In the Matter of:

SHARYN A. ERICKSON, **ARB CASE NO. 99-095**

COMPLAINANT, **ALJ CASE NO. 99-CAA-2**

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

U.S. ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

For the Respondent:
Karol L. Smith, Esq., *U.S. Environmental Protection Agency, Atlanta, Georgia*

DECISION AND ORDER OF REMAND

Complainant Sharyn A. Erickson alleges that she was subjected to retaliation and continued harassment by Respondent United States Environmental Protection Agency (EPA) because she engaged in activities protected by the whistleblower provisions of six Environmental Acts.[1/] EPA moved to dismiss Erickson's complaint. A Labor Department Administrative Law Judge (ALJ) analyzed EPA's Motion as a motion for summary decision and issued a Recommended Decision and Order (RD&O) recommending that the complaint be dismissed, concluding, *inter alia*, that Erickson's complaint was untimely and that there was no continuing violation. *Erickson v. U.S. Environmental Protection Agency*, ALJ No. 1999-CAA-2 (June 8, 1999). Erickson appealed.

[1/] The Clean Air Act, 42 U.S.C. §7622 (1995), the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9610 (1995), the Safe Drinking Water Act, 42 U.S.C. §300j-9 (1994), the Solid Waste Disposal Act, 42 U.S.C. §6971 (1994), the Toxic Substances Control Act, 15 U.S.C. §2622 (1994), and the Water Pollution Control Act, 33 U.S.C. §1367 (1994).

For the reasons set forth below, we conclude that the EPA did not demonstrate that it was entitled to summary decision on the question of the timeliness of Erickson's complaint and whether a continuing violation may have occurred. Accordingly, we grant Erickson's petition for review and remand this case for further proceedings.

BACKGROUND

Erickson is an Information Resources Coordinator for the EPA. Erickson's *pro se* complaint was filed with the Department of Labor's Occupational Safety and Health Administration (OSHA) on April 9, 1998. Erickson claimed that in 1993 and again in 1995 she engaged in activities protected under the whistleblower protection provisions of the Environmental Acts, and that she subsequently was targeted for retaliation by EPA. According to Erickson, the first protected act occurred in June 1993 when she sent an e-mail to a union official, Al Yeast,

> in which I informed then-NFFE (National Federation of Federal Employees) Local 1907 President Al Yeast of problems with EPA's regulations (especially for Superfund), and with analytical regulations and methods. Those problems created the need for the contract reformation on the Southeastern Wood Preserving Superfund site [and] threatened to open the demonstrated problems with EPA's regulations and analytical methods to public scrutiny. . . .

Complaint, p. 1.

The second claimed act of environmental whistleblowing occurred in early 1995 when Erickson informed officials at the Texas Department of Natural Resources Commission and EPA Region 6 of the "same problems and issues" with respect to a contract the State of Texas was about to issue containing "the same impossibility of performance - thus opening the state and Superfund to significant monetary liability (as had been experienced by Region 4 on the Southeastern Wood Preserving site contract)." Complaint, p. 1. Erickson subsequently advised a member of Congress of these contacts.

Erickson charged that EPA subjected her to a "pattern of continuing, discriminatory acts and hostile environment" in retaliation for having engaged in these whistleblowing activities, which created "an ongoing, continuing violation." Complaint, p. 1. In support of her charge, Erickson cited approximately a dozen incidents of alleged retaliation taken against her, "[a]mong the most egregious" being "the maintenance of an open, indefinite criminal investigation against me by the [EPA's] Inspector General's (IG's) office." *Id.*, p. 2. Critical to resolution of the instant appeal, "[o]ne of the most recent instances of that ongoing, discriminatory retaliation" was "another denial of promotion, for which I received . . . notice (dated March 5, 1998) on

March 10, 1998." *Id.*, p. 1. This incident of non-selection occurred within the thirty-day period immediately preceding Erickson's filing of her complaint.[2/]

PROCEEDINGS BELOW

OSHA investigated Erickson's complaint pursuant to 29 C.F.R. §24.4, but concluded that the complaint was without merit. Erickson objected to that determination and requested a hearing before an ALJ. *See* 29 C.F.R. §24.4(d)(3).

Prior to the scheduled hearing, EPA submitted a Motion to Dismiss Erickson's complaint, citing in support of its Motion various exhibits that had been attached to EPA's prehearing statement. EPA argued that dismissal was appropriate because (1) Erickson's complaint generally failed to establish the *prima facie* elements of a whistleblower claim (*i.e.*, no showing of protected activity and no showing of discriminatory acts); (2) Erickson's complaint was untimely because the alleged protected activity occurred in 1993 and 1995, more than 30 days prior to the filing of the complaint in April 1998; and (3) Erickson had already litigated these issues in another forum and should be barred from re-litigating them before the Labor Department.

The ALJ treated EPA's Motion to Dismiss as a motion for summary decision pursuant to 29 C.F.R. §18.40. *See* RD&O at 1.[3/] The ALJ concluded that Erickson's complaint should be dismissed as untimely. With regard to the alleged acts of retaliation that occurred soon after the 1995 contacts with Texas and EPA officials, the ALJ concluded that these were "discrete occurrences" and that a complaint should have been filed then in order to be timely. With regard to the March 1998 non-selection, the ALJ found that this adverse action was too remote in time

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[2/] Erickson subsequently amended her complaint to include allegations that EPA also had attempted to intimidate, harass and scare her *subsequent* to the filing of her initial complaint by: (1) issuing a letter on August 5, 1998, warning her against falsely representing herself to officials at the General Services Administration, and (2) denying another promotion request, pursuant to letter dated August 10, 1998.

[3/] Because EPA submitted evidence outside the pleadings in support of its Motion to Dismiss, EPA's Motion must be viewed as a motion for summary decision under 29 C.F.R. §18.40. *See High v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-075, ALJ No. 96-CAA-8, slip op. at 3-4 (ARB Mar. 13, 2001). *See also Stephenson v. NASA*, 94-TSC-5, slip op. at 3 (Sec'y Sept. 28, 1995). Office of Administrative Law Judges (OALJ) Rules 18.40 and 18.41 (29 C.F.R. §§18.40 and 18.41) govern the disposition of motions for summary decision before ALJs. The rules are modeled on Rule 56 of the Federal Rules of Civil Procedure, *Williams v. Lockheed Martin Corp.*, ARB Nos. 99-054/064, ALJ Nos. 98-ERA-40/42, (ARB Sept. 29, 2000), and the standard for granting summary decision under the OALJ rules is essentially the same standard applicable in granting summary judgment under Federal Rule 56. *Hasan v. Burns and Roe Enterprises*, ARB No. 00-080, ALJ Case No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001). *See also Hill v. U.S. Dep't of Labor*, 198 F.3d 257 (Table), 1999 WL 815830 at 2 (10th Cir. 1999) (summary decision procedure of 29 C.F.R. Part 18 "operates in much the same way as the summary judgment authorized by Fed. R. Civ. P. 56").

from Erickson's alleged protected activity in 1995 to serve as the basis for a timely complaint, and also observed that Erickson's non-selection was the result of a competitive selection process.

Although the ALJ purported to limit his ruling to the issue of timeliness ("Because the complaint is not timely, I need not decide whether the alleged actions are protected activities under the various whistleblower acts." RD&O at 5), he nevertheless went on to consider and decide several other aspects of Erickson's complaint. The ALJ found that Erickson did not engage in protected activity in 1993, but that "[i]t is possible that Ms. Erickson's actions in 1995 might have been a protected activity." Although not argued by EPA in its Motion, the ALJ found that the alleged acts of discrimination by EPA did not constitute a continuing violation. Additionally, the ALJ found that where there is a three year gap between the alleged protected activity and the adverse action, there can be no continuing violation.

The ALJ entered summary decision for EPA and recommended that Erickson's complaint be dismissed as untimely filed. RD&O at 2-4.[4/]

JURISDICTION

We have jurisdiction pursuant to the employee protection provisions of the various environmental acts and 29 C.F.R. §24.8.

STANDARD OF REVIEW

The Board reviews an ALJ's grant of summary decision *de novo*; thus our review is governed by the same standard used by the ALJ. *Williams v. Lockheed Martin Corp.*, ARB Nos. 99-054/064, ALJ Nos. 98-ERA-40/42, slip op. at 3 (ARB Sept. 29, 2000). *See* 29 C.F.R. §18.40(d). Accordingly, the Board will affirm the ALJ's recommendation that summary decision be awarded if, upon review of the evidence in the light most favorable to the non-moving party, we determine that there exists no genuine issue as to any material fact and that the ALJ correctly applied the relevant law. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 1999-STA-21, slip op. at 2, 6 (ARB Nov. 30, 1999). *See generally* 10A Wright, Miller & Kane, *Federal Practice and Procedure* §2716 *et seq.* (appellate review of grant of summary judgment).

[4/] The ALJ apparently believed that the 30-time limit for filing a complaint begins to run from date on which the employee engages in protected activity. However, 29 C.F.R. §24.3 (b) states in relevant part: "Except [with regard to complaints under the Energy Reorganization Act], any complaint shall be file within 30 days after the occurrence of the alleged violation." Thus the time for filing a complaint begins to run from the date of the adverse action, not the date the employee engaged in the protected activity.

DISCUSSION

At the outset of this Discussion, we note that EPA's Motion to Dismiss offers a series of poorly focused challenges to Erickson's complaint that are difficult to follow, and which plainly created a dilemma for the ALJ. However, having reviewed EPA's Motion to Dismiss and its attachments closely, we conclude that the ALJ's grant of summary decision was inappropriate on the pleadings that were before him.

A. The timeliness of Erickson's complaint regarding her March 1998 non-selection.

Erickson apparently first learned of her non-selection for a promotion on March 10, 1998, and filed her original complaint on April 8, 1998. On its face, this would appear to be a timely-filed complaint under the Environmental Acts, all of which require that a complaint be filed within 30 days of an act of alleged retaliation.

EPA appears to argue that the non-selection complaint is untimely because "both alleged 'whistleblowing' incidents [in 1993 and 1995] occurred far more than thirty days prior to Complainant's April 8, 1998 complaint." Motion at 4. This approach apparently was accepted by the ALJ, who similarly suggested that the passage of three years between the protected activity and the complaint automatically precludes relief. RD&O at 4. However, while the passage of time between protected activity and adverse action plainly mitigates against the likelihood of retaliation, temporal proximity (or the lack thereof) does not by itself determine whether an adverse action was retaliatory. *See, e.g., Bonnano v. Stone & Webster Eng'g Corp.*, 95-ERA-54 and 96-ERA-7 (ARB Dec. 12, 1996)("In this case, the passage of three years, *with evidence of a lack of animus on the part of the Respondents after the protected activity*, convince us that there is no causal connection between the protected activity and the alleged adverse actions." (emphasis added)).

EPA also declares (without any legal argument) that "Complainant applied for a promotion through the Merit Promotion process, which is a competitive process, and was not selected from among several other candidates," seeming to suggest that this is grounds for dismissing a complaint.[5/] Although it is unclear precisely what the ALJ made of this argument,

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[5/] Attached to EPA's Motion is a document labeled "Exhibit S." The document is titled "Vacancy Selection, Senior Contracting Officer, GS-1102-13" and was signed by Keith R. Mills on July 27, 1998. It references an employment decision made by Mills as the Selecting Official on June 30, 1998. Exhibit S indicates that on or about July 27, 1998, Mills selected Charles Hayes to be "Senior Contracting Officer" as the result of a competitive process involving nine applicants "presented to the Selecting Official . . . on June 30, 1998." However, Exhibit S does not mention Erickson or make any statements with regard to her claim of discrimination; moreover, EPA's Motion does not refer to the exhibit at all.

EPA's position is unclear, but unavailing in any event. If EPA submitted Exhibit S to challenge Erickson's allegation that the person who did not select her was motivated by retaliatory intent, then the parties disagree as to a material issue of fact and summary decision is simply inappropriate. On the other

(continued...)

he concluded that EPA's claim that it followed merit selection procedures rebutted Erickson's argument that she had been subjected to discrimination. At the summary decision stage, and on the pleadings before the ALJ, all that this exchange suggests is that there are material facts in dispute and that dismissal is not warranted based on the Motion as drafted.

B. Erickson's claim of a continuing violation.

EPA also seems to assert, as a matter of *law*, that to the extent Erickson's complaint depends on alleged discriminatory conduct occurring well outside the period of limitations, she cannot claim a continuing violation. Motion at 5. But EPA in its *Motion* does not advance any serious argument grappling with the *facts* of Erickson's allegations of early misconduct by EPA or the evidence developed during discovery. It is only later, in EPA's *rebuttal brief*,[6/] that the agency argues for the first time that Erickson has not asserted the existence of any invalid underlying policy that connects the earlier alleged adverse actions.

Although EPA's *Motion* does not squarely argue that Erickson's specific continuing violation claim must be dismissed for lack of evidence that would support a *prima facie* case, the ALJ nonetheless proceeded to find that the early alleged discriminatory acts were all discrete occurrences, and not part of a continuing violation. We find that the ALJ erred in reaching this question.

At least one court has held that arguments raised for the first time in reply briefs are waived. *Echo, Inc. v. Whitson Co.*, 1994 WL 395004 (N.D. Ill. 1994). However, we need not reach this issue here. At a minimum, we think that when a new argument is raised in a reply brief, the other party must be given an adequate opportunity to respond in some manner (*e.g.*, by ordering an additional round of briefing). *See Booking v. General Star Management Co.*, 2001 WL 692174 (2d Cir. 2001). There is no indication in the record that the ALJ ordered

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[5/](...continued)
hand, if EPA submitted Exhibit S to show that it is entitled to prevail as a matter of law because EPA believes that a competitive process *per se* is evidence that its actions were non-discriminatory, EPA's argument is deficient because the agency has failed to explain why Erickson is precluded from asserting a discrimination claim simply because other candidates applied for the position and the defendant selected someone other than her.

[6/] Respondent's Answer to Complainant's Motion to Quash its Motion to Dismiss (June 9, 1999).

additional briefing and, consequently, we find that summary decision on this issue is premature.[7/]

Accordingly, we grant Erickson's appeal and remand this matter to the ALJ for further proceedings consistent with this decision.[8/]

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

RICHARD A. BEVERLY
Alternate Member

[7/] We note that EPA's Motion asserts that Erickson is precluded from litigating her claim because she previously litigated the same issues in other forums. The ALJ did not address this aspect of the motion. The question whether any of these issues were litigated in another forum is a factual issue best resolved in the first instance by the ALJ. Therefore, we leave this question for the ALJ to consider in light of the standards set forth in *Sedlack v. Braswell Servs. Group, Inc.*, 134 F.3d 219, 224 (4th Cir.1998).

[8/] We emphasize the narrowness of this decision, which focuses specifically on the arguments raised by EPA in its Motion and the ALJ's associated rulings on (1) the timeliness of the complaint in connection with the March 1998 non-selection, and (2) the continuing violation question. On remand, the ALJ and the parties have available to them the full range of tools normally used to promote efficient adjudication. Indeed, the ALJ would not be foreclosed from considering a properly constructed and supported motion for summary decision. Neither the ALJ nor this Board has an obligation "to research and construct the legal arguments open to parties, especially when they are represented by counsel." *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1987).