UNITED STATES DEPARTMENT OF LABOR • OFFICE OF ADMINISTRATIVE LAW JUDGES

Whistleblower Newsletter

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AIR21 CASES

ADVERSE EMPLOYMENT ACTION; TEMPORARY AND MINIMAL CHANGES IN CONDITIONS OF EMPLOYMENT DURING PERSONNEL INVESTIGATION

In ***Majali v. Airtran Airlines***, 2003-AIR-45 (ALJ Aug. 10, 2004), the Complainant asserted that when he went to work on an unscheduled work day following a vacation, his key would not permit access to the building, he found his desk occupied, and his access to the computer was denied when he attempted to log on. Later that day, the Complainant was directed not to report to work as regularly scheduled but instead to report the following day to a meeting to discuss his failure to report for work for three days following the end of the vacation. Although denied by his supervisor, the Complainant alleged that on the day he returned to work he was directed to wait outside the building to be escorted. Following the meeting, the Complainant believed that he would be contacted by the human resources department the following day, but he was not. The Complainant had also heard rumors that his job was in jeopardy. The Complainant alleged before the ALJ that these circumstances were tantamount to a constructive discharge or an actionable change in the conditions of employment.

The ALJ found that neither ground was actionable. The ALJ found that it was not clear that the Respondent had intentionally prevented the Complainant's entry or access, that desks were frequently shared and the Complainant had not been

scheduled to work the day that it was occupied, and there was no indication that the restricted access was more than temporary. The ALJ found that although the Complainant reasonably may have believed that his job was in jeopardy, he may have been able to straighten out the situation if he had allowed the internal disciplinary process to work. The ALJ found that the conditions of employment had only been temporarily and minimally changed during the course of a personnel investigation in a manner consistent with the Respondent's usual procedures. The ALJ also noted that the Complainant had remained in pay status.

ADVERSE EMPLOYMENT ACTION; COMPLAINANT PLACED IN UNPAID STATUS AFTER FAILURE TO RETURN TO WORK

In ***Majali v. Airtran Airlines***, 2003-AIR-45 (ALJ Aug. 10, 2004), the Complainant was directed to attend a meeting with human resources following an absence. At the meeting the Complainant indicated that he would like to return to work for the Respondent; however, two days later the Complainant's attorney wrote to the Respondent informing that the Complainant believed that he had been constructively discharged, was seeking a severance package, and was unwilling to accept reinstatement as a solution. The Employer replied to the attorney inviting the Complainant to return to work by a stated date, and denying the existence of a constructive discharge. When the Complainant did not return to work on the date specified, the Respondent put the Complainant on unpaid leave.

The ALJ noted that these circumstances were similar to those in *Smith v. Western Sales & Testing*, ARB No. 02-080, 2001-CAA-17 (ARB Mar. 31, 2004), and that it could not be found, therefore, that the Complainant had been constructively discharged by the Respondent. Nonetheless, the ALJ observed that the AIR21 regulations defined adverse action broadly to include "*any* change with respect to compensation, terms, conditions, or privileges of employment." The ALJ found that a suspension placing an employee in nonpay status is an adverse action under this broad definition.

COVERAGE; PRIVATE AIRCRAFT THAT CARRIED LETTERS TO AND FROM OILFIELD NOT ON A POSTAL ROUTE ARE NOT "AIR CARRIERS" WITHIN THE MEANING OF AIR21

In ***Broomfield v. Shared Services Aviation***, 2004-AIR-20 (ALJ Aug. 9, 2004), the ALJ concluded that the Respondent, which partially funds an aviation service to transport workers by aircraft to its oilfields in the North Slope of Alaska, and which often carries mail in cooperation with (but not under contract with) the USPS, is not a covered "air carrier" within the meaning of the whistleblower provision of AIR21. Considered collectively, 49 U.S.C. §§ 40102(a)(2), 40102(a)(5) and 40201(a)(30), and 42121(a) indicate that transportation of U.S. mail is covered by AIR21's whistleblower provision. Under the facts of the case, however, the ALJ found that in the absence of a contractual relationship with the Postal Service, the letters carried by Respondent were not part of the postal system and hence are not mail. There was no evidence of a postal route between Anchorage and the North Slope, and the Respondent's aircraft were merely carrying mail to post offices for mailing, and picking it up for delivery.

JURISDICTION; COVERAGE IS NOT A JURISDICTION ISSUE

In ***Broomfield v. Shared Services Aviation***, 2004-AIR-20 (ALJ Aug. 9, 2004), the ALJ observed that the issue of whether the Respondent is an air carrier covered by AIR21 is an issue of coverage rather than jurisdiction.

ERA CASES

[Nuclear and Environmental Whistleblower Digest IX M 2 and XVIII C 10]
DISMISSAL FOR CAUSE; COUNSEL'S DELIBERATE AND CONTEMPTUOUS REFUSAL TO COMPLY WITH LAWFUL ORDER OF THE ALJ

An ALJ may recommend dismissal of an ERA whisteblower complaint based upon a party's failure to comply with a lawful order. 29 C.F.R. § 24.6(e)(4)(i). Dismissal of a complaint for failure to comply with the ALJ's lawful orders, however, is a very severe penalty to be assessed in only the most extreme cases. In ***Puckett v. Tennessee Valley Authority***, ARB No. 03-024, ALJ No. 2002-ERA-15 (ARB June 25, 2004), the ARB affirmed the ALJ's recommended dismissal of the complaint where the record supported the ALJ's finding that "Counsel's failure to comply with the Scheduling Order was a deliberate unjustified delaying tactic and a deliberate expression of contempt for the Court...." USDOL/OALJ Reporter at 3 (citations omitted). The ARB also found that the record supported the ALJ's finding that "Counsel has exhibited a drawn out history of deliberately proceeding in a dilatory manner and his continued disregard of the Court's Orders indicates that with anything less than dismissal, counsel will never understand the severity of potential consequences for not complying with the Court's Orders...." USDOL/OALJ Reporter at 3-4 (citations omitted).

[Nuclear and Environmental Whistleblower Digest IX M 2 and XVIII C 10]
ATTORNEY MISCONDUCT AS GROUNDS FOR DISMISSAL OF COMPLAINT; COMPLAINANT NOT PERMITTED TO DISASSOCIATE WITH MISCONDUCT WHERE HE WAS AWARE OF IT AND APPEARED TO RATIFY IT

In ***Puckett v. Tennessee Valley Authority***, ARB No. 03-024, ALJ No. 2002-ERA-15 (ARB June 25, 2004), the ARB affirmed the ALJ's dismissal of the complaint based on the Complainant's counsel's deliberate and contemptuous refusal to comply with a lawful order. The ARB rejected the Complainant's request to permit him to obtain a new attorney and proceed with the case where the Complainant had been aware of his counsel's contumacious refusal to comply with the ALJ's scheduling order, but nevertheless, he continued to ratify his counsel's actions even after the case had been appealed to the ARB.

[Nuclear and Environmental Whistleblower Digest XIII B 8]
REFUSAL TO HIRE; COMPLAINANT MUST ESTABLISH THAT HE WAS QUALIFIED FOR THE POSITION

In ***Hasan v. Sargent & Lundy***, ARB No. 03-030, ALJ No. 2000-ERA-7 (ARB July 30, 2004), a refusal to hire case, the complaint was properly dismissed where the

Complainant, a contract engineer, was unable to establish that he was qualified for the positions that were available.

[Nuclear and Environmental Whistleblower Digest XIII B 8]
ADVERSE EMPLOYMENT ACTION; FAILURE TO PROMOTE; HIREE BETTER QUALIFIED THAN COMPLAINANT

Where a position is filled by a clearly better qualified candidate, a whistleblower cannot establish that he suffered an adverse employment action as a result of his non-selection for the job, even though he is able to prove that he applied for the position, was qualified, and was rejected. ***Williams v. Administrative Review Board, USDOL***, __ F.3d __, No. 03-60028 (5th Cir. July 15, 2004) (available at 2004 WL 1440554) (case below ARB No. 98-030, ALJ No. 1997-ERA-14).

[Nuclear and Environmental Whistleblower Digest XIII C]
HOSTILE WORK ENVIRONMENT THAT DID NOT CULMINATE IN UNFAVORABLE PERSONNEL ACTION SUPPORTS CAUSE OF ACTION UNDER ERA WHISTLEBLOWER PROVISION

In ***Williams v. Administrative Review Board, USDOL***, __ F.3d __, No. 03-60028 (5th Cir. July 15, 2004)) (available at 2004 WL 1440554) (case below ARB No. 98-030, ALJ No. 1997-ERA-14), the Fifth Circuit, noting an apparent inconsistency between general caselaw and the statutory text of the ERA, invited the parties to brief the issue of whether a hostile work environment that does not culminate in unfavorable personnel action can support a claim under the ERA whistleblower provision. The parties declined, appearing to agree that such claims are cognizable. The 5th Circuit, recognizing that the ARB and the 4th Circuit has recognized such claims while no authority had denied them, and in view of the party's apparent agreement on this point, concluded that such claims are cognizable.

[Nuclear and Environmental Whistleblower Digest XIII C]
5TH CIRCUIT REVERSES ARB RULING THAT *ELLERTH/FARAGHER* STANDARD DOES NOT APPLY TO HOSTILE WORK ENVIRONMENT CASES BROUGHT UNDER THE ERA; AFFIRMATIVE DEFENSE OF REASONABLE CARE AND PROMPT RESPONSE

In ***Williams v. Administrative Review Board, USDOL***, __ F.3d __, No. 03-60028 (5th Cir. July 15, 2004)) (available at 2004 WL 1440554) (case below ARB No. 98-030, ALJ No. 1997-ERA-14), the Fifth Circuit held that "the ARB erred in finding that the standard developed by the Supreme Court in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) was not applicable to hostile work environment cases brought under 42 U.S.C. § 5851 where no adverse personnel action was taken." The ARB had concluded that the *Ellerth-Faragher* standard was only applicable to Title VII sexual harassment cases and not to ERA whistleblower claims. The Fifth Circuit found the ARB's analysis unpersuasive.

The Fifth Circuit, however, affirmed the ARB's alternative holding that even under the *Ellerth-Faragher* standard, the Employer established both prongs of the *Ellerth-Faragher* affirmative defense: (1) that the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and (2) that the harassed

employee unreasonably failed to take advantage of any preventative opportunities provided by the employer. In the instant case, the Respondent had set up an Employee Concerns Program (ECP) that was independent of the usual chain of supervisory command and was in place long before the instant harassment took place. All employees were made aware of the program. Moreover, once the Respondent was made aware of the hostile environment, it acted swiftly to address the situation, assembling an investigatory team, shutting down production while requiring the staff to complete 40 hours of training in effective human interaction and teamwork, conducting a line-by-line group review of safety procedures, performing a follow-up investigation after restart of production, and ordering a root-causes analysis which resulted in the publication of written guidelines for supervisors on avoiding future hostilities. In addition, none of the plaintiffs had filed a harassment complaint with the ECP or proceeded through any other channel until a month after the harassment started. Moreover, after restart of production there were no other instances of harassment reported to the Respondent until the filing of the instant ERA complaints.

[Nuclear and Environmental Whistleblower Digest XX E]
SOVEREIGN IMMUNITY IN ERA WHISTLEBLOWER CASES; RETROACTIVE APPLICATION OF *PASTOR* RULING

In ***De Melo v. U.S. Dept. of Veterans Affairs***, ARB No. 03-027, ALJ No. 2002-ERA-17 (ARB June 22, 2004), the ARB dismissed the appeal, finding that it lacked jurisdiction over § 5851(b) complaints against Federal agencies such as the Department of Veterans Affairs because Congress did not waive sovereign immunity from such claims. *Pastor v. Department of Veterans Affairs,* ARB No. 99-071, ALJ No. 1999-ERA-11 (ARB May 30, 2003). The Board observed that the ruling in *Pastor* applied even though the ALJ issued his Recommended Decision and Order prior to that decision.

ENVIRONMENTAL CASES

[Nuclear and Environmental Whistleblower Digest II B 2]
JURISDICTION; COVERAGE AND TIMELINESS ARE NOT DETERMINATIVE OF JURISDICTION

In ***Gain v. Las Vegas Metropolitan Police Dept.***, ARB No. 03-108, ALJ No. 2002-SWD-4 (ARB June 30, 2004), the ALJ had determined that she lacked jurisdiction over a complaint because she found that the complaint concerned occupational rather than environmental hazards and because she found the complaint to be untimely. The ARB affirmed the dismissal of the complaint on the ground that it did not include the essential element of protected activity. In a footnote it observed that coverage and timeliness are not jurisdictional matters, citing *OFCCP v. Keebler Co.*, ARB No. 97-127, ALJ No. 1987-OFC-20, slip op. at 10 (ARB Dec. 21, 1999).

In ***Culligan v. American Heavy Lifting Shipping Co.***, ARB No. 03-046, ALJ Nos. 2000-CAA-20, 2001-CAA-9 and 11 (ARB June 30, 2004), however, the ARB held that safety and health issues that pertain only to a complainant's workplace are not covered under the whistleblower protection provisions, and OALJ and the ARB lack

jurisdiction over complaints filed under section 11(c) of the Occupational Safety and Health Act. To the same effect: ***Evans v. Baby-Tenda***, ARB No. 03-001, ALJ No. 2001-CAA-4 (ARB July 30, 2004).

[*Editor's note*: The ARB in ***Gain*** and ***Culligan*** and ***Evans*** uses the concept of subject matter jurisdiction differently in procedural terms. Undoubtedly, the use of the concept in the two decisions seems to be directly contradictory, and the ARB may need to clarify the concepts more distinctly. In ***Gain***, the Board is making the point that the mere fact that the ALJ needs to decide whether a cause of action under Part 24 has been presented provides the requisite subject matter jurisdiction for a DOL ALJ to adjudicate that issue. In ***Culligan*** and ***Evans***, however, the Board is making the point that safety and health issues that pertain only to a complainant's workplace are not covered under the whistleblower protection provisions, and that DOL OALJ and the ARB lack subject matter jurisdiction over complaints filed under section 11(c) of the Occupational Safety and Health Act. Probably the Board panel in ***Gain*** would say that the ***Culligan*** and ***Evans*** panels had subject matter jurisdiction to decide the issue of whether the complaint raised issues within the jurisdiction of DOL OALJ and the ARB under Part 24, and that they correctly decided that since DOL OALJ and the ARB do not have such jurisdiction, the complaints had to be dismissed.]

[Nuclear and Environmental Whistleblower Digest II B 2 and XX B 1]
JURISDICTION; SEAMAN COVERED BY U.S. COAST GUARD RULES ON SAFETY AND HEALTH; FACT THAT OSH ACT ANTI-RETALIATION PROVISION IS PREEMPTED DOES NOT PRECLUDE INVESTIGATION OF ENVIRONMENTAL WHISTLEBLOWER COMPLAINTS; NEED TO EXAMINE PURPOSES OF ACTS TO DETERMINE JURISDICTION

Although the OSH Act's prohibition against employer retaliation, 29 U.S.C.A. § 660(c)(1), is pre-empted for blue-water seamen, such preemption does not necessarily preclude OSHA from investigating employee whistleblower complaints filed under the environmental statutes. In ***Culligan v. American Heavy Lifting Shipping Co.***, ARB No. 03-046, ALJ Nos. 2000-CAA-20, 2001-CAA-9 and 11 (ARB June 30, 2004), the ARB therefore had to examine the purposes of each of the six whistleblower acts cited by the Complainant -- a merchant seaman -- and then determine whether any of several alleged environmental violations were related to the concerns covered by the acts in order to determine whether the Complainant had established subject matter jurisdiction. In ***Culligan***, the Board concluded that none of the environmental statutes conferred subject matter jurisdiction over the Complainant's complaints, but declined to dismiss on this ground because there was some ambiguity about exactly where the protected activities that could have potentially affected the environment took place. The Board found a remote possibility that some of the incidents could be covered by CERCLA or the FWPCA, and therefore proceeded to an alternative finding on the merits of the complaints.

[Nuclear and Environmental Whistleblower Digest II B 2]
JURISDICTION; PURPOSES OF ENVIRONMENTAL STATUTES

In ***Culligan v. American Heavy Lifting Shipping Co.***, ARB No. 03-046, ALJ Nos. 2000-CAA-20, 2001-CAA-9 and 11 (ARB June 30, 2004), the Complainant was a merchant seaman who alleged violations of six environmental whistleblower statutes

by his employer, a shipping company. The ARB found that, although most of his complaints were about the working conditions aboard the vessel concerning safety and health issues that did not relate to the environment, a few of Complainant's allegations might implicate the environmental statutes. The Board therefore closely examined the purposes of each statute to determine if a jurisdictional basis existed. The discussion is too lengthy to adequately summarize in a casenote, but, in brief, the Board found:

- The purpose of the CAA 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.A. § 7401(b)(1).

- The purpose of the SDWA is to promote the safety of the nation's public water systems through the regulation of contaminants so as to provide water fit for human consumption. 42 U.S.C.A. 300f(1).

- The purpose of the TSCA is to regulate chemical substances and mixtures that present such risks and to take action against imminent hazards. 15 U.S.C.A. § 2601(b)(2).

- The purpose of the SWDA is to promote the reduction of hazardous waste and the treatment, storage, or disposal of such waste so as to minimize threats to human health and the environment. 42 U.S.C.A. § 6902(b).

- The two main purposes of CERCLA are the "prompt cleanup of hazardous waste sites and the imposition of all cleanup costs on the responsible party." *General Electric Co. v. Litton Industrial Automation Systems, Inc.,* 920 F.2d 1415, 1422 (8th Cir. 1990).

- The objective of the FWPCA, also known as the Clean Water Act, is to restore and maintain the chemical, physical, and biological integrity of the nation's waters, with the goal of eliminating the discharge of pollutants by industry into the navigable waters, waters of the contiguous zone, and the oceans. 33 U.S.C.A. § 1251(a).

The ARB found that none of the statutes provided subject matter jurisdiction over the Complainant's complaints because none of the activities cited by the Complainant could be considered as carrying out the purposes of those acts or relating to the administration or enforcement of their provisions.

The Board, however, declined to decide the case based on subject matter jurisdiction because there was a remote possibility that some the incidents were covered [alleged dumping of oil-contaminated oil drums and untreated garbage; malfunctioning sanitation equipment; faulty steam valves left open while the ship was at dock].

[Nuclear and Environmental Whistleblower Digest II B 2]
FAILURE TO STATE A CAUSE OF ACTION; ALLEGED HARDBALL LITIGATION TACTICS

In ***Culligan v. American Heavy Lifting Shipping Co.***, ARB No. 03-046, ALJ Nos. 2000-CAA-20, 2001-CAA-9 and 11 (ARB June 30, 2004), the Complainant had filed a complaint alleging that the Respondent had further retaliated against him in violation of the environmental whistleblower statutes by engaging in "hardball litigation tactics." The ARB found that the complaint seemed to be grounded in a request that the ALJ reconsider numerous discovery rulings, and held that "[s]uch a request is not cognizable under the whistleblower protection provisions of the environmental statutes." USDOL/OALJ Reporter at 15 (citations omitted). The Board wrote: "While sanctions may be imposed in cases of discovery abuse and inappropriate legal maneuvers, there is no legal basis for filing a subsequent whistleblower complaint to raise such issues or seek reconsideration of an ALJ's orders. Furthermore, after review of the procedural record, we find that the ALJ acted within her discretion in disposing of the multitudinous motions filed below. Culligan's 2001 complaint is thus also frivolous."

[Nuclear and Environmental Whistleblower Digest II B 2]
JURISDICTION; COMPLAINT MUST ALLEGE ACTIVITIES THAT FURTHER THE PURPOSES OF THE ENVIRONMENTAL ACTS OR RELATE TO THEIR ADMINISTRATION AND ENFORCEMENT IN ORDER TO ESTABLISH SUBJECT MATTER JURISDICTION; EVEN IF SUBJECT MATTER JURISDICTION IS ESTABLISHED, THE COMPLAINANT MUST ALSO ESTABLISH THAT SHE ENGAGED IN PROTECTED ACTIVITY UNDER THE ENVIRONMENTAL ACT

In cases arising under the environmental whistleblower statutes, subject matter jurisdiction exists only if the complainant is alleging that the respondent illegally retaliated against him for engaging in activities protected by the environmental statutes' whistleblower provisions. *Culligan v. American Heavy Lifting Shipping Co.,* ARB No. 03-046, ALJ Nos. 00-CAA-20, 01-CAA-09, 01-CAA-11, slip op. at 8 (ARB June 30, 2004). That is, the complainant must have alleged activities that further the purposes of those acts or relate to their administration and enforcement. *See* 29 C.F.R. § 24.2(a), (b). ***Evans v. Baby-Tenda***, ARB No. 03-001, ALJ No. 2001-CAA-4 (ARB July 30, 2004).

In ***Evans***, the ARB assumed that it had subject matter jurisdiction because the Complainant alleged that she had included a CAA complaint to OSHA: that paint fumes were escaping from Baby-Tenda's manufacturing plant into the outside air. The ARB only assumed that the Complainant made this allegation because the actual complaint was not in the record. The ARB, however, also observed that in order to prevail under the CAA, the Complainant must establish by a preponderance of the evidence that she engaged in protected activity, *i.e.*, she must demonstrate that her complaint was based on a reasonable belief that the Respondent was violating the CAA by emitting paint fumes and asbestos into the ambient air. Disagreeing with the ALJ's analysis of the evidence, the ARB found that the Complainant had not established that she engaged in CAA protected activity.

The ALJ had found that the Complainant could be attributed to have engaged in protected activity "by extension" where a co-worker filed a complaint with state and

federal authorities about asbestos removal by the Respondent, and the Employer assumed that it was the Complainant who had made the complaint. The ARB did not decide the issue of whether a complainant can be attributed with protected activity by extension because it found in the instant case that the Complainant's supervisor did not know about the protected activity at the time he terminated the Complainant.

[Nuclear and Environmental Whistleblower Digest IX B 2 and XVIII C 8]
DISMISSAL FOR CAUSE; ARB; FAILURE TO FILE TIMELY BRIEF OR REQUEST FOR EXTENSION

In ***Mugleston v. EG&G Defense Materials, Inc.***, ARB No. 04-060, ALJ No. 2002-SDW-4 (ARB June 30, 2004), the ARB dismissed an appeal where the Complainant failed to file a timely brief and did not file a motion for an extension of time to file the brief until nearly three months after the brief was due. The Board, while sympathetic to counsel's situation, found that an illness in the attorney's family and a busy litigation schedule did not excuse the failure to file a timely brief or request for an extension.

[Nuclear and Environmental Whistleblower Digest IX B 2 and IX M 2]
ATTORNEY MISCONDUCT; STRIKING OF BRIEF BEFORE THE ARB BECAUSE OF INAPPROPRIATE INVECTIVE

In ***Culligan v. American Heavy Lifting Shipping Co.***, ARB No. 03-046, ALJ Nos. 2000-CAA-20, 2001-CAA-9 and 11 (ARB June 30, 2004), the ARB granted the Respondent's motion to strike the Complainant's initial brief where the Complainant's attorney had violated his professional obligation to demonstrate respect for the courts. The attorney's brief, the ARB found, was panoply of gratuitous excoriation and high-blown opinions that obfuscated his discussion of the ALJ's recommended decision. The Board observed that each of the "assertions of error in the R. D. & O. could have been expressed without the addition of adjectives that have no place in a legal document purporting to assist Culligan in his appeal of the adverse decision." Because the attorney had used similar invective in briefing other cases before the ARB, the Board declined to permit him any additional opportunity to address the case, citing by example a prior case in which the same attorney had been permitted to resubmit a brief without personally disparaging remarks. The Board, however, declined to penalize the Complainant for his attorney's inappropriate pleadings by dismissing the appeal.

[Nuclear and Environmental Whistleblower Digest IX M 2]
ATTORNEY MISCONDUCT; DISQUALIFICATION BY OALJ; AUTHORITY FOR RECIPROCAL DISCIPLINE BY OTHER AGENCIES WITHIN DOL

In ***Erickson v. U.S. Environmental Protection Agency***, ARB No. 04-086, ALJ Nos. 1999-CAA-2 et al (ARB July 14, 2004), the ARB stated that "a denial of authority to appear as a representative in any case before the OALJ may be relied on by other Department of Labor agencies, including this Board, in determining whether the attorney is qualified to represent parties before those agencies." The Board cited in this regard OALJ's order disqualifying an attorney, and *Selling v. Radford*, 243 U.S. 46 (1917) (discussing guidelines for federal court's determination whether to impose reciprocal discipline following disbarment by either a state court or another federal court).

[Nuclear and Environmental Whistleblower Digest XIV B 2]
EMPLOYER-EMPLOYEE RELATIONSHIP; SHIPPING COMPANY OWNED BY UNION'S PENSION FUND; LACK OF SHOWING OF CONTROL OVER EMPLOYMENT

In ***Culligan v. American Heavy Lifting Shipping Co.***, ARB No. 03-046, ALJ Nos. 2000-CAA-20, 2001-CAA-9 and 11 (ARB June 30, 2004), the Complainant alleged that the masters, mates, and pilots union and the International Longshoreman's Association retaliated against him by expelling him from the union because of his case against a shipping company which was owned by the pension funds of the two union organizations. The ARB, however, found that there was no evidence that the union controlled the Complainant's employment or had any connection to his firing by the shipping company.

[Nuclear and Environmental Whistleblower Digest XIV B 4 j]
EMPLOYER-EMPLOYEE RELATIONSHIP; INDIVIDUALS PROPERLY DISMISSED IF THEY DID NOT CONTROL TERMS AND CONDITIONS OF EMPLOYMENT; ANY DISCRIMINATORY ACTIVITY WOULD IMPUTED TO THEIR EMPLOYER

In ***Culligan v. American Heavy Lifting Shipping Co.***, ARB No. 03-046, ALJ Nos. 2000-CAA-20, 2001-CAA-9 and 11 (ARB June 30, 2004), the ARB found that the ALJ had properly dismissed five individuals named as Respondents where the Complainant presented no evidence that the individuals had control over the terms and conditions of the Complainant's employment, or had acted in any capacity except as a supervisor within the scope of their employment with the Employer. The Board stated that "[e]ven if they engaged in discriminatory activity, which is not evident in this record, any liability would be imputed to their employer. *Lissau v. Southern Food Services, Inc*, 159 F.3d 177, 181 (4th Cir. 1999)."

SOX CASES

FINAL SARBANES-OXLEY WHISTLEBLOWER REGULATIONS PUBLISHED BY OSHA

On August 24, 2004, OSHA published final regulations setting out the procedures and time frames for handling SOX whistleblower complaints. 69 Fed. Reg. 52104 (Aug. 24, 2004). Some highlights of the preamble to the final rule include:

- **Regulations are only procedural and not interpretative**. Several commentators made suggestions of regulatory provisions to assist in the defining the parameters of SOX whistleblower coverage on matters such as whether coverage extends to employees employed outside the U.S. or to foreign corporations that have U.S. employees, and on the scope of protected activity. OSHA declined to set such parameters on the ground that "the purpose of these regulations is to provide procedural rules for the handling of whistleblower complaints and not to interpret the statute." 69 Fed. Reg. at 52107.

- **Liability for adverse actions of a contractor or subcontractor**. In response to one commentor's suggestion that OSHA clarify the scope of a respondent's liability for the actions of contractors or subcontractors, OSHA cited the ARB decision in *Stephenson v. NASA*, ARB No. 96-080, ALJ No. 1994-TSC-5 (ARB Apr. 7, 1997) for the proposition that "a respondent may be liable for its contractor's or subcontractor's adverse action against an employee in situations where the respondent acted as an employer with regard to the employee of the contractor or subcontractor by exercising control of the work product or by establishing, modifying, or interfering with the terms, conditions, or privileges of employment." OSHA added: "Conversely, a respondent will not be liable for the adverse action taken against an employee of its contractor or subcontractor where the respondent did not act as an employer with regard to the employee." 69 Fed. Reg. at 52107.

- **Reinstatement: security risk: petition to OALJ for stay**. Several commentors addressed the "security risk" exception to preliminary reinstatement. OSHA clarified that this provision was added to the AIR21 regulations [which are the procedural model for SOX process] in response to the events of September 11, 2001, and "was designed to address situations where after-acquired evidence establishes that an employee's reinstatement might pose a significant safety risk to the public, notwithstanding the fact that the employee's discharge was retaliatory in violation of the Act." OSHA stated that the exception is not to be broadly construed and that it would only apply where reinstatement might result in "physical violence" against persons or property. Thus, OSHA perhaps implicitly rejected one commentor's observation that "security risk" could include risk to trade secrets. OSHA, however, amended section 1980.106(b)(1) to provide that a named person could file a motion with OALJ for a stay of the Assistant Secretary's preliminary reinstatement order. In OSHA's view, however, such a stay would only be granted in exceptional circumstances akin to the criteria for equitable injunctive relief. Section 1980.110(b) was similarly changed to permit the filing of a motion with the ARB to stay an ALJ's reinstatement order.

- **Economic reinstatement**. OSHA also explained its reasoning for including "economic reinstatement" as an option in lieu of actual reinstatement:

> When a violation is found, the norm is for OSHA to order immediate reinstatement. An employer does not have a statutory right to choose economic reinstatement. Rather, economic reinstatement is designed to accommodate an employer that establishes to OSHA's satisfaction that reinstatement is inadvisable for some reason, notwithstanding the employer's retaliatory discharge of the employee. If the employer can make such a showing, actual reinstatement might be delayed until after the administrative adjudication is completed as long as the employee continues to receive his or her pay and benefits and is not otherwise disadvantaged by a delay in reinstatement. The employer, of course, need

> not request the option of economic reinstatement in lieu of actual reinstatement, but if it does, there is no statutory basis for allowing the employer to recover the costs of economically reinstating an employee should the employer ultimately prevail in the whistleblower adjudication.

69 Fed. Reg. at 52109.

- **Definition of conclusion of the hearing**. Where the ARB grants a petition for review, it must issue a decision no later than 120 days after the date of the conclusion of the hearing before the ALJ. In the preamble to the final rule, OSHA defines the conclusion of the hearing to be "10 days after the date of the decision of the administrative law judge unless a motion for reconsideration has been filed in the interim." 69 Fed. Reg. at 52111.

- **Concluding the administrative proceeding after the complainant elects to proceed in federal district court**. In response to commentors who suggested specific incorporation of preclusion principles into the regulations to protect employers from having to defend both a DOL and a federal court action -- including a provision that once a complainant elects to go to district court DOL's administrative adjudication should cease and desist -- OSHA stated that there was no statutory basis for doing so, that it did not have the authority to regulate litigation in federal district courts, and that there was no legislative history suggesting that the complainants had to end their administrative proceedings prior to seeking relief in the federal courts. OSHA, however, observed that to date, complainants who choose to go to federal court generally do so before the ALJ conducts the hearing, and that after the complainant files in district court, ALJs dismiss the hearing requests, often in response to a motion filed by the complainant.

ADVERSE EMPLOYMENT ACTION; LOSS OF JOB RESPONSIBILITIES

In ***Willis v. Vie Financial Group, Inc.***, No. Civ.A. 04-0435 (E.D. Pa. Aug. 6, 2004) (available at 2004 WL 1774575), the defendant argued that a claim based on loss of job responsibilities should be dismissed because it is not one of the enumerated acts that constitute a violation of the SOX whistleblower provision. The court, however, held that the complaint sufficiently alleged a change in employment conditions within the meaning of the Act, citing *Glanzman v. Metro. Mgmt. Corp.*, 290 F.Supp.2d 571, 582 (E.D. Pa. 2003) (recognizing that significantly diminished material responsibilities can constitute a materially adverse change in working conditions).

AMENDMENT OF COMPLAINT; MISTAKE IN FAILING TO NAME PARENT CORPORATION

In ***Gonzalez v. Colonial Bank***, 2004-SOX-39 (ALJ Aug. 17, 2004), the Complainant moved to amend his complaint before the ALJ to include as a Respondent the publicly held parent company of his employer. Applying the Secretary's holding in an STAA case, *Wilson v. Bolin Associates, Inc.*, 1991-STA-4 (Sec'y Dec. 30, 1991), the

ALJ permitted the amendment under 29 C.F.R. § 18.5(e) and FRCP 15(c). The named Respondent did not dispute that it had received notice of the claim when originally filed or that the claim arose out of the same transaction described in the original complaint, but argued that Rule 15(c) did not apply because the failure to name it as a Respondent from the beginning was not based on a "mistake." Respondent contended that a "mistake" under Rule 15(c) permits a relation back only when a complainant had named the "correct defendant by the wrong name or other cases of genuinely mistaken identity." Slip op. at 3, quoting Respondent's opposition brief. The ALJ rejected this contention, finding that the relevant "mistake" is not one of identity, but of a mistake in identifying the responsible party. The ALJ, therefore permitted the amendment of the complaint, where the Complainant had alleged that the parent company was responsible for his employment at the employer and had responsibility for his termination. The ALJ also found that it was undisputed that there was a shared management and function between the parent and the subsidiary.

[Editor's note: the Complainant's amendment of his complaint to include the publicly traded parent corporation enabled him to withstand his employer's motion for summary decision on the ground that it was not a publicly traded company. *See* ***Gonzalez v. Colonial Bank***, 2004-SOX-39 (ALJ Aug. 20, 2004).]

CLAIM SPLITTING; DISMISSAL ON GROUND OF CLAIM SPLITTING IS NOT SUPPORTED BASED ON COMPLAINANT'S PURSUIT OF A STATE WHISTLEBLOWER CAUSE OF ACTION WHERE THE SOX AND THE STATE LAW ARE MATERIALLY DIFFERENT IN PROCEDURE, POTENTIAL ASSISTANCE TO THE COMPLAINANT, AND THE OBLIGATIONS IMPOSED ON THE SECRETARY OF LABOR

In ***Gonzalez v. Colonial Bank***, 2004-SOX-39 (ALJ Aug. 9, 2004), the Complainant filed a SOX whistleblower complaint with OSHA and several days later filed a complaint in a Florida state court for damages under the Florida Whistleblower statute based on defamation. On motion of the Respondent, the latter proceeding was transferred to U.S. District Court. Before the ALJ in the SOX case, the Respondent moved to dismiss arguing that the SOX case was based on the same facts and seeks the same relief as the claim filed under Florida law, and therefore is contrary to the rule against claim splitting.

The ALJ denied the motion, finding that the cases cited by the Respondent were decided all on the basis of *res judicata* or claim preclusion. The ALJ observed that the SOX whistleblower provision imposes obligations on the Secretary of Labor and provides additional support to a complainant different from the Florida law. Specifically, the ALJ pointed out that the Assistant Secretary for OSHA and the SEC could participate as amicus curiae at any time in the administrative process; that the SOX process provides for expeditious handling by DOL, for ALJ's broad authority to limit discovery, for immediate reinstatement, and for DOL authority to file a civil action to enforce an order of reinstatement. The ALJ also observed that settlements of SOX complaints must be approved by the ALJ or the ARB, who have the obligation of ensuring that the settlement is fair, adequate and reasonable not only in regard to the complainant's individual interests, but also those of the public.

Thus, the ALJ found that the SOX case before DOL was not barred by *res judicata* or by claim-splitting as there was no prior judgment, the SOX claim was filed first, and most significantly, because the SOX action differs materially from the Florida law.

COVERED EMPLOYER; NON-PUBLIC SUBSIDIARY OF PUBLICLY TRADED COMPANY; BOTH COMPANIES NAMED AS RESPONDENTS

In ***Gonzalez v. Colonial Bank***, 2004-SOX-39 (ALJ Aug. 20, 2004), the Complainant's employer, a non-publicly traded company, moved for summary decision on the ground that it was not a covered employer under the SOX whistleblower provision. The Complainant, however, had recently amended his complaint to name his employer's parent company as a Respondent, alleging that the parent had shared management and function with the subsidiary and that the parent's actions affected the Complainant's employment. The parent was a publicly traded company. The ALJ found that since the parent company had been named as a respondent, and Congress intended to provide whistleblower protection to employees of subsidiaries of publicly traded companies, the Complainant had set forth a cause of action sufficient to withstand a motion for summary decision.

COVERED EMPLOYER; FAILURE TO NAME PUBLICLY TRADED PARENT COMPANY AS A RESPONDENT

In ***Klopfenstein v. PPC Flow Technologies Holdings, Inc.***, 2004-SOX-11 (ALJ July 6, 2004), the ALJ considered the issue of whether the Complainant's failure to name a publicly traded company in his complaint should result in the dismissal of the complaint.

The Complainant was employed by a limited partnership, which was owned by a holding company. Neither the limited partnership nor the holding company was a publicly traded company. The holding company in turn was owned by a parent company, which was a publicly traded company. The complaint, for unexplained reasons, named only the holding company and the Vice President for Finance for the limited partnership. The Vice President had conducted an investigation of some of the Complainant's business practices at the request of the holding company, but made no recommendations as to what should be done about his findings. The complaint did not name either the limited partnership or the publicly traded parent company.

The Respondent holding company moved to dismiss based on *Flake v. New World Pasta Co.*, ARB No. 03-126, ALJ No. 2003-SOX-18 (ARB Feb. 25, 2004), in which the ARB held that SOX only covers companies with securities registered under § 12 or companies required to file reports under § 15(d) of the Exchange Act. The ALJ agreed with the Complainant that employees of non-public subsidiaries of publicly traded companies can be covered by the SOX whistleblower provisions, citing the ALJ's decision in *Morefield v. Exelon Services, Inc.*, 2004-SOX-2 (ALJ Jan. 28, 2004). The ALJ also found that, had the Complainant sued the parent company in this case, the commonality of management and purpose would likely have been sufficient to bestow whistleblower protection. But since the only company sued by the Complainant was a subsidiary of the parent company, which was neither the Complainant's employer nor a publicly traded company, the ALJ found that the complaint could not be maintained. The ALJ wrote: "Despite the apparent

legislative intent to attach liability to publicly traded companies who surround themselves by other entities under their control, it does not seem the Act provides a cause of action directly against such subsidiary alone." ***Klopfenstein,*** Slip op. at 12. The ALJ also rejected the Complainant's contention that the holding company was an agent of the parent company.

The ALJ also found that the named Vice President of Finance was not a proper party to the action because he was not an officer, employee, contractor, subcontractor, or agent of the publicly traded parent company.

EXHAUSTION OF ADMINISTRATIVE REMEDIES; POST-OSHA COMPLAINT RETALIATION; COMPLAINANT MUST AMEND OR FILE NEW COMPLAINT WITH OSHA IN ORDER FOR FEDERAL DISTRICT COURT TO PROCEED WITH POST COMPLAINT RETALIATION CLAIM

In ***Willis v. Vie Financial Group, Inc.***, No. Civ.A. 04-0435 (E.D. Pa. Aug. 6, 2004) (available at 2004 WL 1774575), the court held that the exhaustion requirement of the whistleblower provision of the Sarbanes-Oxley Act precludes recovery for a discrete act of retaliation that arose after the filing of the administrative complaint which was never presented to OSHA for investigation. In *Willis*, the original OSHA complaint filed in April of 2003 was based on a threatened termination and a stripping of job responsibilities. The Complainant was terminated in May 2004, but he never sought to amend his administrative complaint, nor did he file a new complaint, nor did he inform OSHA that he was complaining in any way about his termination. At some point (the district court's decision does not identify when this occurred) the case was removed to federal court. Because an OSHA complaint was never filed in regard to the termination, the Complainant did not exhaust his administrative remedies (which under the SOX process are judicial in nature compared with the informal conciliatory process in Title VII cases), and the termination complaint could not be pursued before the federal district court.

PROTECTED ACTIVITY; MEANING OF "PROVIDED INFORMATION TO THE EMPLOYER"

In ***Gonzalez v. Colonial Bank***, 2004-SOX-39 (ALJ Aug. 20, 2004), the Complainant informed two executive employees of the Respondent bank (a regional CEO and a regional president) that a lending company they had formed possibly violated banking laws, was a fraud against shareholders, and violated employment contracts with the Respondent that prohibited them from engaging in business in competition with the Respondent. The Respondent moved for summary decision before the ALJ based on the assertion that the Complainant did not "provide information" to the regional CEO because he already knew about it. The ALJ found that while the CEO clearly knew about the lending company he had formed, the Complainant had advised him to sell it or shut it down because of possible violations of banking and mail fraud laws, and that this type of communication was protected by the SOX whistleblower provision. The ALJ found that the same was true of the Complainant's communications to the regional bank president.

STAA CASES

[STAA Whistleblower Digest II D 1]
TRIAL OF ISSUE BY IMPLIED CONSENT

In ***Roberts v. Marshall Durbin Co.***, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004), the ALJ found the Complainant's protected activities were both internal and external; although the complaint itself alleged only internal complaints, both theories were advanced at the hearing. On appeal, the Respondent argued that the ALJ's finding was a denial of due process. The ARB noted that "[w]hen issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. 29 C.F.R. § 18.5(e)." Slip op. at 9. The ARB analyzed the proceedings before the ALJ, and found that although the complaint did not specifically address safety complaints made to federal officials, the Respondent knew from the opening statement of Complainant's counsel that this theory would be presented, the Respondent made no objection and instead affirmatively defended against that theory by calling a witness (whose testimony was only related to that issue) and by questioning other witnesses. The Board therefore found that the Respondent consented to try the issue and could not now object that it was not timely raised.

[STAA Whistleblower Digest II K]
DISCOVERY; REFUSAL TO IDENTIFY "CONFIDENTIAL SOURCE"; SANCTION OF LIMITATIONS ON EVIDENCE THAT THE NON-COMPLYING PARTY CAN PRESENT

In ***Cefalu v. Roadway Express, Inc.***, 2003-STA-55 (ALJ Jan. 20, 2004), the ALJ imposed sanctions on the Respondent for failure to comply with the ALJ's order granting the Complainant's motion to compel discovery of the identity of a confidential source. The ALJ in that earlier order had found that the Respondent had not articulated a recognizable privilege to protect the source's identity and that the identity of the source was relevant to the discovery process. The Respondent refused to reveal the identity of the source, and the Complainant moved for judgment against the Respondent as a sanction. In response, the Respondent argued that it had respected all the orders and deadlines imposed by the ALJ, with the exception of the confidential source ruling, and suggested that default was not proportional to the violation and that limited attorney fees and costs related to the discovery dispute would be a more appropriate sanction.

The ALJ found that default was not appropriate because the Complainant had not yet even established a prima facie case. The ALJ also found, however, that limited attorney's fees were not proportional either. Rather, the ALJ determined that the sanction would be "that Respondent shall not be permitted to present any evidence that arose from the unidentified confidential source, including, but not limited to, the testimony of the individual(s) who confirmed that Complainant was terminated from his prior employment, the testimony of the individual(s) who made the decision to terminate Complainant, and any related documentary evidence." Slip op. at 1-2.

[STAA Whistleblower Digest IV C 2 a]
PRETEXT; IF SUFFICIENT EVIDENCE SHOWS THAT EMPLOYER'S ASSERTED JUSTIFICATION IS FALSE, PRIMA FACIE CASE MAY PERMIT TRIER OF FACT TO FIND DISCRIMINATION

In ***Roberts v. Marshall Durbin Co.***, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004), the Respondent alleged that it fired the Complainant because he repeatedly refused to adhere to the company's policy regarding post-trip inspections. The ARB found, however, that substantial evidence supported the ALJ's finding that this reason was pretext. Noting that after a case is fully tried on the merits, it is the complainant's burden to prove that the respondent's proffered reasons for the adverse employment action were a pretext for discrimination, the Board quoted *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000), to wit:

> [O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation . . . . Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Slip op. at 16, quoting *Reeves, supra*. In the instant case, a meeting was held between the Complainant and managers to discuss the events surrounding the Complainant's refusal to drive. The Complainant tape recorded the meeting. The ARB found that substantial evidence supported the ALJ's finding that the transcript of the meeting indicated that a human resources employee was predisposed to fire the Complainant from the outset; the Complainant brought up his contact with the DOT at the outset of the meeting and the meeting itself was set up shortly after the Employer had been informed of that contact; the Complainant's refusal to drive based on defective windshield wipers (one of the Complainant's protected activities) was specifically complained about at the meeting; throughout the meeting the Complainant cited the federal requirements he believed were being violated, and the Respondent never explicitly stated that its policy met those requirements.

[STAA Whistleblower Digest V A 2]
COMPLAINT PRONG; EVIDENCE OF DISOBEDIENCE IS NOT REQUIRED

Evidence of disobedience is not required in establishing coverage under the "complaint" prong of the STAA. ***Pugh v. Con-way Southern Express***, ARB No. 03-142, ALJ No. 2003-STA-27 (ARB May 28, 2004).

[STAA Whistleblower Digest V B 2 b]
PROTECTED ACTIVITY; REFUSAL TO DRIVE; FAULTY WINDSHIELD WIPER

In ***Roberts v. Marshall Durbin Co.***, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004), the ARB affirmed the ALJ's finding that the Complainant engaged in protected activity when he refused to drive a truck which had defective windshield wipers. The ALJ found that driving the truck in such condition would be a literal violation of DOT regulation 49 CFR § 392.7. The Complainant's supervisor argued that common sense was necessary -- that it was a sunny day, and the

Complainant was only asked to drive nine miles to a repair facility. The ARB, however, found nothing in the DOT regulation or DOT interpretations that give the driver discretion to drive in such circumstances. Although the Respondent presented Appendix A of the North American Standard Vehicle Out-of-Service Criteria, which indicates that a vehicle need only be placed out of service due to faulty wipers in the event of inclement weather, the ARB found that these criteria only applied to authorized safety inspections of vehicles on the road. Later in the decision, however, the ARB found that the "reasonable apprehension of serious injury" clause of the STAA whistleblower provision was not applicable because there was no evidence that the defective wipers alone presented any threat of serious injury to the Complainant or the public under the circumstances.

[STAA Whistleblower Digest V B 2 b]
PROTECTED ACTIVITY; REASONABLE APPRENHENSION OF SERIOUS INJURY; FAULTY WINDSHIELD WIPER

In ***Roberts v. Marshall Durbin Co.***, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004), the ARB affirmed the ALJ's finding that the Complainant engaged in protected activity when he refused to drive a truck which had defective windshield wipers. The ALJ found that driving the truck in such condition would be a literal violation of DOT regulation 49 CFR § 392.7. The Complainant's supervisor argued that common sense was necessary -- that it was a sunny day, and the Complainant was only asked to drive nine miles to a repair facility. The ARB, however, reversed the ALJ's finding that the Complainant's refusal to drive was also protected under the "reasonable apprehension of serious injury" clause of the STAA, 49 U.S.C. § 31105(a)(1)(B)(ii). The ARB found that the Complainant had not presented any evidence that the defective wipers alone presented any threat of serious injury to the Complainant or the public under the circumstances (no threat of rain; short drive to repair shop).

[STAA Whistleblower Digest V B 2 d]
PROTECTED ACTIVITY; REFUSAL TO DRIVE; INCOMPLETE OR INACCURATE POST-TRIP REPORT

In ***Roberts v. Marshall Durbin Co.***, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004), the ALJ found that the Complainant engaged in protected activity when he refused to drive because post-trip reports were inaccurate and a supplementary report was allegedly falsified. The ARB found that such defects in post-trip reports, standing alone, do not necessarily justify a refusal to drive under 49 U.S.C. § 31105(a)(1)(B)(i). Although not making a conclusive holding in this regard, the ARB's decision implies that a short drive and a pre-trip inspection could "override" an incomplete or inaccurate post-inspection report, and that a DOT interpretation specifically permits a substitute post-trip report to be created when, in unusual circumstances, the post-trip report is missing.

[STAA Whistleblower Digest VI B 4]
ADVERSE ACTION; FATIGUE; INABILITY OF COMPLAINANT TO GET ENOUGH SLEEP DURING THE DAY IN PREPARATION FOR NIGHTTIME DRIVING ASSIGNMENTS

In ***Blackann v. Roadway Express, Inc.***, ARB No. 02-115, ALJ No. 2000-STA-38 (ARB June 30, 2004), the ARB affirmed the ALJ's grant of summary decision as to disciplinary actions relating to the Complainant's fatigue. Although observing that cases turn on their particular facts, the ARB stated that in individual situations it does not violate the STAA to take employment action against a driver who is unable to meet the physical demands of the job on a sustained basis. In ***Blackann***, taking the facts in the light most favorable to the Complainant, the ARB found that the Complainant "was unable to adapt to a physical requirement of his employment, namely [driving] at night and prepar[ing] for work by sleeping during the daytime. Accordingly, we do not believe that Roadway violated the STAA in issuing warning letters for Blackann's failure to meet established running times on four nearly successive nights, and so hold."

[STAA Whistleblower Digest VI B 4]
ADVERSE ACTION; DRIVER'S SIZE AND CONFIGURATION OF CAB AS PHYSICIAL LIMITATION TO SAFE DRIVING

In ***Samsel v. Roadway Express, Inc.***, ARB No. 03-085, ALJ No. 2002-STA-46 (ARB June 30, 2004), the Complainant's dispatch did not occur after he complained that the steering wheel rubbed against his stomach (thereby causing a safety hazard) and he consequently requested assignment of a different vehicle. The Complainant is approximately 5 feet, 5 inches tall and weighs 350 pounds. He alleged that he had previously been assigned tractors that did not have the steering wheel problem.

The ARB remanded the case for a hearing where it found that the ALJ erred in granting summary judgment to the Respondent, there being genuine issues of material fact in dispute as to whether the Respondent subjected the Complainant to adverse employment action. Although not reaching other issues in the case, the ARB did note in a footnote that the ARB had issued several decisions determining that an employer does not violate the STAA by taking adverse action because a driver cannot meet job requirements. The Board observed that "it is axiomatic that one cannot refuse to do that which it is physically impossible for one to do."

[STAA Whistleblower Digest IX B 1]
COMPENSATORY DAMAGES; ALLEGATIONS SUPPORTED ONLY BY COMPLAINANT'S TESTIMONY

In ***Roberts v. Marshall Durbin Co.***, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004), the ALJ awarded $10,000 in compensatory damages based on a finding that Complainant's testimony regarding his humiliation and emotional distress was unrefuted, credible and persuasive. On appeal, the Respondent contended that since no evidence supported the Complainant's bare allegations, the ALJ's award was erroneous. The ARB affirmed the ALJ, finding that he had evaluated the Complainant's testimony and provided a rationale that was supported by substantial evidence.

[STAA Whistleblower Digest IX B 3 a]
BACK PAY; MITIGATION OF DAMAGES; RESPONDENT'S BURDEN

In ***Roberts v. Marshall Durbin Co.***, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-35 (ARB Aug. 6, 2004), the Respondent was relieved of its burden of showing the availability of substantially equivalent work to support its claim that the Complainant failed to mitigate damages where the Complainant admitted that he had not looked for work for about 8 months after his discharge because he was busy working on his OSHA complaint. Once the Complainant began his job search, however, the Respondent was obliged to present evidence of the availability of substantially equivalent work. It was not enough in this regard to merely ask the ALJ to take judicial notice that properly licensed truck drivers have no trouble finding jobs.