U.S. Department of Labor

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

In the Matter of:

TOD N. ROCKEFELLER,	**(Rockefeller I)**
	ARB CASE NO. 99-002
COMPLAINANT,	**ALJ CASE NOS. 98-CAA-10, 98-CAA-11**
v.	
	(Rockefeller II)
CARLSBAD AREA OFFICE (CAO),	**ARB CASE NO. 99-067**
U.S. DEPARTMENT OF ENERGY;	**ALJ CASE NO. 99-CAA-1**
WESTINGHOUSE ELECTRIC CO.,	
A DIVISION OF CBS, INC., AND	**(Rockefeller III)**
WESTINGHOUSE ISOLATION DIV. (WID),	**ARB CASE NO. 99-068**
	ALJ CASE NO. 99-CAA-4
RESPONDENTS.	
	(Rockefeller IV)
	ARB CASE NO. 99-063
	ALJ CASE NO. 99-CAA-6[1/]
	DATE: October 31, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

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

For Respondents:
C.S. "Tyler" Przybylek, Esq., *U.S. Department of Energy, Albuquerque, New Mexico;*
Cooper H. Wayman, Esq., *U.S. Department of Energy, Carlsbad, New Mexico;*
Gloria J. Barnes, Esq., *Westinghouse Electric Corp., Carlsbad, New Mexico*

[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).

FINAL DECISION AND ORDER

These four cases arise under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105 (1994), and the Clean Air Act (CAA), 42 U.S.C. § 7622 (1994). Complainant Tod Rockefeller levels a number of charges against Respondents the Department of Energy (DOE) and Westinghouse Electric Company, as well as against the Administrative Law Judges who issued Recommended Decisions in these cases and one of the counsels for DOE. Chief among these complaints is that Rockefeller was discharged from his job at the DOE Carlsbad Area Office (CAO) in retaliation for activity protected under the STAA and the CAA. Because we conclude that the Department of Labor has no jurisdiction over the STAA complaints, that the CAA retaliation complaint was untimely, and that the other complaints have no legal foundation, we dismiss all the complaints in these cases.[2/]

BACKGROUND

A. Rockefeller's employment history.

Tod Rockefeller worked as a GS-13 Environmental Specialist for the Department of Energy Carlsbad Area Office from April 1993 to December 1997. In April 1996 Rockefeller gave a report to his supervisor in which he found Westinghouse's draft comment resolutions to a "safety analysis report for packing" for a remote handled shipping cask to be unacceptable. When after two days his superior had not acted on his report, Rockefeller forwarded the report to other DOE officials and to Westinghouse Electric Corporation, which was a contractor of DOE at the sight where Rockefeller worked.

Rockefeller later received a failing performance appraisal for the period from August 1996 to July 1997 and was given a Notice of Proposal to Remove him from the federal service on September 2, 1997. On December 9, 1997, Rockefeller was given a Notice of Decision to Remove him from the federal service effective December 10, 1997, and on that date he was terminated.

B. Rockefeller's pursuit of redress.

When DOE proposed to remove Rockefeller from his position on September 2, 1997, he filed a complaint with the Office of Special Counsel[3/] alleging that (as characterized by the OSC) CAO management had discriminated against him on the basis of his physical and mental disabilities; had violated 5 C.F.R. §430 (providing for performance appraisals); had failed to issue him a determination concerning material he had requested under the Freedom of information Act (FOIA);

[2/] The Administrative Review Board has jurisdiction to decide these appeals under 29 C.F.R. §24.8 (2000) and 29 C.F.R. §1978.109 (2000).

[3/] The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency whose authority is derived from the Civil Service Reform Act, 5 U.S.C. §1101 *et seq.*(1994); the Whistleblower Protection Act, 5 U.S.C. §2302(b) (1994); and the Hatch Act, 5 U.S.C. §7323 (1994).

and had retaliated against him for whistleblowing and for filing EEO complaints. Rockefeller (as restated by OSC) asserted that in retaliation for "blowing the whistle on DOE management's wrongdoing in April 1996," DOE gave Rockefeller a failing performance evaluation, failed to select him for promotion, denied him training, and proposed his removal in September 1997. OSC denied Rockefeller's complaint. Of particular relevance to this case, OSC rejected his claim under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8), because it found he had not engaged in activity protected by that statute.[4/]

After the OSC denied his complaint, Rockefeller filed an Individual Right of Appeal of DOE's proposal to remove him with the Merit Systems Protection Board (MSPB), making the same claim of reprisal for whistleblowing that he had raised with the OSC, as well as EEO, disability discrimination, and other claims. An MSPB Administrative Judge found that Rockefeller had not engaged in whistleblowing protected under the Whistleblower Protection Act and dismissed his appeal. *Rockefeller v. Department of Energy*, MSPB Docket Number DE-1221-98-0003-W-1, Initial Decision, Nov. 3, 1997, slip op. at 3.

Rockefeller also appealed his termination to the MSPB. The same administrative judge found again that Rockefeller had not engaged in protected activity under the Whistleblower Protection Act and affirmed DOE's action to remove him. *Rockefeller v. Department of Energy*, MSPB Docket Number DE-0752-98-0138-I-1, Initial Decision, April 6, 1998, slip op. at 4.

Rockefeller appealed both Initial Decisions of the administrative judge to the MSPB but then moved on June 8, 1998, to dismiss those appeals without prejudice on the asserted ground that he needed to do so in order to pursue the first of the DOL complaints at issue here. The MSPB granted Rockefeller's motion and gave him until December 15, 1998, to refile his complaint. *Rockefeller v. Department of Energy,* MSPB Docket Numbers DE-1221-98-0003-W-1 and DE-0752-98-0138-I-1, Order, Nov. 13, 1998. When Rockefeller failed to refile until January 25, 1999, the MSPB dismissed his appeals as untimely. *Id.,* Opinion and Order, April 28, 1999.

In the meantime Rockefeller filed his first complaint of discrimination under the STAA and the CAA with the Department of Labor on May 9, 1998. Rockefeller named as respondents both DOE and Westinghouse.

[4/] The Whistleblower Protection Act prohibits the taking of a personnel action because of

> any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences–(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs . . . .

5 U.S.C. §2302(b)(8) (1994).

C. The four DOL complaints and the ALJs' dispositions.

1. In *Rockefeller v. Department of Energy* (*Rockefeller I*), 98-CAA-10 and 11, Rockefeller alleged that after he raised safety concerns in his internal report and sent that report to DOE management and Westinghouse, DOE retaliated against him by giving him poor performance evaluations and then terminating him. Rockefeller asserted that his report was protected activity under the employee protection provisions of the STAA and the CAA.

Respondents filed motions to dismiss, and on September 28, 1998, the ALJ issued a Recommended Decision and Order (*Rockefeller I* RD&O) recommending that those motions be granted. The ALJ ruled that Rockefeller was not a covered employee, and DOE was not a covered employer under the STAA, and that Rockefeller's CAA complaint was untimely filed because it was filed more than 30 days after Rockefeller's termination. The ALJ rejected Rockefeller's contention that the CAA's limitations period was equitably tolled because Rockefeller had filed his environmental complaint timely but in the wrong forum.

The ALJ also issued an order finding that Rockefeller's counsel had treated the ALJ to "unwarranted, outrageous, insulting written abuse" which "constitute[d] improper professional conduct and evidence[d] a shameless refusal to adhere to reasonable standards of orderly and ethical conduct . . . ." The ALJ therefore barred Rockefeller's counsel from "appearing before the undersigned in this or any other matter . . ." pursuant to 29 C.F.R. §§18.34(g)(3) and 18.36. Order Barring Counsel from Future Appearances, Sept. 28, 1998, slip op. at 5.

2. On October 2, 1998, Rockefeller filed a complaint in *Rockefeller v. Department of Energy* (*Rockefeller II*), 99-CAA-1. He repeated his allegations from *Rockefeller I* and alleged that:

- DOE and Westinghouse wrongfully induced the ALJ to recommend dismissal of *Rockefeller I.*
- The Recommended Decision and Order in *Rockefeller I* was contaminated by *ex parte* contacts between Respondents, OSHA, and the ALJ.
- A DOE lawyer had an improper motive and gave improper legal advice to DOE's Albuquerque Regional Office personnel about Rockefeller's FOIA request, which resulted in DOE denying Rockefeller's fee waiver request and attempting to charge him $28,000 for 1200 hours of search time under FOIA.
- DOE's $28,000 search charge was an act of discrimination to impede and delay Rockefeller's ability to obtain evidence of environmental violations.
- Respondents' actions were an obstruction of Rockefeller's whistleblower rights and a continuing violation under the STAA and CAA.

A second ALJ, to whom *Rockefeller II* was assigned, issued an Order to Show Cause why the complaint should not be dismissed. Following responses by all parties,[5/] on December 4, 1998, the ALJ issued a Recommended Decision and Order of Dismissal with Prejudice (*Rockefeller II* RD&O). The ALJ found that Rockefeller's response to the show cause order "contained no facts that would support the allegations of improper ex parte contacts and undue influence . . ."; and the fact "[t]hat one of the respondents wished to charge a copying fee in the first action fails to state a cause of action under the Clean Air Act." *Rockefeller II* RD&O slip op. at 3.

3. In the meantime, on November 2, 1998, Rockefeller filed his third complaint, which also concerned DOE's treatment of Rockefeller's FOIA request. *Rockefeller v. Department of Energy* (*Rockefeller III*), 99-CAA-4. Rockefeller had appealed DOE's denial of the fee waiver request to the DOE Office of Hearings and Appeals, which denied the appeal because it found that the requested material would not contribute to the general public's understanding of the subject of the materials. DOE Office of Hearings and Appeals Decision and Order (DOE D&O), Oct. 28, 1998, slip op. at 3-4. In *Rockefeller III*, Rockefeller repeated his allegations from *Rockefeller I* and *II,* and alleged that DOE's reference to Rockefeller's counsel as a "commercial requester" for purposes of a FOIA fee waiver request was improper and contrary to law. Rockefeller also alleged that a DOE lawyer had been motivated by retaliatory animus to give improper legal advice to DOE about the FOIA request which caused DOE to assess Rockefeller $28,000. *Rockefeller III*, slip op. at 4.

The ALJ issued an order to show cause why *Rockefeller III* should not be dismissed; following responses by the parties, on March 10, 1999, the ALJ issued a Recommended Decision and Order dismissing the case with prejudice. *Rockefeller III* RD&O. The ALJ ruled that the *Rockefeller III* complaint did not state a new cause of action and was barred by operation of collateral estoppel. In addition the ALJ ruled that the complaint "fails to prove the essential elements of a violation of the employee protection provision of the STAA or the CAA." *Rockefeller III* RD&O, slip op. at 8.

4. Rockefeller filed another complaint, *Rockefeller v. Department of Energy* (*Rockefeller IV*), ALJ Case No. 99-CAA-6, repeating the allegations of *Rockefeller I, II,* and *III,* and alleging that: (1) he was improperly served with the motions to dismiss in *Rockefeller II* because the motions were filed with the ALJ by Federal Express but were served on Rockefeller by regular mail; and (2) the ALJ improperly granted Respondents' motions to dismiss before the time had elapsed for the filing of Rockefeller's response to the motions. The ALJ found the only new allegations "patently absurd" and on February 19, 1999, issued a Decision and Order Recommending Dismissal with Prejudice (*Rockefeller IV* RD&O).

Rockefeller timely petitioned for review of the two recommended decisions in *Rockefeller I* and of the recommended decisions in *Rockefeller II, III,* and *IV*.

[5/] DOE and Westinghouse responded to the show cause order by filing supported motions to dismiss.

DISCUSSION

None of these cases have merit. As we discuss below, Rockefeller has no cause of action under the STAA because the federal government and its employees are excluded from the STAA's scope. Moreover, Rockefeller's CAA claim of unlawful termination was not filed within the CAA's 30-day limitations period and is not subject to equitable tolling. And the allegations in *Rockefeller II, III,* and *IV*--to the extent that they are not mere repetitions of claims made in *Rockefeller I*--do not state claims under the CAA and are spurious.

A. *Rockefeller I.*

1. The Surface Transportation Assistance Act claims.

Rockefeller's claims under the STAA must be dismissed because neither Rockefeller nor DOE come within the STAA's scope. The STAA's definition of "employee" explicitly excludes "an employee of the United States Government," and the definition of "employer" explicitly excludes "the Government." 49 U.S.C. §31101(2)(B), §31101(3)(B). There is no ambiguity in these scope provisions, and therefore we can rely upon their plain meaning. Moreover, the United States is immune from suit absent an **explicit statutory waiver** of sovereign immunity. *United States Dep't of Energy v. State of Ohio*, 503 U.S. 607, 615 (1992) (any waiver of the government's sovereign immunity must be "unequivocal"). Here we have an **explicit statutory invocation** of such immunity. Therefore, with respect to his complaint against DOE, neither Rockefeller nor DOE is covered by the statute.

Because of the explicit exclusion of employees of the United States Government from the STAA's protections, Rockefeller's claim against Westinghouse does not fare any better.

Rockefeller argues that the Secretary's decision in *Flor v. U.S. Department of Energy*, Case No. 93-TSC-1, Sec'y Dec. (Dec. 9, 1994), is binding precedent for the proposition that government employees may sue their government employers under the STAA.[6/] The short answer to this

---

[6/] Rockefeller devotes a substantial portion of his opening brief to his argument that *Flor* held that government employees are covered by the STAA. Complainant's Opening Brief (*Rockefeller I* Br.) at 8-16. Among other things, Rockefeller argues that Congress endorsed *Flor* by its silence in 1994, that is, when Congress recodified the STAA in July 1994 it implicitly approved the holding in *Flor* because "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it reenacts a statute without change," *Id.* at 12, quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). However, *Flor* was decided on December 9, 19**94** (**after** the STAA's recodification) and not on December 9, 19**93**, as Rockefeller asserts. *See* United States Department of Labor, Office of Administrative Law Judges, OALJ Law Library, Whistleblower Case List on the Internet at www.oalj.dol.gov. Congress could not have endorsed a decision that had not yet been issued. We note that elsewhere in his brief Rockefeller cites to *Flor* with the correct date. *See, e.g., Rockefeller I* Br. at 5.

assertion is that *Flor* did not address the issue of the STAA's exclusion of the government and its employees from its scope. Flor, an employee of DOE, was responsible for review and approval of work plans for projects to be carried out at national laboratories. She disapproved one project in part because she believed the plan for transporting hazardous materials to the laboratory would violate Department of Transportation regulations. After DOE allegedly took adverse action against her in retaliation for her disapproval, Flor filed a complaint under various environmental whistleblower provisions and the STAA. The ALJ granted summary decision in favor of DOE. On review, the Secretary observed that "[i]f the disapproved proposal contemplated transportation of a toxic chemical by commercial motor carrier, it is possible that disapproval was protected under the STAA." *Flor*, slip op. at 10. Although, as we have held here, it is apparent that there has been no statutory waiver of sovereign immunity under the STAA, the *Flor* decision did not purport to address or decide that issue. Neither did the Secretary address the STAA's exclusion of employees of the United States from the scope of the definition of "employee." Thus *Flor* does not stand for the proposition that, in spite of a clear statutory invocation of sovereign immunity, the government may be sued under the STAA. Rockefeller's STAA claims are **DISMISSED**.

2. The Clean Air Act claims.

Rockefeller received a notice of removal from the federal service from Rush O. Inlow, Deputy Manager, Albuquerque Operations Office, Department of Energy, on December 9, 1997. Rockefeller did not file his discrimination complaint with the Department of Labor until May 9, 1998, well beyond the 30-day time limit for filing a complaint under the employee protection provision of the Clean Air Act. 42 U.S.C. §7622(b)(1).

Rockefeller argues that the limitations period should be tolled because he filed his CAA claim within the limitations period but in the "wrong forum." He claims he made a complaint of retaliation on January 5, 1998, "to the EPA WIPP group in Washington, D.C." May 9, 1998 complaint, ¶ 12. In addition, he asserts that his complaint to the MSPB tolled the CAA limitations period.

Although he does not cite or discuss it in his briefs before us, Rockefeller apparently is referring to the discussion of equitable tolling of statutory time limits in *School Dist. of the City of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981). In that case arising under the Toxic Substances Control Act, 15 U.S.C. § 2622 (TSCA), the court found that the TSCA whistleblower protection provision's 30-day limitations period is more like a statute of limitations than a jurisdictional bar, and therefore is subject to equitable tolling. *Allentown,* 657 F.2d at 19. The court articulated three principal situations in which equitable tolling may apply: when the defendant has

---

We also note that cases cited by Rockefeller in his Opening Brief in *Rockefeller II, III, and IV* for the same proposition--that the STAA covers government employees--do not address that issue. Indeed, the STAA was not even raised in those cases. *See Tyndall v. Environmental Protection Agency*, Case Nos. 93-CAA-6, 95-CAA-5, ARB Dec. (June 14, 1996); *Jenkins v. Environmental Protection Agency,* Case No. 92-CAA-6, Sec'y Dec. (May 18, 1994).

actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when "the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum." *Id.* at 20 (internal quotations omitted). Neither the first nor the second principle of equitable tolling applies to this case. As we discuss below, there are no material facts in dispute relating to the question whether Rockefeller raised the precise statutory claim in the "wrong forum," and Respondents are entitled to summary decision as a matter of law.

Rockefeller asserts that he made an allegation to the EPA on January 5, 1998, which constituted a CAA whistleblower complaint. He maintains that the January 5 submission was in writing and "was part of the public record of comments made to EPA concerning the DOE Waste Isolation Plant Project . . . ." Complainant's Rebuttal Brief at 2. Although Rockefeller submitted numerous exhibits to the ALJ and the ARB, he did not provide a copy of his January 5 EPA document. Neither did he submit an affidavit attesting to the exact nature of the claim he made to the EPA on January 5. When a complainant invokes equitable tolling of a statute of limitations, it is the complainant's burden to demonstrate existence of circumstances that would support tolling. *Cf. Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 661 (11th Cir. 1993) (plaintiff in Title VII action has burden of proving equitable reasons for failure to comply with limitations period). There is nothing in Rockefeller's pleadings or materials filed with the ALJ or the ARB to demonstrate that the document he assertedly provided to the EPA "raised the precise statutory claim in issue," as required under *Allentown*. In the absence of any factual support for the notion that Rockefeller filed a CAA environmental whistleblower complaint with the EPA we conclude that equitable tolling on the basis of that incident is not justified.

Rockefeller also argues that his MSPB challenge to DOE's decision to discharge him tolled the CAA's statute of limitations. But the record clearly shows that Rockefeller was raising an entirely independent claim under the Federal Whistleblower Protection Act, 5 U.S.C. §2302(b)(8), not the CAA. The Whistleblower Protection Act prohibits the taking of a personnel action because of "any disclosure of information by an employee . . . which the employee . . . reasonably believes evidences--(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety . . . ." 5 U.S.C. §2302(b)(8). Thus, Rockefeller's argument is that he made a complaint to the MSPB that he was being removed from his position in retaliation for engaging in activity protected by the CAA whistleblower provision.

Because we consider matters outside the pleadings, such as the MSPB decisions, we treat the Respondents' motions to dismiss for failure to state a claim as motions for summary decision pursuant to 29 C.F.R. §§18.40-18.41. *See* 29 C.F.R. §18.1, Rule 12(b)(6), Federal Rules of Civil Procedure. We must grant summary decision where there are no material facts in dispute and the moving party is entitled to a decision as a matter of law. The jurisdictional facts are not in dispute here, and those facts do not support Rockefeller's claim that his MSPB complaint constituted a CAA whistleblower complaint.

In his December 20, 1997 appeal of his discharge to the MSPB, Rockefeller stated that the laws he believed were violated were "DOE-AL's [Albuquerque Operations Office] OPM approved Personnel Mgm't System, Americans with Disabilities Act, Perjury, Forgery." DOE Exhibit to Motion to Dismiss (DOEX) M, p. 3. Rockefeller asserted that those laws had been violated because "[n]o required Mid-Year Progress Review performed. Perjury and forgery comitted [sic] within sworn affidavits of my supervisors and the CAO manager. Request of medical documentation violating the ADA." *Id.* In a memorandum to the MSPB Examiner dated December 24, 1997, Rockefeller further described his claims: "What I have done with this appeal is to address and outline the unjustified nature of my removal along with violations of essentially Office of Personnel Management (OPM) law, the Americans with Disabilities Act, EEO law, perjury, and forgery." *Id.*, p. 5.

The MSPB decisions also shed light on the substance of Rockefeller's MSPB complaints. Thus, in the November 8, 1997 Initial Decision dismissing Rockefeller's appeal, the Administrative Judge characterized Rockefeller's whistleblower claim as follows:

> [Rockefeller] stated that he issued an April 18, 1996 report in which he found Westinghouse's draft comment resolutions to a "safety analysis report for packing" (SARP) for a remote handled shipping cask to be unacceptable. Specifically, he reported that Westinghouse's draft resolutions failed to resolve certain concerns with the SARP. He submitted the report to his team leader in the Department of Energy's (DOE's) Carlsbad Area Office (CAO), Don Watkins. But perceiving that Watkins would not issue the report, he independently submitted it to CAO management and to Westinghouse. The appellant claims that by his independent release of the report, he blew the whistle on CAO management's failure to follow DOE Order Number 5480.3, paragraph 6.c(2), which states that "heads of Field Organizations . . . perform an independent and objective review and evaluation of contractors' safety analysis reports for packaging designs."

Rockefeller v. Department of Energy, MSPB Docket Number DE-1221-98-0003-W-1, Initial Decision, Nov. 3, 1997, slip op. at 3.

The purpose of the CAA is to protect the public health by controlling air pollution. *Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 764 (D.C. Cir. 1984). There is no hint in the MSPB proceedings that Rockefeller ever articulated to the MSPB a CAA whistleblower claim. Rather, Rockefeller's MSPB whistleblower complaint related to his assertion that DOE officials did not follow internal DOE procedural regulations. Therefore, this case does not present a circumstance in which Rockefeller filed a CAA whistleblower claim in the "wrong forum"-- the MSPB. Rather, he filed claims with the MSPB under entirely different statutory schemes. Where the gravamen of a complaint filed in the "wrong forum" sounds under another, independent remedy and not under

the provision under which relief is sought before us, there is no basis for invoking equitable tolling.[7/] Rockefeller's CAA claims in *Rockefeller I* are **DISMISSED** as untimely.

B. *Rockefeller II.*

Rockefeller alleged in his second complaint that: (1) Respondents "wrongfully induced" the ALJ in *Rockefeller I* to recommend dismissal; (2) there were improper *ex parte* contacts among Respondents and OSHA and the ALJ; and (3) DOE wrongfully charged Rockefeller $28,000 for search time on his FOIA request for the purpose of obstructing Rockefeller in obtaining evidence of environmental violations and in retaliation for his protected activity.

Rockefeller's first two claims appear to allege fraud and unethical conduct on the part of several individuals in the course of the litigation of *Rockefeller I.* We do not have subject matter jurisdiction over either of these types of claims under the CAA whistleblower provision, which, of course, prohibits an employer from taking adverse action against an employee in retaliation for activity protected by that statute. 29 C.F.R. §18.1(a); Rule 12(b)(1), Federal Rules of Civil Procedure.

Rockefeller's third claim relates to DOE's assessment of a $28,000 FOIA search fee, and DOE's refusal to waive the fee. Rockefeller's counsel filed a FOIA request on behalf of Rockefeller on August 4, 1998, requesting a wide variety of materials in many different DOE offices and requesting a waiver of the search and copying fee. The DOE Albuquerque Operations Office apparently compiled the material but assessed a $28,000 fee for 1200 hours of search time and denied his request for a fee waiver. Rockefeller asserts that the refusal to waive the fee was in

---

[7/] *See, e.g., Greenwald v. City of North Miami Beach, Fla.,* 587 F. 2d 779 (5th Cir. 1979), in which a city employee appealed his termination to the local Civil Service Board, which upheld his discharge. The complainant then filed a complaint under the Safe Drinking Water Act 115 days after his termination but only 20 days after the action of the Civil Service Board. The Fifth Circuit held that "the remedy provided by the [SDWA] is entirely independent of any local remedies [and] the fact that Greenwald sought local Civil Service Board review of his discharge did not toll the 30-day time limitation for filing a claim under the [SDWA]." *Id.* at 780.

Similarly, in *Lewis v. McKenzie Tank Lines, Inc.,* Case No. 92-STA-20, Sec'y Dec. Nov. 24, 1992, the complainant filed a complaint of age discrimination with the EEOC under the Age Discrimination in Employment Act alleging that the he had been fired for "a safety related refusal to drive [while] Respondent allegedly did not fire other, younger employees who acted similarly." *Id.* at 2. The Secretary held that the claim was not asserted under the STAA and therefore did not constitute the precise claim raised in the wrong forum. *Id.*, slip op. at 2-3. *See also Grace v. City of Andalusia Waste Water Treatment Facility*, ARB Case No. 96-059, ARB Dec. (Sept. 23, 1996), slip op. at 2 (administrative appeal of discharge before city commission which did not raise Water Pollution Control Act does not toll statute of limitations); *Kelly v. Flav-O-Rich,* Case No. 90-STA-14, Sec'y Dec. (May 22, 1991), slip op. at 2 (claim before State Employment Security Commission not asserting STAA violation is not precise claim raised in wrong forum).

retaliation for his CAA protected activity. The CAA provides that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" has engaged in activity protected under the CAA. 42 U.S.C. §7622(a). Because refusal to waive a FOIA search fee is not discrimination with respect to "compensation, terms, conditions, or privileges of employment," Rockefeller has failed to state a claim upon which relief can be granted under the CAA. *See* 29 C.F.R. §18.1(a); Rule 12(b)(6), Federal Rules of Civil Procedure.

Rockefeller raises a procedural issue on appeal. He argues that in *Rockefeller II* the ALJ violated the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules) by granting Respondents' Motions to Dismiss before the time allowed for Rockefeller's response to the motions had elapsed. In the circumstances of this case we conclude that the ALJ did not commit reversible error. A brief review of the chronology of events will clarify our conclusion.

Rockefeller filed his complaint with OSHA on October 2, 1998. OSHA denied the complaint on October 7, and Rockefeller requested a hearing on October 14. The matter was then forwarded to the Office of Administrative Law Judges. On November 6, 1998, the ALJ who had been assigned the case issued an Order to Show Cause why the matter should not be dismissed and granted Rockefeller until November 20 to respond. The ALJ **also** granted both Rockefeller and the Respondents until November 27 to file briefs in support of their positions. *Rockefeller II* RD&O, slip op at 3. Rockefeller responded to the Order to Show Cause on November 19, 1998. DOE and Westinghouse both filed motions to dismiss with supporting memoranda in response to the ALJ's order allowing them to file briefs. The ALJ issued his recommended decision and order of dismissal on December 4, 1998, prior to his receipt of a response by Rockefeller to the motions to dismiss. Although the ALJ discussed the propriety of dismissal with reference to his show cause order, in his recommended order he stated that "[a]ll claims of complainant are dismissed, with prejudice. The Motions of Dismissal of respondents, are granted." *Id.*, slip op. at 4. Rockefeller argues that because the ALJ dismissed his complaint prior to receipt of Rockefeller's response to the motions to dismiss he violated the OALJ Rules.

OALJ Rule 18.6(b) provides:

> Within ten (10) days after a motion is served, or within such other period as the administrative law judge may fix, any party to the proceeding may file an answer in support or in opposition to the motion, accompanied by such affidavits or other evidence as he or she desires to rely upon.

29 C.R.R. §18.6(b). Rule 18.4(c)(3) requires that five days be added to the response period when a pleading is served by mail. 29 C.F.R. §18.4(c)(3). The ALJ did not wait the requisite fifteen days prior to issuing his recommended order. However, the ALJ had before him--and considered--Rockefeller's response to the Order to Show Cause, which addressed precisely the same issues raised in the motions to dismiss. *Rockefeller II* at 3. In *Rockefeller III*, the ALJ explained his order in

Rockefeller II: "Although I granted Respondents' Motions to Dismiss in the decision, my decision was based solely upon the failure of Complainant to meet the requirements of the Order to Show Cause." *Rockefeller III* RD&O at 3.

Although the RD&O was inartfully drafted, we do not find that the ALJ committed reversible error. *Rockefeller II* therefore must be **DISMISSED**.

C. *Rockefeller III.*

Rockefeller III also relates to the FOIA search fee. Rockefeller appealed the denial of Rockefeller's request for a fee waiver to the DOE Office of Hearings and Appeals (OHA). Although OHA denied Rockefeller's appeal, the decision noted in a footnote that OHA disagreed with the Albuquerque Operations Office's

> conclusion that Rockefeller's counsel should be designated a commercial requester because his client did not prevail in previous whistleblower actions. We have no evidence that Rockefeller's current action is "personal in nature" as AL contends, or that Rockefeller is not pursuing a new action seeking compensation or retribution for wrongs he allegedly suffered.

Decision and Order of the DOE OHA (OHA D&O), Case Number VFA-0447, Oct. 28, 1998, slip op. at 4 n.*. Rockefeller then filed his third complaint with the Department of Labor, alleging that the OHA D&O proved that DOE had engaged in invidious discrimination and that a DOE attorney had a conflict of interest in providing "undisclosed, self-interested legal advice" to the Albuquerque Operations Office on the response to the FOIA fee waiver request.

Rockefeller's allegations regarding the DOE attorney relate to matters of attorney ethics over which we have no subject matter jurisdiction. Moreover, for the reasons discussed in section B above, Rockefeller's allegations regarding the FOIA fee do not state a claim upon which relief can be granted under the CAA. *See* 29 C.F.R. §18.1(a); Rule 12(b)(6), Federal Rules of Civil Procedure.[8/]

Rockefeller III must therefore be **DISMISSED**.

D. *Rockefeller IV.*

[8/] We note that before us Rockefeller's counsel has repeatedly misstated the holding in the OHA D&O, asserting that OHA held that the search and copying fee was "illegal." *See* Rockefeller Opening Brief in *Rockefeller II, III, and IV* at pp. 3, 6, 10, 14, 21, 30. OHA actually upheld the fee and denied Rockefeller's FOIA fee waiver appeal.

Rockefeller filed a fourth complaint alleging that his rights had been violated because Respondents in *Rockefeller II* had filed their motions to dismiss with the ALJ on November 24 and 25, 1998, by Federal Express but only served him by regular mail, and the ALJ did not allow Rockefeller 15 days to respond to those motions, but rather issued his Recommended Decision and Order of Dismissal with Prejudice on December 4, 1998. Rockefeller argues that the ALJ's actions violated his rights. In section B above we have rejected Rockefeller's claim that the ALJ committed reversible error by dismissing *Rockefeller II* prior to receipt of Rockefeller's response to the motions to dismiss. We need not discuss that matter further here, except to note that Rockefeller's CAA complaint regarding the ALJ's action does not state a claim under the CAA for which relief can be granted. To the extent that Rockefeller is asserting Respondents' use of Federal Express to serve the ALJ and the U.S. Postal Service to serve him violated the CAA whistleblower provision, we must reject that claim as well. Whatever could be made of Respondents' use of Federal Express and the U.S. Postal Service in this case,[9/] as a matter of law it cannot constitute discrimination with respect to "compensation, terms, conditions, or privileges of employment . . . ." 42 U.S.C. §7622(a). *Rockefeller IV* must be **DISMISSED.**

E. Other arguments made on appeal.

1. "Right" to take discovery and to a hearing.

Rockefeller argues that Department of Labor regulations and case law require that Rockefeller be given an opportunity to take discovery and be given a fair hearing, and that the ALJs therefore erred in not permitting any discovery and not providing Rockefeller a hearing on the merits in any of these cases. Complainant's Opening Brief in *Rockefeller II, III, & IV* at pp. 4-5.

The CAA whistleblower protection provision provides that "[a]n order of the Secretary shall be made on the record after notice and opportunity for public hearing." 42 U.S.C. §7622(b)(2)(A). This language does not mean that a trial-type evidentiary hearing must be held in every case. For obvious reasons, evidentiary hearings are required when there are factual issues which must be resolved. Where, as in these cases, it is determined that there is no subject matter jurisdiction over a claim, or that complainant has failed to state a claim upon which relief can be granted, or where there are no material issues of fact in dispute, a trial-type evidentiary hearing is not in order. *See, e.g., U. S. v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 453 (9th Cir. 1971) ("It is settled law that when no fact question is involved or the facts are agreed, a plenary, adversary administrative proceeding involving evidence, cross-examination of witnesses, etc., is not obligatory-even though a pertinent statute prescribes a hearing. In such situations, the rationale is that Congress does not intend administrative agencies to perform meaningless tasks.").

[9/] Westinghouse indicates in its Reply Brief in *Rockefeller II, III, and IV* that it filed its motion to dismiss by Federal Express in order to meet the November 27, 1998 deadline set by the ALJ because the regulations provide that documents are not deemed filed until they are received by the Chief Clerk of the OALJ. 29 C.F.R. §18.4(c)(1). It served the motion on Rockefeller by mailing it on November 24, 1998, in compliance with 29 C.F.R. §18.4(c)(2).

As to the right to take discovery, in appropriate circumstances, a trial judge may suspend discovery pending a decision on a motion potentially dispositive of the case. *See Hahn v. Star Bank*, 190 F.3d 708, 719 (6th Cir. 1999) ("Trial courts have broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined."); *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987) (same); *Wyatt v. Kaplan*, 686 F.2d 276, 284 (5th Cir. 1982) (district judge properly granted defendants' protective order barring discovery prior to decision on pending motion to dismiss for jurisdictional defects). Of course, under certain circumstances it is necessary and proper to allow a party to engage in discovery of facts related to jurisdictional issues prior to ruling on jurisdiction. Thus, for example, the Fifth Circuit has stated:

> It is true that the factual determinations decisive to a motion to dismiss for lack of jurisdiction are within the court's power, and that no right to a jury trial exists with regard to such issues . . . . But still the district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss. Thus, some courts have refused to grant such a motion before a plaintiff has had a chance to discover the facts necessary to establish jurisdiction . . . . Other courts have refused to uphold such a motion where -- absent an incurable defect in the complaint -- the plaintiff has had no opportunity to be heard on the factual matters underlying jurisdiction . . . .

Williamson v. Tucker, 645 F.2d 404, 414 (5th Cir. 1981). However, in the circumstance of these cases, where the jurisdictional facts are not in dispute, discovery was not warranted.

We reject Rockefeller's claims that he was entitled to discovery and a trial-type evidentiary hearing.

2. Request for recusal of Cynthia L. Attwood.

In a July 5, 1999 cover letter to his Rebuttal Brief in *Rockefeller II, III, and IV*, Rockefeller's counsel "object[ed] to Ms. Cynthia Attwood deciding this case by reason of her involvement in OSHA Compliance Director Richard D. Fairfax's enclosed defamatory memorandum . . . ." The referenced Memorandum is from Richard Fairfax, the Occupational Safety and Health Administration's Director of the Directorate of Compliance Programs, to John B. Miles, Jr., Regional Director, OSHA, dated February 19, 1999. Fairfax's Memorandum apparently was written in response to correspondence from Complainant's counsel raising concerns about whistleblower investigations being performed by the OSHA Region VI office. Fairfax, in his Memorandum, stated that Complainant's counsel previously had corresponded with the Secretary about these concerns, and that Complainant's counsel had raised similar complaints about investigative work in other OSHA regional offices. Fairfax also stated in his Memorandum that Complainant's counsel "has also asked for the recusal of all Administrative Law Judges who have presided over hearings for his clients, and made charges against Chief Administrative Law Judge John Vittone and Administrative

Review Board Member Cynthia Atwood [sic]." Attached to the Rebuttal Brief is a July 4, 1999 letter from Rockefeller's counsel to Tom Buckley, Director, OSHA Office of Investigative Assistance entitled "Rockefeller V Complaint and Request for Recusals." Among many other things, the letter states "any involvement by ARB Member Ms. Cynthia Attwood in this case at any stage of the proceedings would be an appearance of impropriety." There is no further explanation in the Rebuttal Brief or any of the attachments of the basis for the charge that ARB Member Attwood was "involved" in the Fairfax memorandum.

The Board, of course, must consider carefully the allegation that a Board Member's participation in a case would raise an appearance of impropriety. However, we strongly disagree with Rockefeller's assertion that Fairfax's Memorandum raises a "clear" question as to the existence of any *ex parte* communication, whether direct or indirect, between Board Member Attwood and Fairfax. Member Attwood does not know Richard D. Fairfax, and to her knowledge has never had any direct or indirect communication with him. No Board Member has communicated with Fairfax, and we are not aware that any member of the Administrative Review Board's staff has communicated with Fairfax. We therefore conclude that Member Attwood's consideration of these cases would not create an appearance of impropriety because Rockefeller's allegation that Member Attwood possibly engaged in *ex parte* communication with Richard Fairfax is baseless. We **DENY** the request for recusal as wholly without foundation.

3. Request for oral argument.

Counsel for Rockefeller has requested oral argument. We have determined that oral argument would not facilitate the decision of these cases. The request is **DENIED**.[10/]

[10/] In light of our disposition of these cases we need not address the *Rockefeller I* ALJ's suspension of Rockefeller's counsel from further participation in the case before him. We point out that this attorney again has engaged in personal and vituperative attacks on Department of Labor ALJs. *See Johnson v. Oak Ridge Operations Office*, ARB Case No. 97-057, ARB Final Dec. and Ord., slip op. at 14-15 (Sept. 30, 1999); *Williams and Farver v. Lockheed Martin*, ARB Case Nos. 99-054, 99-064, ARB Final Dec. and Ord., slip op. at 5-6 and n. 6 (Sept. 29, 2000). The level of invective with which counsel describes the work of the ALJs in these cases is offensive, and the characterizations of the ALJs' actions are factually inaccurate and insulting. As we have previously noted, attorneys have a professional obligation to demonstrate respect for the courts. *See* ABA Model Rules of Professional Conduct, Preamble, Rules 3.5 and 8.2 (1999); 29 C.F.R. §18.36. Once again counsel for Rockefeller has exhibited his disregard of that professional obligation.

CONCLUSION

For the foregoing reasons the complaints in *Rockefeller I*, *II*, *III*, and *IV* are **DISMISSED.**

SO ORDERD.

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member