statutory origin, we have looked to cases decided under Title VII for guidance regarding the meaning of this phrase. *Martin v. Department of the Army*, ARB No. 96-131, ALJ No. 93-SWD-1, slip op. at 7 (ARB July 30, 1999).

In interpreting whether an act is an adverse action under Title VII, the Seventh Circuit recently stated:

> Although we have defined adverse employment actions "quite broadly," *Smart v. Ball State Univ*., 89 F.3d 437, 441 (7th Cir. 1996), adverse actions must be materially adverse to be actionable,

---

[10/] The employee protection provisions of SWDA and the CERCLA contain different language than the other whistleblower statutes. Specifically, SWDA states: "[n]o person shall fire, or in any way discriminate against, or cause to be fired, or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter . . . ." 42 U.S.C.A. §6971 (a). CERCLA states: "[n]o person shall fire or in any discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government . . . ." 42 U.S.C.A. §9610 (a). Shelton has not suggested that these differences in wording create different standards for evaluating whether an action is adverse.

> meaning more than a "mere inconvenience or an alteration of job responsibilities." *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993). For example, a "materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Id*. We have noted, however, that "not everything that makes an employee unhappy is actionable adverse action. Otherwise, minor and even trivial employment actions that 'an . . . employee did not like would form the basis of a discrimination suit.'" *Smart*, 89 F.3d at 441 (citation omitted). Because "adverse actions can come in many shapes and sizes," *Knox v. State of Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996), it is important to consider the particular factual details of each situation when analyzing whether an adverse action is material, see *Bryson v. Chicago State Univ.*, 96 F.3d 912, 916 (7th Cir. 1996) . . . . [We do not] believe that the oral or written reprimands received by Ms. Oest under the Department's progressive discipline system can be considered, on this record, as implicating sufficiently "**tangible job consequences**" to constitute an independent basis for liability under Title VII.

Oest v. Illinois Dep't of Corrections, 2001 WL 12111 at 7 (7th Cir. 2001) (emphasis added). *See Davis v. Town of Lake Park*, 2001 WL 289882 (11th Cir., Mar. 26, 2001) (Under Title VII, critical memorandum which was placed in employee's file for over a year and then removed not adverse action when there were no tangible consequences to the employee).

In reaching that conclusion, the court in *Oest* specifically rejected the view that a reprimand can be considered adverse simply because each reprimand may bring an employee closer to termination. According to the court "[s]uch a course [is] not an inevitable consequence of every reprimand, however; job-related criticism can prompt an employee to improve her performance and thus lead to a new and more constructive employment relationship." *Id*.

In this case, the ALJ found that an Oral Reminder is the lowest step of formal discipline. It is memorialized in a memorandum that is placed in the employee's personnel file where it remains for six months. After the memorandum is removed, it cannot be considered in connection with future disciplinary action. We note that the memorandum was removed from Shelton's file on August 23, 1995, the week before this case went to trial. See RD&O at 25. Shelton has not asserted that the Oral Reminder, or the memorandum memorializing it, had any tangible job consequence, nor are any such consequences obvious. We are persuaded that, in the absence of any showing that some tangible job consequence flowed from it, the "Oral Reminder" issued to Shelton is not an adverse action. To the extent that *Helmstetter* would require a different result, we depart from it. As the Eleventh Circuit noted with regard to Title VII in *Davis, supra*, at *8:

> Employer criticism, like employer praise, is an ordinary and appropriate feature of the workplace. Expanding the scope of Title VII to permit discrimination lawsuits predicated only on unwelcome day-to-day critiques and assertedly unjustified negative evaluations would threaten the flow of communication between employees and supervisors and limit an employer's ability to maintain and improve job performance. Federal courts ought not be put in the position of monitoring and second-guessing the feedback that an employer gives, and should be encouraged to give, an employee.

In any event, the ALJ found that the Lockheed Respondents established by "overwhelming" evidence that it would have issued the Oral Reprimand even if Shelton had not engaged in any protected activity. Shelton does not take issue with that finding, nor do we. Having determined that the Oral Reminder is not an adverse action and, even if it were, would have been issued to Shelton in any event, we agree with the ALJ that the complaint should be **DISMISSED**.[11/]

SO ORDERED.

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member

[11/] As to Shelton's remaining arguments, we have reviewed them and find that they are without merit and do not warrant a separate discussion in this opinion.