In the Matter of:

DAVID L. LEWIS,

COMPLAINANT,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

ARB CASE NO. 04-117

ALJ CASE NOS. 2003-CAA-006
2003-CAA-005

DATE: June 30, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Stephen M. Kohn, Esq., *Kohn, Kohn & Colapinto, LLP*, Washington, District of Columbia

For the Respondent:
David P. Guerrero, Esq., *Office of General Counsel, United States Environmental Protection Agency,* Washington, District of Columbia

ORDER GRANTING RECONSIDERATION

David L. Lewis filed whistleblower complaints with the United States Department of Labor (DOL) alleging that his employer, the United States Environmental Protection Agency (EPA), violated the employee protection provisions of six federal statutes.[1] A

[1] The Clean Air Act 42 U.S.C.A. § 7622(a) (West 2003) (CAA); the Safe Drinking Water Act, 42 U.S.C.A. § 300j-9(i)(1)(A) (West 2003) (SDWA); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9610(a) (West 2005) (CERCLA); the Toxic Substances Control Act, 15 U.S.C.A. § 622(a) (West 1998)

DOL Administrative Law Judge (ALJ) consolidated the complaints and, after a hearing, recommended that Lewis's complaints be dismissed. Lewis appealed to the Administrative Review Board (ARB), which issued a March 30, 2007 Final Decision and Order denying Lewis's complaints.[2] We now address Lewis's Motion for Reconsideration.

Lewis argues that we should reconsider our Final Decision and Order because (1) we overlooked his claim that EPA had subjected him to a hostile work environment; (2) we erred in deciding that federal sovereign immunity barred Lewis's claims under the SDWA, the CERCLA, the TSCA, and the FWPPCA; (3) we misapplied the United States Supreme Court's holding in *Nat'l R.R. Passenger Corp. v. Morgan*;[3] (4) we erroneously applied *Burlington Northern & Santa Fe Ry. Co. v. White*;[4] and (5) we ignored our own precedent in considering Lewis's blacklisting claim.[5]

The Legal Standard

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the decision was issued.[6] Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure.[7] Rule 40 expressly requires that any petition for rehearing "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended . . . ."[8]

(TSCA); the Federal Water Pollution Prevention and Control Act, 33 U.S.C.A. § 1367(a) (West 2001) (FWPPCA); and the Solid Waste Disposal Act, 42 U.S.C.A. § 6971(a) (West 2001) (SWDA). Regulations implementing these statutes are found at 29 C.F.R. Part 24 (2006).

[2] *Lewis v. U.S. Envtl. Prot. Agency*, ARB No. 04-117, ALJ Nos. 2003-CAA-005, -006 (ARB Mar. 30, 2007).

[3] 536 U.S. 101 (2002).

[4] 548 U.S. 53 (2006).

[5] Motion for Reconsideration, 3-20.

[6] *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002), *aff'g Macktal v. Brown & Root, Inc.*, ARB Nos. 98-112/122A, ALJ No. 1986-ERA-023, slip op. at 2-6 (ARB Nov. 20, 1998); *Powers v. Pinnacle Airlines, Inc.*, ARB No. 04-102, ALJ No. 2004-AIR-006, slip op. at 1 (ARB Feb. 17, 2005). *See also Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007).

[7] *Powers v. Pinnacle Airlines, Inc.*, ARB No. 06-078, ALJ Nos. 2006-AIR-004, 2006-AIR-005, slip op. at 3 (ARB Jan. 30, 2008).

[8] Fed. R. App. P. 40(a)(2).

A petition for rehearing should not reargue unsuccessful positions or assert an inconsistent position that may prove more successful.[9] Likewise, issues not presented in initial briefs or during oral argument are not appropriate subjects for rehearing.[10] But raising new issues on rehearing may be appropriate if supervening judicial decisions or legislation, not reasonably foreseen during initial argument, would alter the outcome.[11]

Thus, the Board will reconsider a final decision if the movant demonstrates: (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.[12]

After reviewing Lewis's five reasons for requesting reconsideration, we conclude that, except for his argument that we overlooked his hostile work environment claim, Lewis has failed to meet any of the provisions of the ARB's four-part test for reconsideration. Lewis's interpretations of the holdings in *Morgan* and *White* offer no material differences in fact or law that were not previously presented. Furthermore, Lewis cannot argue that we should reconsider our sovereign immunity ruling in as much as he did not argue that issue on appeal. Nor has Lewis proffered any new material facts or a change in the law that followed the ARB's decision. Finally, Lewis's exposition of his blacklisting claim merely rehashes the arguments the ARB considered and rejected.

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[9] *United States v. Smith*, 781 F.2d 184 (10th Cir. 1986).

[10] *Utahns for Better Transp. v. United States Dep't of Transp.*, 319 F.3d 1207, 1210 (10th Cir. 2003); *FDIC v. Massingill*, 30 F.3d 601, 605 (5th Cir. 1994); *American Policyholders Ins. Co. v. Nyacol Prods.*, 989 F.2d 1256, 1264 (1st Cir. 1993).

[11] *Lowry v. Bankers Life & Cas. Ret. Plan*, 871 F.2d 522, 523 n.1, 525-526 (5th Cir. 1989).

[12] *Powers, supra*; *Chelladurai v. Infinite Solutions, Inc.*, ARB No. 03-072, ALJ No. 2003-LCA-004, slip op. at 2 (ARB July 24, 2006); *Rockefeller v. U.S. Dep't of Energy*, ARB Nos. 03-048, 03-184; ALJ Nos. 2002-CAA-005, 2003-ERA-010, slip op. at 2 (ARB May 17, 2006); *Saban v. Morrison-Knudsen*, ARB No. 03-143, ALJ No. 2003-PSI-001, slip op. at 2 (ARB May 17, 2006); *Halpern v. XL Capital, Ltd.*, ARB No 04-120, ALJ No. 2004-SOX-054, slip op. at 2 (ARB Apr. 4, 2006); *Getman v. Southwest Secs.*, ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 1-2 (ARB Mar. 7, 2006); *Knox v. Dep't of the Interior*, ARB No. 03-040, ALJ No. 2001-LCA-003, slip op. at 3 (ARB Oct. 24, 2005).

Lewis's Hostile Work Environment Claim

Background

When Lewis appealed the ALJ's recommended decision to us, he argued that the ALJ had ignored an extensive discussion at pages 47-75 of his "Post-Hearing Brief" that set out the facts and legal basis for asserting a hostile work environment claim.[13] Lewis's Post-Hearing Brief to the ALJ was subtitled "Findings of Fact and Conclusions of Law." It was date stamped as received on September 11, 2003, at the United States Department of Labor, Office of Administrative Law Judges. It is 245 pages long and contains 795 separately numbered paragraphs purporting to contain, one would assume, proposed findings of fact and conclusions of law.

We examined pages 47-75 of the "Post-Hearing Brief." Those pages of that document contain no discussion or argument pertaining to a hostile work environment. And since the rest of the record also contained nothing concerning a hostile work environment claim, we wrote that "since Lewis presented his case as one involving discrete adverse actions and never alleged or presented facts, law, or argument to the ALJ that EPA subjected him to a hostile work environment, we will not consider the hostile work environment argument he argues on appeal."[14]

As noted, Lewis here argues that we must reconsider our final decision because we "overlooked" the fact that he presented a hostile work environment claim to the ALJ. To support this argument, he contends that "pages 47-75 of the Complainant's Conclusions of Law, filed as part of the Post-Hearing Brief, sets [sic] forth in detail the factual and legal basis for an HWE claim in this case." The "Complainant's Conclusions of Law" is an entirely separate document from the "Post-Hearing Brief/Findings of Fact and Conclusions of Law." It is 122 pages long and, unlike the Post-Hearing Brief, it is not date stamped by the Office of Administrative Law Judges. Pages 47-75 of "Complainant's Conclusions of Law" do, however, pertain to a hostile work environment claim.

Thus, the record shows that Lewis first urged us to examine pages 47-75 of a 245-page document entitled "Post Hearing Brief" and subtitled "Findings of Fact and Conclusions of Law." These pages, Lewis argued, set out the facts and basis of his hostile work environment claim. But neither these pages nor any other portion of the record below contain anything resembling such a claim. Lewis now informs us that his hostile work environment particulars can be found on pages 47-75 of an entirely separate

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[13] Complainant David L. Lewis' Brief-In-Chief at 37 n.38.

[14] *Lewis*, slip op. at 23 citing *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-001, slip op. at 9 (ARB April 30, 2004) (argument not presented to ALJ waived on appeal).

122-page document entitled "Complainant's Conclusions of Law." Therefore, since at first Lewis himself did not know where his hostile work environment facts and authority could be found and thus misinformed us where to look, it can hardly be said that this Board "overlooked" Lewis's hostile work environment argument to the ALJ. Nevertheless, since Lewis has, at last, made us aware that the record does contain his allegations and argument that EPA subjected him to a hostile work environment, we will reconsider our earlier decision and determine whether this claim has merit.

The Legal Standard for Hostile Work Environment

The concept of a hostile work environment, first developed in the context of race and sex-based employment discrimination, applies to whistleblower cases.[15] Hostile work environment claims involve repeated conduct or conditions that occur "over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."[16] To succeed on a hostile work environment claim, Lewis must prove by a preponderance of the evidence that 1) he engaged in protected activity, 2) he suffered intentional harassment related to that activity, 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of his employment and to create an abusive working environment, and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect him.[17]

Lewis's Hostile Work Environment Argument

In its March 30, 2007 decision, the ARB found that Lewis had proved by a preponderance of the evidence that he engaged in protected activity when he expressed his concerns to EPA and others that sewage sludge (bio-solids) fertilization posed risks to human health. Lewis's whistleblower complaints alleged that because of his written articles, speeches, and testimony publicizing the problems of sewage sludge, EPA retaliated against him when it condoned a negative peer review of one of his critical articles, disseminated a report that attacked his theories, impugned his international scientific reputation, prevented his future employment with the University of Georgia (UGA), failed to fund his research or credit his work, and collaborated with industry and EPA proponents of sewage sludge to avoid further investigation.

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[15] *Varnadore v. Oak Ridge Nat'l Lab.* (*Varnadore II)*, Nos. 1992-CAA-002, *et al.*, slip op. at 71 (ARB June 14, 1996), *aff'd, Varnadore v. Sec'y of Labor*, 141 F.3d at 625 (6th Cir. 1998).

[16] *Morgan*, 536 U.S. at 114-115.

[17] *See Erickson v. U.S. Envtl. Prot. Agency,* ARB Nos. 03-002 - -004, 03-064; ALJ Nos. 1999-CAA-002, 2001-CAA-008, -013, 2002-CAA-003, -018, slip op. at 19 (ARB May 31, 2006).

We treated each of these alleged adverse actions as discrete acts, that is, as separate and distinct claims. We concluded that these various claims failed either because they were not actionable (i.e., did not occur within 30 days of the date Lewis filed a complaint), or because Lewis did not present argument to us on particular claims, or did not prove that they were adverse, or did not prove that EPA took the action because of Lewis's protected activities.

Lewis argues that we should also consider these alleged adverse acts collectively, each one contributing to an overall hostile work environment.[18] We will do so. We will also assume, without finding, that all of these complained of actions and conditions constitute harassment. Furthermore, we find that Lewis's hostile work environment claim is actionable because at least one of the acts contributing to the claim - disseminating the report that attacked Lewis's theories - occurred within the CAA's 30-day filing period.[19]

Nevertheless, Lewis's hostile work environment claim fails because he did not prove by a preponderance of the evidence that EPA harassed him because of his protected writing, speaking, and testifying about problems with sludge fertilization. After the hearing Lewis argued to the ALJ that "all of the harassment flowed directly from Dr. Lewis' protected activity." [20] But he offered *no* record support for that statement. The ALJ, in fact, concluded that EPA's actions were either not adverse or EPA took them because of legitimate, not retaliatory, reasons.[21]

Similarly, Lewis informed us on appeal that the "record unquestionably demonstrates, through overwhelming direct and circumstantial evidence, that Dr. Lewis engaged in protected activity and that he suffered intentional harassment related to that

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[18] Lewis Brief-In-Chief at 37; Complainant's Conclusions of Law at 47. Lewis argued that other incidents or harassment also contributed to the HWE. He claimed that EPA sought to "muzzle" him, and to limit his participation in certain functions. He claimed that EPA's actions affected his ability to serve as an expert witness, that there were numerous conflicts and disputes about how EPA applied its disclaimer rules, and that EPA restricted his sludge research. Brief-In-Chief at 41-42; Conclusions of Law at 59-60.

[19] 42 U.S.C.A. § 7622 (b)(1). John Walker, Lewis's co-worker, disseminated the report on September 24, 2001, a date that is fewer than 30 days before Lewis filed his October 15, 2001 whistleblower complaint. *See Morgan*, 536 U.S. at 117 ("Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability."). The *Morgan* holding applies to whistleblower complaints. *Erickson*, slip op. at 21 n.60.

[20] Complainant's Conclusions of Law at 62.

[21] *Lewis v. U.S. Envtl. Prot. Agency*, 2003-CAA-005, -006, slip op. at 66 (ALJ June 9, 2004).

activity."[22] He directed us to examine 18 of his proposed findings of fact where we would find record evidence that "animus played a role in all of the adverse employment actions related to Dr. Lewis." But *none* of these proposed findings of fact specifically cites to record evidence that EPA took the complained of action because of Lewis's protected acts.[23]

As far as specific evidence that proves a link between harassment and his protected activity, Lewis points to testimony from Dr. Russo, his second-line supervisor, as evidence that EPA's actions were motivated by animus stemming from his protected activity.[24] Russo testified about a situation where Lewis had apparently been advised that he should include a disclaimer on any abstract that he presented at meetings and conferences. Russo testified that she "doubted" that other EPA scientists had been required to include such disclaimers. Based on this "doubt," Russo opined that Lewis was "treated differently because he dared to publish research that shows the sludge rule to have technical flaws."[25] But we reject Lewis's argument that Russo's testimony constitutes evidence that all of EPA's actions were taken because of protected activity because Russo was referring to only one incident and was merely speculating that, with respect to the disclaimers in abstracts, EPA treated Lewis differently than other scientists.

In addition to Russo's testimony, Lewis also points to evidence that he contends links his protected activity to the hostile work environment. John Walker, who worked in a different EPA division than Lewis, distributed a "White Paper" to sludge fertilization companies. Walker did not author the paper but was a "pro-sludge" advocate. The paper was highly critical of Lewis's views on sludge fertilization. Lewis argues, in effect, that Walker and EPA collaborated and disseminated the paper to retaliate against Lewis and his anti-sludge stance. The ALJ found no evidence that Walker and EPA collaborated. Neither have we. Furthermore, Walker did not supervise Lewis; he was only a fellow employee who worked in a different program office. And even given the strong inference that Walker was retaliating against Lewis due to Lewis's position on sludge fertilization, EPA is not liable for Walker's actions because EPA took prompt disciplinary action against Walker after it learned what Walker had done.[26]

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[22] Brief-In-Chief at 38.

[23] Lewis cited Findings of Fact Nos. 4, 9, 28, 142, 168-169, 171-178, 223, 656, 659, and 676 contained in his Post-Hearing Brief/Findings of Fact and Conclusions of Law.

[24] Brief-In-Chief at 36.

[25] Complainant's Exhibit 1, p. 96-104.

[26] *See Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-014, slip op. at 47-48 (ARB Nov. 13, 2002) where, inter alia, the Board held that when a whistleblower asserts a hostile work environment claim, the employer will be liable for co-

CONCLUSION

We have decided that the only issue that warrants reconsideration of our March 30, 2007 Final Decision and Order is Lewis's argument that he had asserted a hostile work environment claim before the ALJ, that the ALJ ignored that claim, and that we should therefore decide its merits. We have reconsidered that issue. We have assumed without finding that all of the acts Lewis alleges constitute harassment and that his hostile work environment claim is actionable. Even so, the claim fails because Lewis did not prove by a preponderance of the evidence, as he must, that EPA harassed him because of his protected conduct.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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worker harassment when it knew or should have known about the harassment and failed to take prompt remedial action.