In the Matter of:

WALTER MOORE, **ARB CASE NO. 99-094**

COMPLAINANT, **ALJ CASE NO. 1999-CAA-14**

v. **DATE: July 31, 2001**

U.S. DEPARTMENT OF ENERGY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

Appearances:

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

For the Respondent:
Jake J. Chavez, Esq., *U.S. Department of Energy, Albuquerque, New Mexico*

FINAL DECISION AND ORDER

Complainant Walter Moore filed this case under the employee protection ("whistleblower") provisions of the Clean Air Act, 42 U.S.C.A. §7622 (West 1995) ("CAA"), the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C.A. §9610 (West 1995), and the Surface Transportation Assistance Act ("STAA"), as amended and recodified, 49 U.S.C.A. §31105 (West 1997). This case – "*Moore II*" – is the second of three complaints that Moore filed against Respondent Department of Energy ("DOE").[2/]

[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,979 (1996).

[2/] The other complaints were dismissed: *Moore v. Department of Energy*, ARB No. 99-047, ALJ No. 98-CAA-16 (ARB June 25, 2001) (*Moore I*); *Moore v. Department of Energy*, ARB No. 00-038, ALJ No. 99-CAA-15 (ARB Jan. 1, 2001) (*Moore III*).

According to Moore, while the Occupational Safety and Health Administration ("OSHA")[3/] was investigating the first complaint, DOE made certain statements against him and engaged in improper *ex parte* contacts with the OSHA investigator. Moore viewed DOE's actions as retaliatory and filed the second complaint with OSHA.

OSHA found no merit to Moore's complaint in this case and dismissed it. Moore objected to that determination and the matter was referred to an Administrative Law Judge ("ALJ"). Once the matter was before an ALJ, DOE moved to dismiss the complaint arguing, *inter alia*: 1) the STAA does not apply to federal employees; and 2) the allegations in Moore's complaint, even if true, did not establish *prima facie* case of discrimination under either STAA, CAA or CERCLA. The ALJ granted DOE's motion and this appeal followed.

JURISDICTION

We have jurisdiction pursuant to the CAA, 42 U.S.C.A. §7622; CERCLA, 42 U.S.C.A. §9610; STAA, 49 U.S.C.A. §31105; and the implementing regulations at 29 C.F.R. §24.8 (2000) and 29 C.F.R. §1978.109(c)(1) (2000).

STANDARD OF REVIEW

A determination that a complainant has failed to state a claim upon which relief can be granted is a legal conclusion. The ALJ's determination in this case that Moore is not covered by the STAA's employee protection provisions is also a legal conclusion. The Board reviews the ALJ's legal conclusions *de novo*. *Johnson v. Roadway Express, Inc*., ARB No. 99-011, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000), citing *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Masek v. Cadle Co*., ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000).

DISCUSSION

A. Moore's complaint under the STAA.

With regard to Moore's claim under the STAA, the ALJ noted:

> An "employee" under the STAA does not include " . . . an employee of the United States Government, a state or a political subdivision of a state acting in the course of employment." 29 C.F.R. §1978.101(d); 49 U.S.C. §31101(2)(B); and an "employer" under the STAA does not include the United States Government, a state or a political subdivision of a state. 49 U.S.C.

[3/] OSHA is the Department of Labor agency responsible for investigating complaints under the employee protection provisions of the CAA, CERCLA, and STAA. *See* 29 C.F.R. §24.4 and 29 C.F.R. §1978.103.

> §31101(3)(B). Exhibit A to the complaint filed with OSHA is the alleged discriminatory *ex parte* communication. It identifies Complainant as an employee of the Transportation Safeguards Division of the Department of Energy. Complainant has not challenged this representation and there appears to be no factual issue that at all times relevant Complainant was and is an employee of the United States Government. Therefore, I grant Respondent's motion to dismiss the Complaint under the STAA.

Recommended Decision and Order ("RD&O") at 3.

Moore claims that the Secretary held in his remand decision in *Flor v. Department of Energy*, No. 93-TSC-01 (Dec. 9, 1994), that government employees are covered by the STAA. This is incorrect. We considered and rejected this same argument in *Rockefeller v. Carlsbad Area Office, U.S. Department of Energy*, ARB Nos. 99-022/063/067/068, ALJ Nos. 98-CAA-10/11, 99-CAA-1/4 (ARB Oct. 31, 2000), noting that *Flor* simply did not address the issue of sovereign immunity under the STAA. As we observed in *Rockefeller*,

> 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.

Rockefeller, slip op. at 6,7. The ALJ's reasoning in this case with regard to Moore's STAA complaint is similar to the analysis adopted by the Board in *Rockefeller*. Moore has offered no persuasive argument suggesting that the ALJ's reasoning was in error, nor do we discern any. Therefore, we concur with the ALJ that Moore is not covered by the STAA.

B. Moore's complaint under the CAA and CERCLA.

In order to state a claim under the environmental acts, the complainant must show: 1) that he engaged in protected activity; 2) that the respondent knew about the protected activity; 3) that the respondent took adverse action against him; and 4) that the protected activity was the likely reason for the adverse action. *See Carroll v. Bechtel Power Corp.*, No. 91-ERA-46 (Sec'y Feb. 15, 1995), *aff'd sub nom. Carroll v. Dep't of Labor*, 78 F.3d 352 (8th Cir. 1996), citing *Dartey v. Zack Co. of Chicago*, No. 82-ERA-2, slip op. at 7-8 (Sec'y Apr. 25, 1983).

In his recommended decision, the ALJ stated:

> Taking all the facts alleged in the complaint as true and making all reasonable inferences in favor of Complainant, I find that the Amended Complaint fails to allege that Respondent took any adverse action against Complainant. Nowhere does Complainant allege any act on the part of Respondent that affected Complainant's compensation, terms, conditions or privileges of employment. Nowhere does Complainant allege that Respondent intimidated, threatened, restrained, coerced, blacklisted, discharged or in any other manner discriminated against him. . . . [I]t is clear that even if Complainant proved all of the allegations in the Amended Complaint filed pursuant to my pretrial order, he could not prevail. Thus, dismissal is appropriate.

RD&O at 5. Moore takes issue with the ALJ's reasoning, arguing that in a hostile working environment case he is not required to show a tangible job detriment.

As a general proposition, we agree with Moore's statement that tangible job detriment is not an essential element of proof in a hostile working environment case. But even if the ALJ may have mischaracterized the proper legal standard to be applied in a hostile environment case, this was harmless error in this case because the ALJ nonetheless reached the correct result.

We have previously determined that the following factors are to be weighed in a hostile work environment claim:

(1) the complainant suffered intentional discrimination because of his or her membership in the protected class;
(2) the discrimination was pervasive and regular;
(3) the discrimination detrimentally affected the complainant;
(4) the discrimination would have detrimentally affected a reasonable person of the same protected class; and
(5) the existence of *respondeat superior* liability.

Berkman v. U.S. Coast Guard Academy, ARB No. 98-056, ALJ No. 97-CAA-2 and 97-CAA-9 (ARB Feb. 29, 2000).

Moore neither alleged nor offered facts to support an allegation that any of these factors are present here. Stated differently, Moore's allegations – even if true – would not support a finding of hostile working environment discrimination. As a result, Moore failed to allege facts sufficient to establish an element essential to his case and the matter was subject to immediate dismissal. *Hasan v. Commonwealth Edison Co.*, ARB Nos.01-002/003, ALJ Nos. 2000-ERA-

8/11 (ARB Apr. 23, 2001).[4/] Therefore, we concur with the ALJ that DOE's motion to dismiss should be granted and the case **DISMISSED**.[5/]

SO ORDERED.

PAUL GREENBERG
Chair

RICHARD A. BEVERLY
Alternate Member

[4/] Although Moore has argued that the ALJ erred in denying him discovery, he has not explained how any amount of discovery could produce evidence establishing that DOE's conduct during the investigation of his first complaint amounts to discrimination that is both pervasive and regular. Absent a showing that the discrimination was both pervasive and regular, he cannot establish a hostile work environment.

[5/] In its reply brief, EPA argues that Moore's complaint also should be dismissed because there has been no waiver of sovereign immunity under the CAA and CERCLA. In light of the disposition of this case, it is not necessary to reach this issue.