



In the Matter of:

JIMMY R. LEE,

ARB CASE NO. 10-021

COMPLAINANT,

ALJ CASE NO. 2009-SWD-003

v.

DATE: February 29, 2012

**PARKER-HANNIFIN CORPORATION,
ADVANCED PRODUCTS BUSINESS UNIT,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

John M. Brown, Esq., *Law Office of John M. Brown*, Hartford, Connecticut

For the Respondent:

Bruce G. Hearey, Esq., Daniel L. Messeloff, Esq., *Ogletree Deakins Nash Smoak & Stewart, P.C.*, Cleveland, Ohio

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*.

DECISION AND ORDER OF REMAND

This case arises under the whistleblower protection provisions of the Solid Waste Disposal Act of 1976, 42 U.S.C.A. § 6971 (Thomson/West 2003)(the Act or the SWDA), and the Act's implementing regulations, 29 C.F.R. Part 24. A Department of Labor (DOL) Administrative Law Judge (ALJ) granted Respondent Parker-Hannifin Corporation's motion for summary decision and dismissed the complaint. Lee timely appealed the dismissal of his complaint. For the reasons set forth, we reverse the ALJ's decision and remand for further proceedings.

FACTUAL BACKGROUND

The ALJ based his summary decision on the following facts.¹ Lee worked for Parker-Hannifin Corporation (Parker-Hannifin or Respondent) as the Environmental Health and Safety Coordinator/Facilities Lead at its Advanced Products Business Unit. On or about March 13, 2007, the Connecticut Department of Environmental Protection (CT DEP) notified Parker-Hannifin of a concern that the concentration of precious metals in the waste water discharged into Evaporator No. 2 was not high enough to claim an exemption under federal and state environmental health and safety regulations that would permit Parker-Hannifin to use specified processes for reclamation of precious metals contained in the discharged waste water. In his capacity as Environmental Health and Safety Coordinator, Lee was tasked with compiling the information required to appropriately respond to CT DEP's concerns. Consequently, Lee contracted with Apex Environmental (Apex), an environmental consulting firm, to test the waste water streams that were discharged into Evaporator No. 2, to respond to the concerns CT DEP raised.

On October 28, 2008, Lee received the report from Apex that indicated that the precious metals exemption that Parker-Hannifin had previously claimed did not apply to the waste water discharged into Evaporator No. 2. Lee raised his concerns regarding the hazardous waste treatment and its possibly noncompliant operation with Sharon Chu, the highest ranking officer at the facility. Parker-Hannifin management responded by suggesting that a meeting be scheduled to address Lee's concerns within approximately three weeks.²

¹ The factual summary is extracted from the ALJ's Decision and Order Granting Summary Decision and Dismissing Complaint (D. & O.) at 2-3, unless otherwise specified.

² The ALJ states in the D. & O.'s factual statement that Parker management "responded by scheduling a meeting no earlier than three weeks later to address the issue" citing Lee's OSHA complaint at ¶25. Paragraph 25 of Lee's complaint states, however, that management's response was to "suggest" a meeting "no sooner than three weeks after the company received proof that it was breaking the law (November 18th meeting proposed)."

On October 30, 2008, Lee informed Chu in a letter that he was “ordering” that Evaporator No. 2 be shut down and not used until such time as its use was approved by CT DEP and the waste waters collected and managed as RCRA hazardous waste. Later that day Chu met with Lee, informed him that he did not have the authority to shut down the evaporator, and instructed Lee not to do so. She also told Lee that the company would investigate his concerns.

On November 4, 2008, Lee shut down Evaporator No. 2 and placed a padlock on it. Parker-Hannifin immediately suspended Lee without pay the same day. Evaporator No. 2 was inoperative for several days until Parker-Hannifin was able to remove the lock that Lee had put on it, during which time Parker-Hannifin instituted an alternative method for storing and processing the waste water that would have been processed by the shut-down evaporator.

Parker-Hannifin began an investigation the same day that Lee shut down Evaporator No. 2. The investigation found Lee’s allegations to be without merit, and on November 10, 2008, Parker-Hannifin terminated Lee’s employment. Both Lee and the Respondent agree that the Respondent terminated Lee’s employment because he shut down Evaporator No. 2.

PROCEEDINGS BELOW

Lee filed a complaint letter with the Occupational Safety and Health Administration (OSHA) on November 8, 2008, alleging that the Respondent unlawfully suspended him in response to his action of shutting down an evaporator unit used to process hazardous waste rinse water at the Respondent’s Connecticut facility on November 4, 2008. Upon the Respondent’s subsequent termination of Lee’s employment on November 10, 2008, Lee amended his complaint to include the dismissal.

Following an investigation, the Regional Administrator for OSHA concluded that there was “no reasonable cause to believe the Respondent violated the SWDA.” Lee filed a notice of objections and requested a hearing before a Department of Labor Administrative Law Judge (ALJ). On October 29, 2009, the ALJ issued a Decision and Order Granting Summary Decision and Dismissing Complaint. The ALJ concluded that the undisputed facts established that the Complainant was not engaged in protected activity when he shut down the evaporator, and thus his suspension and termination were not unlawful under the SWDA.

JURISDICTION AND STANDARD OF REVIEW

The SWDA affords any employee who believes that he has been fired or otherwise discriminated against for engaging in protected activity the right to file a complaint with the Secretary of Labor, and authorizes the Secretary, upon finding a violation of the Act, to order abatement and other remedies. 42 U.S.C.A. § 6971(b). The Secretary has delegated her authority to issue final agency decisions in cases arising under the SWDA to the Administrative Review Board (ARB or Board). *See* Secretary's Order 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (January 15, 2010). *See also* 29 C.F.R. § 24.110(a).

The Board reviews de novo an ALJ's grant of summary decision pursuant to 29 C.F.R. § 18.40 (2011).³ Pursuant to that regulation, summary decision is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."⁴ The first step is to determine whether there is any genuine issue of a material fact. If the pleadings and documents the parties submitted demonstrate the existence of a genuinely disputed material fact, then summary decision cannot be granted. Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense.

Determining whether there is an issue of material fact requires several steps. First, the ALJ must examine the elements of the complainant's claims to sift the material facts from the immaterial.⁵ Once materiality is determined, the ALJ next must examine the arguments and evidence the parties submitted to determine if there is a genuine dispute as to the material facts. The party moving for summary decision bears the burden of showing that there is no genuine issue of material fact.⁶ When reviewing the evidence the parties submitted, the ALJ must view it in the light most favorable to the non-moving

³ *Holland v. Ambassador Limousine/Ritz Transp.*, ARB No. 07-013, ALJ No. 2005-STA-050, slip op. at 1 (ARB Oct. 31, 2008); *King v. BP Prod. N. Am., Inc.*, ARB No. 05-149, ALJ No. 2005-CAA-005, slip op. at 4-5 (ARB July 22, 2008).

⁴ 29 C.F.R. § 18.40(d).

⁵ *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit" preclude summary judgment.).

⁶ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

party, the complainant in this case.⁷ The moving party must come forward with an initial showing that it is entitled to summary decision.⁸ The moving party may prevail on its motion for summary decision by pointing to the absence of evidence for an essential element of the complainant's claim.⁹

In responding to a motion for summary decision, the nonmoving party may not rest solely upon his allegations, speculation or denials, but must set forth specific facts that could support a finding in his favor. *See* 29 C.F.R. § 18.40(c). If the moving party presented admissible evidence in support of the motion for summary decision, the nonmoving party must also provide admissible evidence to raise a genuine issue of fact. In reviewing an ALJ's summary decision, we do not weigh the evidence or determine the truth of the matters asserted.¹⁰

DISCUSSION

Lee's sole basis for claiming SWDA-protected activity was his shutting down of the No. 2 Evaporator due to his concern that it was operationally noncompliant with federal and state environmental health and safety regulations. As the ALJ noted, the parties agreed that "the undisputed reason for which Mr. Lee was terminated was because he shut down Evaporator No. 2," which Parker-Hannifin labeled as "insubordination" because it had not been authorized. D. & O. at 6. The ALJ concluded that the SWDA's definition of protected activity does not include conduct, "especially conduct in contravention of management's orders – which is what happened here." *Id.* at 7. Accordingly, the ALJ held that "Mr. Lee's act of taking Evaporator No. 2 out of service was unprotected and therefore, his termination was proper and not violative of the SWDA's employee-protection provision." *Id.* at 8.

⁷ *Santamaria v. United States Env'tl. Prot. Agency*, ARB No. 04-063, ALJ No. 2004-ERA-006, slip op. at 4 (ARB May 31, 2006) (citations omitted).

⁸ 29 C.F.R. § 18.40(d) (derived from Rule 56 of the Federal Rules of Civil Procedure). *See Pickett v. Tennessee Valley Auth.*, ARB No. 00-076, ALJ No. 2000-CAA-009, slip op. at 3 (ARB Apr. 23, 2003).

⁹ *Holland*, ARB No. 07-013, slip op. at 2 (citation omitted).

¹⁰ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Hasan v. Enercon Servs., Inc.*, ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027; slip op. at 6 (ARB May 29, 2009) (citation omitted); *Seetharaman v. G.E. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 4 (ARB May 28, 2004) (citations omitted).

On appeal, Lee contends that the ALJ erred in granting the Respondent's motion for summary decision as he is protected for "any other action to carry out the purposes" of the SWDA. Lee also contends that the ALJ erred in applying the holding in *Harrison v. A.R.B.*, 390 F.3d 752 (2d Cir. 2004), a case that arose under the Surface Transportation Act, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2010), as amended by the 9/11 Commission Act of 2007, Pub. L. No. 110-53)(STAA), to this SWDA case as the language defining protected activity is broader under the SWDA. In addition, Lee contends that *Harrison* is inapposite because, unlike the complainant in that case, Lee had the authority to shut down the evaporator. He was the Environmental Health and Safety Coordinator/Facilities Lead for his terminal and thus was responsible for ensuring that the plant complied with the environmental laws. The Respondent asserts that Lee did not have the authority to shut down the evaporator, whether it was violating the law or not, and that he was told this prior to his taking action. Parker-Hannifin also contends that the Act only covers "actions" that are related to proceedings such as internal investigations, hearings, inquiries, complaints, administrative reviews, etc., and does not include actual acts such as stopping production.

The ALJ erred in holding that the SWDA's whistleblower protection provision does not include the protection of an employee's conduct. Contrary to the ALJ's opinion, conduct under certain circumstances may indeed constitute protected activity under SWDA. The language of the statute, its implementing regulations, and relevant precedent support this conclusion.

Fundamentals of statutory construction mandate that we begin with the plain language of the statute and the implementing regulations construing the relevant statutory text. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S.Ct. 2458, 2469 (2009). Under the SWDA, no person shall discriminate against any employee "by reason of the fact" that such employee has engaged in enumerated protected activity, namely:

filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any implementation plan.

42 U.S.C.A. § 6971(a).

The Department of Labor regulations implementing the SWDA whistleblower protection provision state at 29 C.F.R. § 24.102 in relevant part:

(b) It is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any

other manner retaliate against any employee because the employee has:

- (1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the statutes listed in § 24.100(a) [including the SWDA] or a proceeding for the administration or enforcement of any requirement imposed under such statute;
- (2) Testified or is about to testify in any such proceeding; or
- (3) Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such statute.

The ARB has recognized the expansive nature of the SWDA's whistleblower protection provision, and that in furtherance of the provision's purposes, the term "proceeding" is to be construed broadly, as it is under other environmental whistleblower protection provisions. Accordingly, the ARB has interpreted the term "proceeding" to encompass "all phases of a proceeding that relate to public health or the environment, including an internal or external complaint that may precipitate a proceeding."¹¹ Moreover, the phrase "any other action" has been interpreted to extend whistleblower protection beyond mere participation in a "proceeding" to include internal complaints made to supervisors and others.¹²

Consistent with this expansive interpretation, the ARB has observed that conduct can constitute protected activity under the SWDA. Indeed, in *Jones v. E.G. & G. Defense Materials*, ARB No. 97-129, ALJ No. 1995-CAA-003 (ARB Sept. 29, 1998), the Board concluded that an employee's decision to "close [a] Lab[oratory] temporarily" that he reasonably believed was "venting agent directly into the atmosphere through racks that did not have charcoal filters or stickers certifying that the amount of air flow was sufficient" was protected activity within the SWDA's scope. *Id.* at 12. The Board determined that the employee's actions involved "concerns that touched on the public's environmental safety." *Id.*

¹¹ *Jenkins v. U.S. Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 17 (ARB Feb. 28, 2003) (citing *Passaic Valley Sewerage Comm'rs v. DOL*, 992 F.2d 474, 478 (3d Cir.), *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926, 931-32 (11th Cir. 1995)).

¹² *See, e.g., Kansas Gas & Elec. v. Brock*, 780 F.2d 1505, 1510 (10th Cir. 1985); *Mackowiak*, 735 F.2d at 1162.

The ARB has reached the same conclusion in interpreting other, similarly worded whistleblower protection statutes. For example, the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121(a)(Thomson/West 2007),¹³ has been interpreted as protecting airline pilots who, acting within their authority and with a reasonable belief concerning safety, refuse to certify a plane as airworthy and order it into flight service.¹⁴ Similarly, the Secretary of Labor has protected a broad range of employee conduct under the whistleblower statutes including taking photographs, making secret tape recordings, and performance of quality control and quality assurance functions.¹⁵ Affirming one such case, the Ninth Circuit reasoned that quality control inspectors play a crucial role in enforcing the NRC regulations and, consequently, “[i]n a real sense, every action by quality control inspectors occurs ‘in an NRC proceeding,’ because of their duty to enforce NRC regulations.” *Mackowiack v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (1984). This rationale applies with equal force to employees, like Lee, whose job duties entail enforcement of environmental laws.¹⁶

¹³ 49 U.S.C.A. § 42121(a) provides, in relevant part, whistleblower protection to an airline employee who, “(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.” *See also* 29 C.F.R. § 1979.102(b)(2011).

¹⁴ *See Sitts v. COMAIR, Inc.*, ARB No. 09-130, ALJ No. 2008-AIR-007 (ARB May 31, 2011); *Sievers v. Alaska Airlines*, ARB No. 05-109, ALJ No. 2004-AIR-028 (ARB Jan. 30, 2008).

¹⁵ *Mosbaugh v. Georgia Power Co.*, No. 1991-ERA-001, slip op. at 7-8 (Sec’y Nov. 20, 1995) (secret one-party lawful tape recordings found protected activity in furtherance of purposes of Act); *Adams v. Coastal Prod. Operators, Inc.*, No. 1989-ERA-003, slip op. at 6, n.4 (Sec’y Aug. 5, 1992) (photographing an oil spill is protected activity); *Richter v. Baldwin Associates*, 1984-ERA-009 - 012, slip op. at 7 (Sec’y Mar. 12, 1986); *Wells v. Kansas Gas & Elec. Co.*, 1983-ERA-012 (Sec’y June 14, 1984), *aff’d sub nom.*, *Kansas Gas & Elec. Co. v. Brock*, Nos. 84-2114, 84-2735, slip op. at 11, 17-18 (10th Cir. Dec. 26, 1985).

¹⁶ Because whistleblower law owes so much to First Amendment jurisprudence, it is worth consulting that body of law to assist in interpretation of whistleblower cases.

Conduct in the form of a refusal to work has also been held to constitute whistleblower protected activity.¹⁷ The ALJ acknowledged that the ARB has so held, but viewed the requirement imposed in the refusal to work cases, i.e. that the employee's refusal is based on a reasonable belief that continuing to work may adversely affect his personal health and safety, as imposing a similar requirement on conduct for which whistleblower protection is sought under the SWDA. D. & O. at 8-9. However, the ALJ's attempt to distinguish the refusal to work cases on the basis of the employee's personal health and safety improperly limits the scope of that protected activity and misses a fundamental premise of whistleblower law. In any case where an employee seeks whistleblower protection for his conduct, the question is whether the employee reasonably believes that the conduct furthers the purposes of the act under which protection is sought.

Under the SWDA the concern is external to the employee and focuses upon the environmental purposes for which the SWDA was intended. SWDA section 6971 protects employees who engage in whistleblower conduct "grounded in conditions constituting reasonably perceived violations" of the Act. *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 1995-CAA-012, slip op. at 2 (ARB Apr. 8, 1997). The SWDA "is a comprehensive environmental statute that governs generation, treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996); *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 2000-CAA-009, 2001-CAA-011; slip op. at 9-10 (ARB June 30, 2004). The Act's purpose 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." *Hall v. U.S. Army*, ARB No. 02-108, ALJ No. 1997-SWD-005, slip op. at 4 (ARB Dec. 30, 2004). Accordingly, to secure the

Although the text of the free speech clause of the First Amendment applies only to "speech," the concept of conduct as constitutionally-protected free speech is by now well established. As the Supreme Court noted in *Texas v. Johnson*, 491 US 397 (1989): "The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word. While we have rejected 'the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,' we have acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" 491 U.S. at 403 (citations omitted).

¹⁷ See *Sutherland v. Spray Sys. Envtl.*, No. 1995-CAA-001 (Sec'y Feb. 26, 1996); *Pennsyl v. Catalytic, Inc.*, No. 1983-ERA-002 (Sec'y Jan. 13, 1984). See also *Kenneway v. Matlock*, No. 1988-STA-020 (Sec'y June 15, 1989); *Wilson v. Bechtel*, 1986-ERA-034 (Sec'y Feb. 9, 1980).

protection of 42 U.S.C.A. § 6971, the actions of the employee, whether in the form of a complaint, participation in an investigation, or by way of conduct such as that Lee engaged in, must be reasonably perceived by the employee as furthering SWDA's purposes.

As demonstrated by the foregoing case authority, conduct under certain circumstances may indeed constitute protected activity under the SWDA's whistleblower protection provision. At the time an employee engages in conduct for which he claims protection, the employee must have a reasonable belief, both subjectively and objectively, that his conduct furthers the SWDA's purposes. *See also Jones*, ARB No. 97-129, slip op. at 13 (ARB concluding that an employee who worked as a "Safety Manager" and called the fire department on observing a "hydrogen leak [that he believed] could lead to an explosion that would destroy the . . . building in and around which numerous hazardous chemical agents were stored" engaged in "protected activity under the environmental statutes").

The ALJ cited *Harrison v. A.R.B.*, 390 F.3d 752 (2d Cir. 2004), a case arising under the STAA, as drawing a distinction between an employee's complaint of safety violations, for which whistleblower protection is to be afforded, and an employee's conduct, for which the ALJ interpreted *Harrison* as affording no similar protection. This misreads the Second Circuit's decision. Contrary to the ALJ's understanding, *Harrison* did not hold that conduct is not protected under STAA's "complaint" provision,¹⁸ but that STAA does not necessarily protect an employee who engages in *unauthorized* conduct. The court expressly noted that to the extent that the respondent discharged Harrison for "red-tagging" vehicles and thereby removing them from service, "the evidence showed that it did so because [Harrison] repeatedly violated Roadway's legitimate policy requiring supervisory approval before removing vehicles from service." 390 F.3d at 758. Harrison was disciplined "not . . . because he red-tagged, but specifically because he violated policy by red-tagging without authorization and taking vehicles out of service on his own initiative." *Id.*

Similarly, the ALJ's reliance on *Consolidated Coal v. Marshall*, 663 F.2d 1211 (3d Cir. 1981), is misplaced. *Consolidated Coal* arose under the worker protection provisions of the Federal Mine Safety and Health Act of 1977¹⁹ and focused, as in

¹⁸ 49 U.S.C.A. § 31105 (a)(1) provides in pertinent part: "A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because – (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding. . . ."

¹⁹ 30 U.S.C. § 815(c)(1).

Harrison, upon the complainant's authority to engage in the conduct for which he claimed protection. Given the interests protected under the Mine Safety Act, *i.e.*, the protection of workers from unsafe and unhealthful working conditions, the Third Circuit recognized that conduct taken in furtherance of those interests, such as walking off the job site, was protected – provided the miner “reasonably believed that he confronted a threat to his safety or health.” *Consolidated Coal*, 663 F.3d at 1219. However, because the Mine Safety Act affords an employee neither the right nor the authority to close down a job site in furtherance of the interests the act was designed to protect, the Third Circuit held that Marshall's conduct in shutting down a machine's operation, thereby closing an entire job site, was not protected. *Id.* at 1221. Thus, *Consolidated Coal* does not stand for the proposition that conduct is never protected, but only that conduct which is within the rights of the complainant to take – provided the complainant has a reasonable good faith belief that his conduct is in furtherance of the purposes of the act under which he seeks protection.

Finally, we note the ALJ's reliance upon *Sievers v. Alaska Air*, ARB No. 05-109, ALJ No. 2004-AIR-028 (ARB Jan. 30, 2008), which the ALJ also misconstrued. It is true that *Sievers* held that AIR 21-protected activity requires more than aggressively carrying out one's duties for ensuring air safety; the complainant must communicate his or her concerns to management. However, the conduct engaged in by the complainant for which the ARB afforded whistleblower protection is not distinguishable from the present case as a refusal to work. Rather, the protected conduct in *Sievers* involved a pilot's decision, acting within the scope of his authority, to place an airplane out of service because of safety concerns. The conduct in *Sievers* for which AIR 21 whistleblower protection was afforded is functionally no different from Lee's conduct at issue in the present case.

While an employee's authority (or lack thereof) is not necessarily determinative of whether particular speech or conduct is protected – it is a factor in assessing the *objective reasonableness* of an employee's belief that his conduct is in furtherance of the purposes of the whistleblower act under which he seeks protection. An employee may exceed his authority and thereby take his conduct outside of the protection afforded by the statute. “That employees are protected while presenting safety complaints does not give them *carte blanche* in choosing the time, place and/or method of making those complaints.” *Garn v. Benchmark Techs.*, No. 1988-ERA-021, slip op. at 4 (Sec'y May 18, 1995). On the other hand, an unauthorized act may, under certain circumstances, be protected under the whistleblower statutes. The Secretary has concluded that the operative determination of whether intemperate or insubordinate (unauthorized) behavior may be eligible for protection requires a balancing of interests: “[t]he right to engage in statutorily-protected activity permits some leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts.” *Kenneway v. Matlack, Inc.*, No. 1988-STA-020, slip op. at 3 (Sec'y June 15, 1989). Determining whether conduct is protected can thus turn on

the objective reasonableness of an employee's belief of a violation, which can be affected by the extent of his/her professional authority to even make such a decision. Even unauthorized conduct may be protected as long as it is lawful and "the character of the conduct is not indefensible in its context." *Id.*²⁰

This balancing of interests to determine whether an employee's unauthorized actions are defensible is, in our view, simply another way of arriving at a determination of the objective reasonableness of an employee's belief that his actions were protected. These analyses turn on the distinctive facts of each case.

CONCLUSION

An employee's conduct based on his reasonable belief that such conduct is in furtherance of the SWDA's purposes can be afforded whistleblower protection under the SWDA. Provided Lee can demonstrate that he had a reasonable (objective and subjective) belief that Evaporator No. 2's continued operation would violate the SWDA and/or pertinent environmental laws, and that his conduct was either taken pursuant to his employment authority or otherwise was within the rights afforded employees under the SWDA, Lee's conduct can constitute protected activity under the SWDA. However, because a determination of the reasonableness of his belief requires findings of fact that are not within the ARB's purview to make, we remand this case to the ALJ to make those findings and for such further proceedings as are warranted.

²⁰ We are not persuaded, as the ALJ apparently was, that an employee's conduct in contravention of a supervisor's order, without more, necessarily removes that conduct from whistleblower protection. If that were the law, presumably any conduct undertaken by an employee could readily be stripped of whistleblower protection by a supervisor's edict, right or wrong, directing the employee to cease and desist. As in *Harrison* and *Consolidated Coal*, for the SWDA's whistleblower protection to affix to Lee's conduct, there must be a showing that he acted under a reasonable belief that his conduct was in furtherance of SWDA's purposes, which can turn on the extent to which he acted within the scope of his employment authority or the extent to which his conduct is within the rights afforded employees under the SWDA.

Accordingly, we **VACATE** the ALJ's grant of Summary Decision and **REMAND** to the ALJ for further proceedings consistent with this Decision and Remand Order.

SO ORDERED

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge