In the Matter of:

JOHN F. WILLIAMS, JR., **ARB CASE NO. 12-024**

COMPLAINANT, **ALJ CASE NO. 2008-TSC-001**

v. **DATE: December 28, 2012**

DALLAS INDEPENDENT SCHOOL DISTRICT,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul W. Simon, Esq., ***The Coles Firm P.C.,*** **Dallas, Texas**

For the Respondent:
Dianna D. Bowen, Esq., ***Fisher & Phillips LLP,*** **Dallas, Texas**

BEFORE: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; E. Cooper Brown,** ***Deputy Chief Administrative Appeals Judge*****; and Luis A. Corchado,** ***Administrative Appeals Judge***

DECISION AND ORDER OF REMAND

John F. Williams, Jr. filed a complaint with the Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) alleging that his former employer, the Dallas Independent School District (DISD), retaliated against him in violation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (Thomson/West 2005) and the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (Thomson Reuters 2009) (collectively, the "Environmental Acts").[1] On December 5, 2011, an Administrative Law Judge (ALJ) granted DISD's motion for summary

[1] Regulations implementing these provisions are found at 29 C.F.R. Part 24 (2012).

decision in part and dismissed Williams's complaint, finding that DISD successfully showed there was no genuine issue of material fact regarding Williams's alleged protected activity and DISD was entitled to judgment as a matter of law. *Williams v. Dallas Indep. Sch. Dist.*, ALJ No. 2008-TSC-001, slip op. at 6 (ALJ Dec. 5, 2011)(D. & O. II). We find that the ALJ construed too narrowly the meaning of protected activity and that genuine issues of material fact exist; therefore, we remand.

BACKGROUND[2]

DISD employed Williams from 1993 to 2007. Beginning in 2001, he served as Projects Director in DISD's Buildings Improvement Division. In October of 2002, DISD informed Williams that it was relocating him to its William H. Cotton Service Center (Service Center II), located at 3701 South Lamar; Dallas, Texas, which DISD had purchased from Proctor & Gamble Manufacturing Company (P&G) in 1994. The alleged protected activity in this case relates to Service Center II.

Prior to the October relocation notice, a DISD Risk Management Department employee contacted Williams and informed him that Service Center II had serious health and safety concerns. The employee provided Williams with several documents (Attachment 1 to Williams's Amended OSHA Complaint) indicating that DISD entered into a contract in February 1998 with Environmental Support Services, Inc., for an environmental assessment of Service Center II, which was described as "consist[ing] of multiple structures currently occupied by approximately 500 DISD employees."[3] Subsequently, a DISD Safety Committee member

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[2] The Background Statement is based on the evidentiary record before the ALJ, including the affidavits, deposition testimony and other documentation the parties submitted, and the allegations in Williams's amended OSHA complaint where not contradicted by the record evidence. Only for purposes of reviewing the motion for summary decision, we view these facts in the light most favorable to Williams, the party responding to the motion for summary decision. *Smale v. Torchmark Corp.*, ARB No. 09-012, ALJ No. 2008-SOX-057, slip op. at 6 (ARB Nov. 20, 2009). We do not suggest that any of these facts have been decided on the merits.

[3] This description of Service Center II is at odds with the Respondent's characterization of the Center as merely an "administrative building." Affidavit of Michael Brown, attached as appendix in support of Respondent's Second Motion for Summary Decision, at App. 012. Also contested is whether the Center was open to the public, non-employee service providers, and student interns (Affidavit of Williams), or not (Affidavit of Brown). When reviewing the evidence the parties submit in support of and in opposition to a motion for summary decision, the Board (like the ALJ) is required to view the evidence in the light most favorable to the non-moving party. Accordingly, reference throughout this decision to "Service Center II" or to "the Service Center II facility" contemplates the description of the facility found in the environmental site assessment proposal the DISD Board of Education approved (Attachment 1 to Amended OSHA Complaint). For the same reason, we consider as a disputed fact whether any relevant area of the Center was or is open to the public, students, and non-employee personnel, at least on occasion. We note that, given the totality

provided Williams with additional documentation (Attachment 2 to Williams's Complaint) consisting of a December 1998 news account of environmental concerns associated with the former P&G site and excerpts from a July 1997 draft site investigation report showing levels of several toxic substances found at various sampling locations on the site. According to the news account,[4] two plumbers DISD had employed sued DISD and P&G in 1995 alleging that their "health was damaged by exposure to toxic chemicals at the [Service Center II] site." The article indicated that the plumbers' lawsuit alleged that they suffered "various debilitating ailments after inhaling fumes" resulting from their "encounter" with toluene, a solvent P&G used in its detergent-making operations, "while digging trenches for a fire-sprinkler line." The article further mentioned that: (1) DISD purchased Service Center II (which it described as a "sprawling complex") from P&G in 1994 for a "sharply discounted price;" (2) the site had a 20-year history of involvement with the city and state regulatory agencies," and that DISD "has spent at least $130,000 on environmental studies after a series of toxic spills;" (3) DISD purchased the property "without conducting its own environmental assessment and after waiving inspection;" and (4) a P&G official who handled the sale of the property to DISD in 1994 "admitted that [P&G] had not documented a toluene leak out of concern that it might affect the sales price."

According to Williams's Amended Complaint, the DISD Safety Committee member also informed Williams about three employees who had been forced to work on the grounds of the facility and had suffered serious health problems including death. Two of these individuals filed the lawsuit mentioned in the December 1998 news article. Williams met with the third individual, Mr. Stovall, who told Williams that he had been forced to dig a ditch on the property and that ooze came from the sides of the ditch. Stovall provided Williams with his medical report and lab tests (Attachment 3 to the Amended Complaint) and informed Williams that his doctor had told him that he had high levels of toxic metals in his blood stream. The complaint alleges that Stovall had since died.

In light of his imminent transfer in October 2002, Williams initiated efforts to obtain the environmental assessment that the Environmental Support Services undertook on DISD's behalf in 1998. Williams asserts that these efforts, occurring between October 23, 2002, and January 8, 2007, constitute whistleblower protected activity under TSCA and CERCLA. His claims of protected activity focus on five letters, one phone call, and one grievance form.[5]

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of Williams's environmental concerns, the significance of public access is only one factor in deciding whether he engaged in protected activity.

[4] For limited purposes, we refer to the newspaper article Williams attached. While the article by itself cannot be accepted as stating facts, it does constitute a public announcement of an alleged environmental concern connected to Service Center II, regarded as a large complex, that raises an issue of fact as to the reasonableness of Williams's environmental concerns.

[5] See D. & O. II at 5; Respondent's Appendix (App.). at 140-41, 261-65; Complainant's App. at 16.

Williams's allegations of protected activity begin with an October 23, 2002 letter to OSHA in which he states, without identifying his employer, that he is about to report "to a facility that could be hazardous to my health." He asserts that the facility "was once used as a production facility that utilized mercury, cadmium, and other hazardous substances" and that "many of these hazardous substances were spilled in this facility." Williams notes that "an environmental assessment study was performed on this facility to determine if any hazardous conditions existed," and asks if he can request a copy of the environmental report from his employer.

OSHA responded to Williams indicating that he had a right to request the environmental assessment report from his employer. As a result, in Williams's second allegation of protected activity, an October 31, 2002 letter to DISD, to the attention of Paul Hiser, Williams's then-supervisor, he requested access to all environmental assessments of the Service Center II facility including, in particular, the environmental assessment that the Environmental Support Services conducted for DISD in 1998. Williams mentioned the health and exposure data that Stovall had provided him (without mentioning Stovall's name), which, he noted, showed "high levels of toxic metals . . . present in this individual who had worked at this facility." As a consequence, Williams stated, he was requesting the environmental assessment records because he was greatly concerned "for his health and safety if pertinent information related to employee exposure is being withheld from employees."

Williams's third allegation of protected activity, a letter to DISD dated November 5, 2002, to the attention of Miguel Ramos, was identical to his letter of October 31, 2002, in requesting all environmental assessment records pertaining to Service Center II and in specifically requesting the 1998 environmental assessment report.

In Williams's fourth allegation of protected activity, involving a letter to OSHA dated November 12, 2002, Williams thanked the Dallas Area Director for her reply to his letter of October 23rd, and stated that he had submitted a request to his employer for access to the environmental assessment report.

Williams's fifth allegation of protected activity involves a January 16, 2004 telephone call that Williams made to OSHA requesting environmental and safety data concerning Service Center II.

In Williams's sixth allegation of protected activity, a letter to OSHA dated February 24, 2004, Williams referenced his prior requests to DISD of November 5 and November 12, 2002, and stated that he had received no response as of the date of the letter. Expressing the concern that his requests might lead to retaliation, Williams requested OSHA's protection under 11(c) of the Occupational Safety and Health Act, 29 U.S.C. § 660(c).

Williams's seventh and final allegation of protected activity is a January 8, 2007 grievance that Williams asserts he filed with DISD (an assertion the Respondent challenged) on which Williams wrote the following: "DG (LEGAL)-P, Whistleblower complaint – Service Center II; environmental, safety, health FOIA request denial by DISD."

On September 14, 2007, Williams filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that DISD terminated his employment in retaliation for requesting environmental and safety information relating to his workplace. He subsequently submitted an amended complaint, on October 30, 2007, that explained in greater detail, and with reference to numerous attached documents, the basis for his allegations that his employment was wrongfully terminated for engaging in whistleblower protected activity. In his amended complaint, Williams also specified that he was filing his complaint under TSCA and CERCLA.

After investigation, OSHA found that the preponderance of the evidence showed that Williams's alleged protected activity was not a contributing factor in DISD's decision terminating Williams's employment and not selecting him for another position for which he applied. OSHA Findings at 2 (Jan. 8, 2008). OSHA dismissed Williams's complaint, whereupon Williams filed his objections to OSHA's ruling and requested a hearing before a Department of Labor Administrative Law Judge (ALJ).

Williams's complaint was assigned to an ALJ for a hearing. DISD filed its first motion for summary decision, which the ALJ granted because he deemed admitted certain requests for admissions that the Respondent had served on Williams that the ALJ had concluded Williams did not answer. *Williams v. Dallas Indep. Sch. Dist.*, ALJ No. 2008-TSC-001, slip op. at 6 (ALJ June 10, 2008)(D. & O. I). Williams appealed the matter to the Board. Because Williams had responded to the requests for admissions, we remanded to the ALJ for further consideration. *Williams v. Dallas Indep. Sch. Dist*, ARB No. 08-103, ALJ No. 2008-TSC-001 (ARB Sept. 30, 2010).

On remand, DISD filed a second motion for summary decision that the ALJ granted, in part, because he found that there was "no genuine issue of material fact with respect to Complainant's alleged protected activity" and that the Respondent was entitled to summary decision as a matter of law. D. & O. II at 6. The ALJ concluded that Williams did not engage in protected activity because none of the actions Williams claimed were protected under CERCLA and TSCA, expressed concern for the environment or the public health and safety. *Id.* at 5.

Williams filed a timely petition for review of the ALJ's decision with the Administrative Review Board. Both Williams and DISD submitted briefs to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the Environmental Acts. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 222 (Nov. 16, 2012). Under the Administrative Procedure Act, the Board, as the Secretary's designee, acts with all the powers the Secretary would possess in reviewing an ALJ decision under the TSCA and CERCLA. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.110.

The Board reviews de novo an ALJ's grant of summary decision pursuant to 29 C.F.R. § 18.40 (2012). *Hasan v. Enercon Servs., Inc.*, ARB No. 10-061, ALJ Nos. 2004-ERA-022, -027, slip op. at 4 (ARB July 28, 2011). 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." 29 C.F.R. § 18.40(d). The first step of this analysis is to determine whether there is any genuine issue of a material fact. *Hasan*, ARB No. 10-061, slip op. at 4. If the pleadings and documents that the parties submitted demonstrate the existence of a genuinely disputed material fact, then summary decision cannot be granted. *Id.* Denying summary decision because there is a genuine issue of material fact simply indicates that an evidentiary hearing is required to resolve some factual questions and is not an assessment on the merits of any particular claim or defense. As the Board stated in *Hasan*:

> 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. 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. When reviewing the evidence the parties submitted, the ALJ must view it in the light most favorable to the non-moving party, the complainant in this case. The moving party must come forward with an initial showing that it is entitled to summary decision. 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.
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> 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 non-moving 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.

Hasan, ARB No. 10-061, slip op. at 4-5 (citations omitted).

THE ENVIRONMENTAL LAWS UNDER WHICH WILLIAMS SEEKS WHISTLEBLOWER PROTECTION

TSCA-protected activity can be as broad as "assist[ing] or participat[ing] . . . in any manner . . . in any other action to carry out the purposes of this chapter." 15 U.S.C.A. §

2622(a)(3). Under the TSCA "adequate authority should exist to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment, and to take action with respect to chemical substances and mixtures which are imminent hazards . . . ." 15 U.S.C.A. § 2601(b)(2). TSCA also addresses "the collection, development, and use of chemical risk data" by covered manufacturers, processors and distributors. *Melendez v. Exxon Chems. Americas*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 19 (ARB July 14, 2000). "[T]he overall purpose of the TSCA was to set up a comprehensive testing scheme to ameliorate the dangers of toxic substances to human and environmental health." *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 2001-SWD-003, slip op.at 12 (ARB Mar. 31, 2005) (citing *Rollins Envtl. Servs. (FS), Inc. v. Parish of St. James*, 775 F.2d 627, 632-33 (5th Cir. 1985)). To this end, "TSCA provides for the testing of chemical substances and mixtures that 'may present an unreasonable risk of injury to health or the environment' through their manufacture, distribution in commerce, processing, use, or disposal, or a combination of such activities." *Devers*, ARB No. 03-113, slip op. at 11-12 (citing 15 U.S.C.A. § 2603(a)). As the Board in *Devers* explained:

> Congress perceived unreasonable risks associated with the increasing marketing of chemical products whose potential toxicity was as yet untested; the TSCA establishes requirements for testing substances believed to pose unreasonable risks before they are dispersed by various means throughout the environment and are difficult, if not impossible, to control. 15 U.S.C.A. § 2603(b); *Natural Res. Def. Council v. Envtl. Prot. Agency*, 595 F. Supp. 1255, 1257-58 (S.D.N.Y. 1984).
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> Section 2602 defines chemical substance as any organic or inorganic substance of a particular molecular identity. 15 U.S.C.A. § 2602(2)(A). Section 2603 provides for EPA issuance of rules requiring the testing of chemicals, which is to be carried out and financed by the manufacturers or processors of the chemical substances. 15 U.S.C.A. § 2603(b)(3)(B). Section 2604 provides for notice and testing of new chemical substances and new uses of chemicals manufactured or processed for commercial purposes. 15 U.S.C.A. § 2604.
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> Section 2605 covers the regulation of hazardous chemical substances and mixtures by prohibiting or limiting their manufacture, processing, or distribution in commerce and requiring warnings and instructions about their use. 15 U.S.C.A. § 2605(a). Thus, the overall purpose of the TSCA was to set up a comprehensive testing scheme to ameliorate the dangers of toxic substances to human and environmental health. *Rollins Envtl. Services (FS), Inc. v. Parish of St. James*, 775 F.2d 627, 632-33 (5th Cir. 1985).

Devers, ARB No. 03-113, slip op. at 12.

A recent court decision states that:

> Congress enacted TSCA in 1976 to prevent unreasonable risks of injury to human health or the environment associated with the manufacture, processing, distribution in commerce, use, or disposal of chemical substances and mixtures. See 15 U.S.C. § 2601(a). Specifically, under Section 2605 of TSCA, if the EPA finds that "the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment," the Agency "shall by rule apply one or more of [several listed regulatory requirements] to such substance or mixture to the extent necessary to protect adequately against such risk using the least burdensome requirements . . . ." *Id.* § 2605(a).

Center for Biological Diversity v. Jackson, 815 F. Supp. 2d 85, 87-88 (D.D.C. 2011).

Protected activity under CERCLA is "provid[ing] information to a State or to the Federal Government, fil[ing], institut[ing], or caus[ing] to be filed or instituted any proceeding under this chapter, or [i]s testify[ing] or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter." 42 U.S.C.A. § 9610. One of CERCLA's purposes is to regulate hazardous substances, "which, when released into the environment may present substantial danger to the public health or welfare or the environment . . . ." 42 U.S.C.A. § 9602(a).

Through CERCLA, Congress sought to protect "public health and the environment." *In Re Jenson*, 995 F.2d 925, 927 (9th Cir. 1993). CERCLA defines "Environment" to include, among other things, "surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States." *Devers*, ARB No. 03-113, slip op. at 15 (citing 42 U.S.C.A. § 9601(8)). As the Supreme Court has explained:

> CERCLA was enacted in response to the serious environmental and health risks posed by industrial pollution . . . . "As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." . . . If it satisfies certain statutory conditions, the United States may, for instance, use the "Hazardous Substance Superfund" to finance cleanup efforts, see 42 U.S.C. §§ 9601(11), 9604; 26 U.S.C. § 9507, which it may then replenish by suits brought under § 107 of the Act against, among others, "any person who at the time of disposal of any hazardous substance owned or operated any facility." 42 U.S.C. § 9607(a)(2). So, those actually "responsible for any damage,

> environmental harm, or injury from chemical poisons [may be tagged with] the cost of their actions."

U.S. v. Bestfoods, 524 U.S. 51, 55 (1998) (citations omitted).

Further, "[t]he Act was designed to promote the 'timely cleanup of hazardous waste sites' and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington Northern & Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 602 (2009) (citations omitted). CERCLA is "principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). *See also Gen. Electric Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990) (the "two . . . main purposes of CERCLA" are "prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party")). *Accord Culligan v. Am. Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ No. 2000-CAA-020, slip op. at 10 (ARB June 30, 2004).

DISCUSSION

In his decision, the ALJ focused on the seven actions that Williams identified as his protected activities. D. & O. II at 4. In none of Williams's actions did the ALJ find that Williams expressed any concern "that the environment or public health has been impacted" or that Williams expressed any concern at the time that any of DISD's activities, of which he complained, constituted "a potential hazard for the environment external to Service Center II." *Id.* at 5. Because Williams's expressions of concern at the time were for his personal safety and health and that of his coworkers when he requested the environmental assessment report for Service Center II, the ALJ viewed Williams's complaints and actions, for which he sought whistleblower protection, as "purely occupational in nature" and thus not protected under CERCLA and the TSCA. *Id.* at 6.

The ALJ erred in focusing on whether Williams "expressed concern" at the time about the environment or public health, rather than on whether Williams's actions, for which he seeks whistleblower protection, "touch[ed] on the concerns for the environment or public health and safety that are the focus of the environmental acts." *Melendez*, ARB No. 96-051, slip op. at 18. "Protection under the environmental acts is extended to a range of activities that further the respective purposes of those statutes." *Id*. at 11. "It is a matter of well settled case law[6] that actions that serve the environmental protection purposes of the TSCA . . . and similar environmental statutes may begin with an employee's personal health concern." *Id*. at 3.

To be engaged in protected activity however, a complainant must also have had "a reasonable good faith belief that his conduct was in furtherance of the purposes of the act under which he seeks protection[,]" when he made the complaint. *Lee v. Parker-Hannifin Corp.*,

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[6] *See Melendez*, ARB No. 96-051, slip op. at 17-18 and accompanying footnote 24.

Advanced Prods. Bus. Unit, ARB No. 10-021, ALJ No. 2009-SWD-003, slip op. at 11 (ARB Feb. 29, 2012). *See also Oliver v. Hydro-Vac Serv., Inc.*, No. 1991-SWD-001, slip op. at 14 (Sec'y Nov. 1, 1995); *Carter v. Elec. Dist. No.2*, No. 1992-TSC-011, slip op. at 19 (Sec'y July 26, 1995); *cf. Berube v. GSA*, 30 M.S.P.R. 581, 596 (1986), *vacated on other grounds*, 820 F.2d 396 (Fed. Cir. 1987) (the law's protections extend to employees who reasonably believe in their charges). Whistleblower protection for a complainant's activities that otherwise "touch on" the environmental acts is contingent on proof that the complainant actually believed that the respondent's activities implicated environmental or public health and safety concerns addressed by the environmental acts, under which protection is sought, or that the complainant's actions otherwise furthered the purposes of those acts. *Melendez*, ARB No. 96-051, slip op. at 25; *Minard v. Nerco Delamar Co.*, No. 1992-SWD-001, slip op. at 7-16 (Sec'y Jan. 25, 1994). Furthermore, the complainant's "belief must be reasonable for an individual in [the complainant's] circumstances having his training and experience." *Melendez*, ARB No. 96-051, slip op. at 28. As the Board further explained in *Erickson*:

> An employee who makes a complaint to the employer that is "grounded in conditions constituting reasonably perceived violations" of the environmental acts, engages in protected activity. Similarly, expressing concerns to the employer that constitute reasonably perceived threats to environmental safety is protected activity under the environmental whistleblower protections.
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> The employee need not prove that the hazards he or she perceived actually violated the environmental acts. Nor must an employee prove that his assessment of the hazard was correct. And we have also held that an employee need not prove that the condition he or she is concerned about has already resulted in a safety breakdown. On the other hand, a complaint that expresses only a vague notion that the employer's conduct might negatively affect the environment is not protected. Nor is a complaint that is based on numerous assumptions and speculation.

Erickson v. U.S. Envtl. Prot. Agency, ARB Nos. 04-024, -025; ALJ Nos. 2003-CAA-011, -019, 2004-CAA-001; slip op. at 7-8 (ARB Oct. 31, 2006) (citations omitted).

We note that a complainant does not need to express his reasonable belief when he engaged in protected activity so long as he reasonably believed, at the time he voiced his complaint or raised his concerns, that a threat to the environment or to the public existed. Rather, "[t]he reasonable belief standard requires an examination of the reasonableness of a complainant's beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities." *Sylvester v. Parexel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 14 (ARB May 25, 2011) (citations omitted)).

One final legal principle that is important to note in this case is the potential overlap between the Environmental Acts and the OSH Act, 29 U.S.C. § 660(c). Under the regulations at 29 C.F.R. § 24.103(e):

> A complaint filed under any of the statutes listed in § 24.100(a) alleging facts that would also constitute a violation of Section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. 660(c), will be deemed to be a complaint under both Section 11(c) and the applicable statutes listed in § 24.100(a). Similarly, a complaint filed under Section 11(c) that alleges facts that would also constitute a violation of any of the statutes listed in § 24.100(a) will be deemed to be a complaint under both section 11(c) and the applicable statutes listed in § 24.100(a). Normal procedures and timeliness requirements under the respective statutes and regulations will be followed.

Therefore, rather than a bright line drawn between the occupational and the environmental, the regulations show that there can be overlap of violations of the OSH Act and of the environmental whistleblower statutes. Case law supports this conclusion. The case law makes clear that while the environmental statutes "generally do not protect complaints restricted solely to occupational safety and health [covered by Section 11(c)]," they do if "the complaints also encompass public safety and health or the environment.'" *Devers*, ARB No. 03-113, slip op. at 10 (*quoting Post v. Hensel Phelps Constr. Co.*, No. 1994-CAA-013, slip op. at 1-2 (Sec'y Aug. 9, 1995)). *Accord Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-014, slip op. at 18-22 (ARB Nov. 13, 2002).[7]

Viewing the allegations of Williams's complaint[8] and evidence of record in the light most favorable to Williams, we find that he presented sufficient information to defeat DISD's motion for summary decision as to protected activity. Williams's communications with OSHA and his repeated requests to DISD for environmental assessments pertaining to Service Center II, including the environmental assessment undertaken in 1998, clearly touch on the environmental

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[7] *See also Jones v. EG&G Def. Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-003 (Sept. 29, 1998) (aff'd on recon., Dec. 24, 1998), in which the ARB stated that "[e]mployee complaints about worker health or safety may be protected under the environment acts if they 'touch[] on public safety and health, the environment, and compliance with the environmental acts.'" *Jones*, ARB No. 97-129, slip op. at 10 (quoting *Scerbo v. Consol. Edison Co.*, No. 1989-CAA-002, slip op. at 4-5 (Sec'y Nov. 13, 1992)).

[8] Where an allegation in Williams's complaint is not contested by evidence submitted in support of the Respondent's motion for summary decision, we will consider such allegations in the light most favorable to Williams to determine if the party moving for summary decision has met its burden of demonstrating (1) a lack of genuine dispute of material fact and (2) entitlement to judgment as a matter of law.

and public health and safety concerns that are CERCLA's focus. As previously noted, the 1998 environmental assessment in particular encompassed assessment of a site consisting of more than the building in which Williams worked, a site that the evidence of record shows may have been the repository of potentially hazardous substances left over from P&G's former ownership of the site.

Having concluded that Williams's activities sufficiently touch on CERCLA to afford Williams whistleblower protection under that statute, it is not necessary to determine whether his activities are also protected under TSCA. We only generally conclude that the ALJ did not consider whether Williams's concerns "touched on" TSCA purposes, rather than focusing only on the words Williams used at the time of raising his concerns. In other words, the ALJ must determine whether Williams's concerns about the P&G activities, the environmental assessments, and the spills, also relate to the purposes of TSCA. We will vacate the dismissal as to the TSCA claim, without prejudice, and remand the TSCA claim for the ALJ to consider it consistent with our decision. The ALJ has the discretion to reconsider the full range of issues of the TSCA claim upon motion by the parties or at an evidentiary hearing. We turn next to the question of whether Williams reasonably believed that he was raising environmental or public health and safety concerns governed by or in furtherance of CERCLA.

The question is whether Williams subjectively believed that he was raising environmental concerns governed by CERCLA or that DISD's actions implicated environmental and/or public health and safety concerns contemplated under the act. On this issue, we have no choice but to remand to the ALJ for an evidentiary hearing. We find that there is sufficient record evidence creating a genuine issue of material fact as to Williams's reasonable belief that cannot be decided in this case without an evidentiary hearing. The ALJ considered Williams's deposition testimony in concluding that Williams's only concern was his personal safety and that of his coworkers. D. & O. II at 5. However, Williams's affidavit submitted in opposition to the Respondent's motion for summary decision states that he requested OSHA's intervention and requested the environmental assessments, documents that touch on concerns covered by CERCLA given the record before us. In addition, Williams's affidavit states that he was "fearing" not only for his own personal safety and health, and that of his coworkers, but also because of "the potential risk to the environment." Affidavit of Williams, Complainant's App. at 3. Allegations and documents in the record supporting the broader environmental concern expressed in Williams's affidavit include the uncontradicted allegations in Williams's Amended Complaint, supported by documentation, about having been informed by a former DISD employee of potentially hazardous conditions on the site, documentation showing toxic chemical levels found in 1997 at various sites on the property, documentation reporting that P&G failed to disclose that a toluene leak occurred on the grounds at the Service Center II site, information that plumbers previously working on the grounds at Service Center II and other co-workers have suffered illnesses they alleged were caused by exposure to toxic substances while working at the Service Center II complex, and evidence suggesting that Service Center II was accessible to the public as well as contractors and student interns. The potential effect on the public and the environment of uncontained toxic metals in the ground is far too important to be disposed of on summary decision. Nevertheless, as much as the documentation Williams submitted bolsters his affidavit testimony that his concerns went beyond the occupational health and safety concerns

covered by Section 11(c), as previously mentioned, the evidence of record as a whole is such as to raise genuine issues of material fact as to Williams's actual concerns at the time and whether those concerns were objectively reasonable. Thus remand for an evidentiary hearing on this issue is required.[9]

CONCLUSION

Clearly, Williams, in seeking from DISD the environmental assessment for the Service Center II facility, was seeking information about a potentially serious environmental hazard. Consistent with the environmental statutes and regulations, prior ARB law, and other case law, Williams's request for information touched on the environmental concerns CERCLA covers. Williams presented evidence that DISD resisted producing the environmental assessments Williams sought, an assertion DISD did not refute.[10] Williams's pursuit of information about such an environmental concern in this particular case is exactly what CERCLA attempts to ensure is not silenced, regardless of whether the employee pursues the interest solely for himself and his co-workers. The ALJ's insistence that, to be protected by CERCLA, Williams express concern for protecting non-DISD employees, the public, or the environment, was too narrow in this case. The environmental hazard, about which Williams sought information, appears to be a

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[9] As the Board cautioned in *Sylvester*, ARB No. 07-123, slip op. at 15, even the question of the objective reasonableness of one's belief may at times require an evidentiary hearing:

> Often the issue of "objective reasonableness" involves factual issues and cannot be decided in the absence of an adjudicatory hearing. *See, e.g., Allen*, 514 F.3d at 477-478 ("the objective reasonableness of an employee's belief cannot be decided as a matter of law if there is a genuine issue of material fact"); *Welch*, 536 F.3d at 278 "objective reasonableness is a mixed question of law and fact" and thus subject to resolution as a matter of law "if the facts cannot support a verdict for the non-moving party."); *Livingston v. Wyeth Inc*., 520 F.3d 344, 361 (4th Cir. 2008) (Judge Michael, dissenting) ("The issue of objective reasonableness should be decided as a matter of law only when 'no reasonable person could have believed' that the facts amounted to a violation. . . . However, if reasonable minds could disagree about whether the employee's belief was objectively reasonable, the issue cannot be decided as a matter of law." [citations omitted]).

[10] Attachment B to Appendix G, Tab 2 to DISD's Motion for Summary Decision dated April 29, 2008, is a letter from Leticia McGowen, DISD Attorney, to Williams. In the letter, McGowan stated that in response to a 2004 request for information from Williams, DISD submitted a request for an opinion to the Texas Office of the Attorney General on February 13, 2004, and that the OAG ruling in response only required DISD to release to Williams a contract, which it stated it mailed to Williams. The record does not indicate that DISD ever gave Williams the environmental assessment report.

potentially large and potentially serious public concern notwithstanding its obvious occupational health and safety implications. The fact question nevertheless remains as to whether Williams subjectively believed he was raising environmental concerns. The ALJ did not resolve this issue, and we cannot resolve it on the record before us.

Therefore, based on the regulations and bolstered by precedent, we remand this case to the ALJ for further consideration. Although we conclude that Williams showed that his activities related to securing the environmental assessment of Service Center II "touched on" CERCLA's purposes, a genuine issue of material fact exists as to his subjective belief at the time and whether that belief was objectively reasonable. Our ruling is limited to the issue of protected activity, and we make no ruling on the merits of Williams's claims or any other issue pertaining to such claims. In contrast, we vacate the ALJ's dismissal of the TSCA claim, without prejudice, for the ALJ to address, consistent with this decision, whether Williams's concerns touched on the TSCA's purposes. Accordingly, we remand for further proceedings consistent with this decision.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge