In the Matter of:

VERNON R. BELT, **ARB CASE NO. 02-117**

COMPLAINANT, **ALJ CASE NO. 01-ERA-19**

v. **DATE: February 26, 2004**

UNITED STATES ENRICHMENT CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
John Frith Stewart, Esq., Jeffrey C. Trapp, Esq., *Segal, Stewart, Cutler, Lindsay, Janes & Berry, Louisville, Kentucky*

For the Respondent:
Mark C. Whitlow, Esq., *Whitlow, Roberts, Houston & Straub, PLLC,* and David Thompson, Esq., *United States Enrichment Corporation, Paducah, Kentucky*

FINAL DECISION AND ORDER DISMISSING COMPLAINT

Vernon R. Belt filed a complaint against the United States Enrichment Corporation (USEC) under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003),[1] and its implementing regulations at 29 C.F.R. Part 24 (2003). He

[1] The statute provides, in pertinent part, that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" notified a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refused to engage in a practice made unlawful by the ERA or AEA, testified regarding provisions or proposed provisions of the ERA or AEA, or commenced, caused to be commenced or is about to commence or

Continued . . .

alleged that USEC terminated his employment due to his protected activity involving fire protection systems at USEC's Paducah, Kentucky gaseous diffusion plant.

The Administrative Law Judge (ALJ) concluded that Belt had timely filed his complaint but failed to establish that USEC discharged him in retaliation for his protected activity. Therefore, the ALJ dismissed the complaint.[2] Belt filed a petition for review with the Administrative Review Board (ARB), and USEC filed a cross-petition.[3] We find Belt's complaint to be untimely filed and, therefore, dismiss his complaint.[4]

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cause to be commenced, or testified, assisted or participated in a proceeding under the ERA or AEA to carry out the purposes of this chapter or the AEA as amended. 42 U.S.C.A. § 5851(a)(1).

[2] The ALJ frequently misstates an ERA respondent employer's burden once the complainant has proven a prima facie case at the prehearing or hearing stage of the whistleblower litigation. He states that the respondent "must establish by clear and convincing evidence that it took the unfavorable action for a legitimate, nondiscriminatory business reason, and that it was the same as it would have taken, in the absence of the employee's protected activity." R. D. & O. at 14-15. *See also* R. D. & O. at 17, 18, 22, 26 (where he also misstates the ERA complainant's burden of proof), and 27. But once a complainant establishes a prima facie case of discrimination, the respondent needs only to "articulate some legitimate, nondiscriminatory reason" to "discharge [its] burden of proof" at this stage of the litigation. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The employer's clear and convincing evidence burden is in the nature of an affirmative defense and arises only when the complainant has proven, by a preponderance of the evidence, that the employer discriminated, at least in part, because of protected activity. *See Kester v. Carolina Power and Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 8 (ARB Sept. 30, 2003). The ALJ here appears to have confused the Secretary of Labor's gatekeeping, investigative duties with her adjudicative role. *Compare* 42 U.S.C.A. § 5851 (b)(3)(B) (If, after filing the complaint but before the hearing, an ERA complainant makes a "prima facie" case that his protected activity contributed to the unfavorable personnel action, the Secretary shall not investigate the complaint "if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of [protected activity].") *with* 42 U.S.C.A. § 5851 (b)(3)(D)(In the adjudicatory phase of the litigation, if the complainant demonstrates a violation of the ERA, the Secretary may nevertheless not grant relief "if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [protected activity]." *See also Kester*, slip op. at 5-6.

[3] The ARB did not assign a separate docket number to USEC's cross-petition for review.

[4] The following abbreviations shall be used: Complainant's Exhibit, CX; Respondent's Exhibit, RX; Hearing Transcript, TR; ALJ Exhibit, ALJX; and Recommended Decision and Order, R. D. & O.

BACKGROUND

We have carefully reviewed the record and find that it generally supports the ALJ's lengthy recitation of the facts and the stipulations of the parties. R. D. & O. at 2-14; Joint Exhibit 1; TR at 10-12. We will summarize the facts relevant to the issue of timeliness.

Factual history

Belt began work for USEC in March 1976 as a janitor, but quickly transferred to fire protection services. He eventually earned the title of fire protection engineer. His duties included inspecting and testing various components of fire alarm and protection systems at USEC's Paducah plant. TR at 45; R. D. & O. at 5. Belt was responsible for filing assessment and tracking reports (ATRs) on any deficiencies he found in the systems. CX 3-4.

On May 5, 2000, USEC announced a reorganization and voluntary reduction in force (VRIF) with an open period until May 25, 2000, for employees to apply. CX 23. At that time, Belt was about 18 months shy of a full retirement. He testified that he decided not to apply for that RIF because "it really wasn't to my benefit," TR at 97, and "wouldn't have been to my advantage." TR at 173.

Shortly after the VRIF open period ended, Belt learned from his supervisor that the reorganization plan would eliminate his fire protection engineer position. Belt testified that his supervisor told him that she did not know of another position in the plant that he could fill and suggested that he talk with human resources employees about his options. TR at 98-102.

Belt believed that he would not have a job at USEC and that his only option was to volunteer for the involuntary RIF that USEC announced after the May VRIF open period had closed. TR at 100. On June 22, 2000, Belt signed a memorandum from USEC acknowledging his request to be selected for the upcoming RIF. RX 3; TR at 103-04. Belt testified that this was his last day at work. TR at 156-57. On June 29, 2000, he received a general notice of the terms of the RIF, stating that his employment would end on July 14, 2000. CX 28; TR at 104.

Procedural history and ALJ's findings

Belt filed a complaint with the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor (DOL) on December 29, 2000. RX 29. He alleged that USEC retaliated against him by abolishing his job because he reported his supervisor's failure to follow up on a safety deficiency. He also alleged that an unhealthy work environment existed at USEC, which did not tolerate dissenting views or welcome questioning attitudes, thus creating a "chilling effect" on employees. OSHA investigated but found no merit in Belt's complaint. Belt requested a hearing before an ALJ.

USEC filed a motion for summary decision, contending that the complaint was not filed within 180 days of the date USEC allegedly retaliated against Belt. ALJX 8 at 11. The ALJ denied USEC's motion. ALJX 10. At the hearing on November 14, 2001, USEC's attorney

reiterated his argument that Belt had not filed his complaint within 180 days of June 22, 2000, his last day at work and the date of the alleged adverse action. TR at 33. Both parties addressed the timeliness issue in their post-hearing briefs before the ALJ.

While noting USEC's argument that the 180-day complaint filing requirement of section 5851(b)(1) began to run on June 22, 2000, the ALJ applied the rationale of *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), and found that Belt had established the existence of a hostile work environment. CX 29; R. D. & O. at 16. The ALJ then determined that USEC actually terminated Belt on July 14, 2000, which constituted the starting date of the 180-day filing requirement under the ERA. Therefore, the ALJ concluded that Belt's complaint was timely filed. R. D. & O. at 16.[5]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Administrative Review Board (ARB) to review an ALJ's recommended decision in cases arising under the ERA. *See* 29 C.F.R. § 24.8 (2003). *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000). The Board is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature. *See* Att'y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself").

ISSUE

Whether Belt timely filed his complaint.

DISCUSSION

Section 5851(b)(1) provides that any employee who believes he has been discharged or otherwise discriminated against in violation of the ERA "may, within 180 days after such

[5] The ALJ also found that Belt's second complaint concerning USEC's failure to rehire him as a janitor was timely filed. That complaint is not part of this record.

violation occurs," file a complaint with the Secretary of Labor alleging such discharge or discrimination. 42 U.S.C.A. § 5851(b)(1). The implementing regulations provide that "any complaint shall be filed within 180 days after the occurrence of the alleged violation." 29 C.F.R. § 24.3(b)(2).

I. Belt's complaint was filed more than 180 days after the adverse action.

Belt argues that since July 14, 2000, was when he "was certain he had lost his job," it was the "official termination date." Complainant's Initial Brief at 7. Therefore, his December 29, 2000 filing occurred within 180 days of July 14, and his complaint was timely.

USEC asserts that Belt's complaint is barred as untimely because it was filed more than 180 days after the adverse employment action in June 2000. Brief of Respondent at 10. Citing *Riden v. Tennessee Valley Auth.*, No. 89-ERA-49 (ALJ Feb. 9, 1990), *aff'd* (Sec'y July 18, 1990), USEC points out that the time for filing a complaint begins when the employee knew or should have known of the adverse action, regardless of the effective date. *Id.* at 12. USEC argues that the limitations period started on June 22, 2000, Belt's last day at work, when he knew that he had no job and was "basically unemployed." TR at 156, 394-95. Thus, since Belt's complaint was filed on December 29, 2000, it was untimely.

The applicable law

In whistleblower cases, statutes of limitation such as section 5851(b)(1) run from the date an employee receives "final, definitive, and unequivocal notice" of an adverse employment decision, *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 14 (ARB Feb. 28, 2003). "Final" and "definitive" notice denotes communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. "Unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities. *Larry v. The Detroit Edison Co.*, 86-ERA-32, slip op. at 14 (Sec'y June 28, 1991). *Cf. Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1141 (6th Cir. 1994) (three letters warning of further discipline did not constitute final notice of employer's intent to discharge complainant).

The date that an employer communicates to the employee its intent to implement an adverse employment decision marks the occurrence of a violation, rather than the date the employee experiences the consequences, *Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 97-ERA-53, slip op. at 8 (ARB Apr. 30, 2001). *See Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become apparent); *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated).

Where the alleged adverse action is a reduction in force, the discriminatory act is the employer's communicating notice of the reduction in force to the employee as opposed to the last date of employment. *Riden*, slip op. at 5. The focus is on the time of the alleged

discriminatory act, not on the point at which "the *consequences* of the act become painful." *English v. General Elec.*, No. 85-ERA-2 (Sec'y Jan. 13, 1987).

Similarly, in *Ross v. Florida Power & Light Co.*, ARB No. 98-044, ALJ No. 96-ERA-36, slip op. at 4, (ARB Mar. 31, 1999), the ARB held that the ERA statute of limitations begins to run "on the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person with a reasonably prudent regard for his rights," *citing McGough v. United States Navy*, 86-ERA-18, 19, and 20, slip op. at 9-10 (Sec'y June 30, 1988).

We find that Belt did not file his complaint within 180 days of the adverse action USEC took against him. Belt testified that he decided to ask to be included in the June RIF after he found out that his job was "going away" during the reorganization.[6] TR at 99-100. The June 22, 2000 memorandum he signed was clear and specific:

> This memo confirms that you have asked us to select you in the upcoming USEC involuntary reduction-in-force (RIF) in exchange for making you eligible for severance pay and other RIF benefits, and that the company will select you for RIF based on your request.
>
> By signing this memo, you confirm that you have requested to be selected for RIF and that you have made this decision voluntarily and without coercion of any kind. You also confirm that you understand that your request will result in termination of your USEC employment on a RIF date to be determined by the company. Your request is not revocable after you sign this memo and you must work through your RIF date to be eligible for RIF benefits.
>
> You also understand and agree that you must keep this request confidential. This means that you cannot disclose this request to other employees, and that your selection for RIF and your eligibility for RIF benefits are contingent upon not disclosing this request.

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[6] The ALJ noted some confusion in the testimony concerning the witnesses' use of the words "title," "position," "work," and "job." He credited the testimony of Pat Jenny that she told Belt his title of fire protection engineer was "going away," but that the work still needed to be done. R. D. & O. at 9. The ALJ also found that Belt misapprehended the reorganization of the plant and that USEC managers did not conspire to trick him into believing he would have no work and therefore get him to "volunteer" for the June RIF. R. D. & O. at 10. In fact, his supervisor at the time tried to talk Belt out of asking to be selected for the RIF—"it makes no sense to volunteer for an involuntary RIF." TR at 299. Further, USEC managers rated Belt as least likely of the eight employees in his department to be riffed. CX 27.

> **I acknowledge that I have voluntarily requested to be selected for RIF and I understand that my USEC employment will be terminated as a result. I also understand that I may not disclose the terms or existence of this request to other USEC employees.**

RX 3 (emphasis in the original).

This memo constitutes final, definitive, and unequivocal notice to Belt that USEC was terminating his employment. By signing this memo, Belt acknowledged his awareness of, and agreement with, USEC's decision to discharge him. His own testimony about June 22, 2000, buttresses his awareness:

> Q. How did you feel on that day?
>
> A. I was devastated. That's my last day. Basically that was my last day at the plant. My job was out the window. I was unemployed. Yes, I was coming back the 14th for a checkout, but I was basically unemployed.

TR at 394-95.

Thus, Belt knew on June 22, 2000, that he was going to be riffed. He signed a document agreeing to the action. He admitted reading the document and understanding its purpose. TR at 153-63. He agreed that he had voluntarily requested to be selected for the involuntary RIF. He acknowledged that his request was irrevocable. That he was paid until July 14, 2000,[7] or had an exit interview does not negate the fact that on June 22, 2000, Belt knew about the termination and its irrevocability.

The June 22, 2000 memorandum itself was in final form and unequivocal. The memo did not intimate that the decision to discharge was subject to further appeal, review, or revocation, either in whole or in part. Neither did it state or imply that the RIF might be rescinded, modified, or postponed. The fact that it did not set a date for actual termination does not change the finality of the action.[8]

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[7] Darlene Coffey, then employment manager, testified that the computer printout of Belt's earnings statement showed that he last worked on June 22, 2000. TR at 324; RX 31.

[8] A June 29, 2000 memorandum from the personnel director to Belt confirmed Belt's participation in the involuntary RIF and stated that he was being placed on leave until July 14, 2000. Even if this memorandum is considered a final notice of the adverse action, Belt's complaint is still untimely filed. CX 28.

As a result, we conclude that since Belt unquestionably knew about USEC's adverse action—termination—on June 22, 2000, his December 29, 2000 filing occurred more than 180 days later and is, therefore, untimely.[9] *See Honardoost v. PECO Energy Co.*, ARB 01-030, ALJ No. 00-ERA-36, slip op. at 5-6 (ARB Mar. 25, 2003) (determinative fact of termination on June 30, 2000, through involuntary force reduction program, was "incontestably certain," despite changing estimate of annuity, thus rendering complaint untimely filed).

II. The ALJ erred in finding that Belt's claim was timely filed under a hostile work environment theory.

In his complaint Belt alleged that the Nuclear Regulatory Commission (NRC) had determined that an unhealthy work environment existed at USEC, whose managers did not tolerate dissenting views or welcome questioning attitudes. He stated that the employees feared to raise safety concerns because of management's reactions, which created a "chilling effect" on employees. RX 29. Belt argues that the ALJ was justified in finding a hostile work environment and that the "effective termination of July 14 is a component of the discharge and thus a component of the hostile work environment." Therefore, the complaint is timely because the December 29, 2000 filing occurred within 180 days of July 14, 2000. Complainant's Initial Brief at 6. USEC argues that the ALJ erred in finding a hostile work environment. Brief of Respondent at 14-15.

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To prevail on a hostile work environment claim, the complainant must establish that the objectionable conduct was extremely serious or serious and pervasive. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Discourtesy or rudeness should not be confused with harassment; nor are the ordinary tribulations of the workplace, such as the sporadic use of abusive language, joking about protected status or activity, and occasional teasing, actionable. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

A whistleblower alleging a hostile work environment must establish 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 to alter the

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[9] The cases Belt cites in support of his argument that the June 22, 2000 memorandum was not final notice and that final and unequivocal notice came only on July 14, 2000, within the 180-day time limit, are inapplicable to this case. In *Amini v. Oberlin Coll.*, 259 F.3d 493 (6th Cir. 2001), the court discussed waiver, estoppel, and equitable tolling in the context of claims untimely filed with the Equal Employment Opportunity Commission. The court declined to suspend the running of the statute of limitations. The record here does not support modification of the 180-day filing requirement under waiver, estoppel, or equitable tolling theories. In *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133 (6th Cir. 1994), the court determined that the three warning letters the complainant received did not constitute final and unequivocal notice of discharge. The warning letters were conditionally phrased; the June 22, 2000 memorandum is not.

conditions of employment and create an abusive working environment, and (4) the harassment would have detrimentally affected a reasonable person and did so affect the complainant. *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ Nos. 97-ERA-14 *et al.*, slip op. at 13 (ARB Nov. 13, 2002). Circumstances germane to gauging a hostile work environment include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97 CAA-9, slip op. at 16 (ARB Feb. 29, 2000) (citations omitted).

The ALJ found that a hostile work environment existed because of the "chilled environment" at USEC, which the NRC found to exist, and "various reactions of management officials" to Belt's alleged protected activities.[10] R. D. & O. at 16. Then, relying on *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), he found that Belt's claim was timely filed. R. D. & O. at 16.

According to the ALJ, *Morgan* holds that in claims involving a hostile work environment, the unlawful employment practice that starts the limitations statute running does not occur on any particular day. Such a claim would not be time barred if all acts constituting the claim were part of the same unlawful practice and at least one act fell within the filing period. The ALJ found that since July 14, 2000, was the day on which Belt was "actually terminated," that date constituted a hostile act and triggered the limitations period, making his December 29, 2000 filing timely. R. D. & O. at 16. However, since the record does not demonstrate that Belt was subjected to a hostile work environment, we find that the ALJ erred when he applied *Morgan.*

In *Morgan*, the Supreme Court distinguished hostile work environment claims from those based on discrete acts of discrimination or retaliation. Discrete acts are easy to identify—failure to promote, denial of transfer, termination, refusal to hire. 536 U.S. at 114. "A discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.' A party therefore must file a charge within [the number of days allowed by statute] of the date of the act or lose the ability to recover for it." *Id.* at 110.

By contrast, a hostile work environment occurs over a series of days, or perhaps years, and a single act of harassment may not be actionable on its own. *Id*. at 115. Hostile work environment claims are based on the cumulative effect of individual acts. *Id.* Such claims are not time-barred if all the acts comprising the claim are part of the same unlawful practice and at least one act happens within the limitations period. *Id*. at 117.

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[10] The ALJ found that "to the extent to which Mr. Belt has attempted to establish that he was terminated as part of the 'chilled environment' found to have existed in the NRC findings, together with his attempts to link various reactions of management officials to his alleged protected activities, they demonstrate that his is a hostile work environment case." R. D. & O. at 16.

The "chilled environment"

On December 8, 1997, the NRC[11] informed USEC that its Allegation Management System had disclosed allegations concerning employment discrimination at the Paducah and Portsmouth plants. CX 9. The NRC noted that such allegations, "if true, along with a fear of retribution for raising safety concerns, could indicate a 'chilling effect' or a 'chilled' environment in which employees believe they may suffer adverse employment action if they raise a safety question." The NRC added that these allegations "may demonstrate that a 'chilling effect' has developed, or could be developing." Also, interviews with managers and other staff showed an apparent lack of understanding of the "responsibilities regarding the rights of individuals to raise safety concerns without fear of retaliation or discrimination." The NRC asked USEC to respond to three areas of concern within 45 days.

Following a meeting between USEC and NRC officials on January 15, 1998, and a survey of more than 2,500 employees, USEC informed the NRC on June 1, 1998, that a significant majority of employees (98 percent) felt a responsibility to report potential nuclear safety concerns, and would feel supported by their supervisors for having done so (93 percent). CX 10,12. The survey showed that most employees (86 percent) were not concerned about harassment, intimidation, or discrimination from peers, supervisors, or managers for pursuing potential safety issues. The NRC found USEC's response "satisfactory." CX 12.

In an August 1, 2001 letter to Belt, which the ALJ did not discuss, the NRC stated that it had previously substantiated its concern about a "chilled environment" at Paducah, but that the safety-conscious work environment was "generally improving." It added that while the NRC continued to monitor the issue through routine inspections, it planned no further action and considered the matter closed. CX 33.

Nevertheless, the NRC's findings about a "chilled environment" do not establish that Belt was the victim of a hostile work environment. The NRC's December 8, 1997 letter is couched in generalities and expresses concern about a situation that "could" be developing. It does not refer specifically to Belt or to the fire protection department in which he worked. CX 9. It does not mention harassment or hostility, or indicate that an abusive atmosphere existed at the Paducah plant. The follow-up letters from USEC and the NRC are similarly devoid of evidence of a hostile environment.

Belt told the NRC that the "chilled environment" discouraged him from filing ATRs (assessment and tracking reports) on deficiencies in the fire protection systems, but the record indicates otherwise. CX 33. Belt wrote more than 300 such reports from 1995 through June 2000, CX 13, TR at 246, received at least six monthly awards for his work, CX 14, RX 6, and won praise for his efforts in his performance evaluations. RX 23-24; TR at 89-91. He also admitted at the hearing that his supervisor at the time, Robert Wimbrow, never discouraged him

[11] The NRC assumed regulatory responsibility for gaseous diffusion plants, which produce enriched uranium, on March 3, 1997.

from filing ATRs. Belt added that he had filed all the ATRs that he felt were appropriate. TR at 128-29. Such evidence indicates that, contrary to his contention, Belt worked in a generally supportive rather than a hostile environment.

Managerial reactions

Belt's testimony about management's reactions to his protected activities—filing ATRs and an employee concerns report—also lends little support to finding a hostile work environment. Wimbrow was Belt's supervisor from early 1997 to late 1999, when John Smith took over. TR at 49-50. On September 11, 1997, Belt asked Wimbrow to review and file an ATR concerning a conflict in OSHA regulations governing the fire system's sprinkler heads. CX 5. On September 17, 1997, Belt filed an ATR against Wimbrow for failing to file the requested ATR. CX 6, TR at 57-58.

According to Belt this caused Wimbrow to become "really agitated." TR at 58. Wimbrow explained that he had forgotten about the ATR but had filed it when Belt reminded him. TR at 202-05. He stated he took no action against Belt for filing an ATR against him and rated Belt as an effective performer on his September 30, 1997 evaluation.[12] TR at 234; RX 23, CX 7.

Belt testified that after this incident, Wimbrow "really was cool" to him. Their relationship "cooled off . . . it was just a chilled environment. I just didn't feel good about it." Belt added that he "didn't feel" that he could go to Wimbrow and get support, and that Wimbrow "didn't have time for me." TR at 73-74. But on cross-examination, Belt admitted that Wimbrow "never failed" to respond to his inquiries and worked with him professionally. TR at 128.

On September 26, 1997, Belt filed a report with the employee concerns department, stating that he was "worried" because Wimbrow had not spoken to him about the ATR Belt had filed against him. Belt added that Charles Hicks, Wimbrow's supervisor, might be prejudiced against him because he [Belt] was white, and that Hicks perceived him as a satanic follower or "devil." CX 8; TR at 60-63.

The department investigated Belt's concerns. Its report indicates that the investigator met with Hicks, who said that he had heard from many other employees that Belt was "difficult to work with," and that he had let Belt know about this impression. In a coaching session with Belt and another employee, Butch McKinney, to teach them to work together professionally, Hicks acknowledged that he had remarked to both men, "I can work with the devil if necessary." McKinney told the investigator that the "devil" remark was not directed at anyone in the room but was meant to emphasize that two people needed to be able to work together regardless of whether they liked each other. CX 8.

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[12] Wimbrow noted Belt's weaknesses: "Performance is inconsistent. Does excellent work and interacts well with others on some jobs. On other jobs, work is incomplete or [he] gets involved in conflicts that require mediation." CX 7.

Thus, this record does not support Belt's contention that USEC managers harassed him in 1997 because he filed ATRs and an employee concerns report. Rather, the testimony and the investigator's report show that USEC managers handled the situation appropriately by contacting the people involved and attempting to alleviate Belt's worries about his relationship with Wimbrow.

Nor was Belt harassed in 1999. On June 2, 1999, Belt filed 84 individual ATRs regarding corroded sprinkler heads after these problems had been found during inspections of the fire protection system the previous month. CX 11. USEC managers were concerned about filing that many ATRs all at once because some of them were untimely by NRC standards and "it made us look bad." TR at 77-85. Two months later, Wimbrow issued a memorandum changing the previous procedure and explaining that individual ATRs had to be processed as soon as the problem was discovered. RX 28; TR at 237-39.

Belt got a verbal reprimand, "a slap on the wrist," according to Wimbrow, because of the untimely filing of some of the 84 ATRs. TR at 238-39. Belt testified that he felt Wimbrow had let him take the blame for the incident and had not "stuck up for me" with the managers. TR at 76-78. Asked about his relationship with Wimbrow, Belt responded "it never was a warm working relationship." TR at 88. However, Belt admitted that Wimbrow didn't criticize him for the untimely filings and that the issue was dropped after Wimbrow's memo clarifying the policy. TR at 130-36. Also, Wimbrow gave Belt a higher rating—commendable performance—on September 16, 1999 than he had received previously. TR at 133, CX 24.

We find that USEC's reactions to Belt's 1999 ATRs do not constitute severe or pervasive harassment, or even minimal abuse of any kind. The evidence merely indicates a difference of managerial opinion about filing ATRs, which was resolved, and then a change in standard operating procedure. Beyond his testimony, Belt produced no evidence to support finding a hostile work environment. His self-generated perception that Wimbrow was not a warm and friendly supervisor may indicate a less-than-ideal working relationship, but Belt himself admitted that the relationship was professional.[13]

Furthermore, even if the record did demonstrate a hostile work environment, for the complaint to be timely, at least one of the acts comprising such an environment must have occurred less than 180 days before the December 29, 2000 filing date. As noted previously, Belt argues that his complaint was timely filed because the effective date of termination, July 14, 2000, was a "component of the discharge and thus a component of the hostile work environment." Complainant's Initial Brief at 6.

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[13] Indeed, Belt's interactions with Smith, who became his supervisor in early 2000, were almost the antithesis of a hostile work environment. Belt testified that he enjoyed working with Smith, who was supportive of him, and that Smith never retaliated against him. TR at 137.

The record does not support Belt's contention that USEC discriminated against him on July 14, 2000. That date was simply when the RIF termination became effective, as explained in the June 29, 2000 memorandum that was sent to all riffed employees. CX 28. The effective date of the termination and Belt's exit interview on July 7, 2000, are not "components" of the alleged hostile work environment. If such an environment existed, it ended on June 22, 2000, which Belt admitted was his last day of work. Therefore, even if Belt had been subjected to a hostile work environment, his claim is untimely filed because all of the acts comprising the alleged hostility occurred more than 180 days before he filed his complaint. *See Morgan*, 536 U.S. at 117.

III. Belt's complaint was not timely filed under the "continuing violation doctrine."

As a third rationale for finding that his complaint was timely filed, Belt argues the so-called "continuing violation doctrine." He asserts that the continuum of USEC's related discriminatory conduct began with his supervisor's false representation that his job was to disappear. It continued with a counselor's suggestion that he apply for an involuntary RIF, his supervisors' failure to correct his misapprehension, and his subsequent RIF discharge after signing the June 22, 2000 memorandum. The final act of retaliation, according to Belt, was the July 14, 2000 exit interview, which occurred less than 180 days before he filed the complaint.[14] Therefore, the complaint was timely filed. Complainant's Rebuttal Brief at 7-8.

The continuing violation theory is an equitable exception to statutory limitations periods "[w]here the unlawful employment practice manifests itself over time, rather than as a series of discrete acts." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). *See Jackson v. Quanex Corp.*, 191 F.3d 647, 667-68 (6th Cir. 1999) (threshold requirement of application of the continuing violation doctrine is a showing that at least one discriminatory act took place during the limitations period); *Connecticut Light & Power Co. v. United States Dep't of Labor*, 85 F.3d 89, 96 (2d Cir. 1996), (a continuing violation exists where there is a relationship between a series of discriminatory actions and an invalid, underlying policy).[15]

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[14] Belt testified that after June 22, 2000, he never went back to the Paducah plant, except to check out on July 14, 2000. TR at 396-98.

[15] The U.S. Court of Appeals for the Seventh Circuit applied a slightly different standard:

> What justifies treating a series of separate violations as a single continuing violation? Only that it would have been unreasonable to require the plaintiff to sue separately on each one. In a setting of alleged discrimination, ordinarily this will be because the plaintiff had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory mistreatment.

Malhotra v. Cotter & Co., 885 F.2d 1305, 1310 (7th Cir. 1989).

The Secretary has held that the timeliness of a claim may be preserved under the continuing violation theory "where there is an allegation of a course of related discriminatory conduct" and the complaint is filed within the limitations period of "the last discriminatory act." *Holden v. Gulf States Utilities*, No. 92-ERA-44, slip op. at 11-12 (Sec'y Apr. 14, 1995); *Freels v. Lockheed Martin Energy Sys., Inc.*, ARB No. 95-110, ALJ Nos. 95-CAA-2 and 94-ERA-6, slip op. at 9 (ARB Dec. 4, 1996). In other words, under the continuing violation doctrine, a single non time-barred act can save other acts that *are* time-barred. *See Varnadore v. Secretary of Labor*, 141 F.3d 625, 631 (6th Cir. 1998), *aff'g sub nom. Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2, *et al.* (Sec'y Feb. 5, 1996). *Accord Berkman*, slip op. at 14-15.

However, the Supreme Court in *Morgan* concluded that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." 536 U.S. at 113. The Court reversed the holding of the U.S. Court of Appeals for the Ninth Circuit, which had applied the continuing violations doctrine to "serial violations."

The Ninth Circuit had held that, in "light of the totality of the circumstances," the pre-limitations conduct at issue was "sufficiently related" to the post-limitations conduct to invoke the continuing violations doctrine. Further, as long as one act fell within the limitations period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act may be considered in determining liability. *Morgan v. National R.R. Passenger Corp.*, 232 F.3d 1008, 1016 (9th Cir. 2000). Writing for the Court, Justice Thomas stated that only discrete acts that fall within the appropriate limitations period are actionable, and all prior discrete acts are untimely filed. *Morgan*, 536 U.S. at 114-15.

Applying *Morgan*, we reject Belt's argument that the continuing violation doctrine makes his December 29, 2000 complaint timely. We find that all of the discriminatory adverse acts Belt alleges are no longer actionable because they took place outside the ERA's 180-day filing requirement. *See Johnsen v. Houston Nana, Inc.*, ARB No. 00-064, ALJ No. 1999-TSC-4, slip op. at 4 (ARB Jan. 27, 2003, *reissued* Feb. 10, 2003) (no continuing violation found because the complainant was not subjected to any adverse action after receiving his notice of termination); *Ilgenfritz v. United States Coast Guard Acad.*, ARB No. 99-066, ALJ No. 99-WPC-3, slip op. at 8 (ARB Aug. 28, 2001) (continuing violation argument rejected because record revealed no underlying policy or pattern of discrimination and no prolonged managerial process that prevented the complainant from determining the dates of alleged discriminatory acts); *Billings v. Tennessee Valley Auth.*, 86-ERA-38, slip op. at 11 (Sec'y June 28, 1990) (the complainant offered no evidence of a discriminatory act during the limitations period to buttress reliance on the continuing violation theory).

USEC took only two discrete acts within 180 days before Belt filed his complaint. The first act occurred when Belt and Brenda Proper, the benefits plans manager, signed various retirement forms on July 5 and 7, 2000, at USEC's resource center. TR at 112, 381-83; RX 8. The second act involved Darlene Coffey, USEC's employment manager, signing an exit questionnaire on July 14, 2000, during the course of Belt's exit interview. RX 17. Belt did not complete or sign this form. It contains Belt's name, job title, badge number, termination date—July 14, 2000—and an exit code. His overall performance rating was "Good/Competent." Pat Jenny, plant services manager, signed the form on August 10, 2000.

Neither document demonstrates discriminatory or retaliatory motivation on the part of USEC. Neither document contains language sufficient to establish an adverse action by USEC, whose managers merely signed the forms where appropriate. Rather, both documents resulted from the alleged adverse action taken on June 22, 2000, when USEC notified Belt that his request to be riffed had been accepted.

Thus, the discrete acts that occurred within the statutory limitations period—Belt's participation in the July 5 and 7 document signing and the exit questionnaire activity on July 14, 2000—were not adverse actions but rather the logical effects of USEC notifying Belt of the involuntary RIF on June 22, 2000. Because the date on which the mere effects of a discrete act occurred is not relevant to the issue of timeliness, and no discriminatory act occurred within 180 days prior to the date Belt filed his complaint on December 29, 2000, we hold that Belt's reliance on the so-called continuing violation theory fails. *See United Air Lines v. Evans*, 431 U.S. 553, 559 (1977) (the fact that the effects of a discriminatory act continue into the limitations period does not provide a basis for concluding that a cause of action was timely filed); *English*, 858 F.2d at 962-963 (discrete, consummated, immediate violation is not "continuing" merely because its effects carry forward).

CONCLUSION

Belt's complaint was filed more than 180 days after USEC discharged him. Therefore, his complaint was not timely filed. Furthermore, because Belt did not prove that USEC harassed him, his complaint was not timely under a hostile work environment theory. Finally, Belt's complaint was not timely under the "continuing violation doctrine" because no discrete act of discrimination occurred within 180 days prior to filing the complaint. Therefore, we **DENY** Belt's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge