In the Matter of:

LINDA L. PLUMLEE,

COMPLAINANT,

v.

DOW CHEMICAL COMPANY,

RESPONDENT.

ARB CASE NO. 99-051

ALJ CASE NO. 98-TSC-8

DATE: June 8, 2001

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:
For the Complainant:
Glen Plumlee, *Danbury, Texas*

For the Respondent:
Richard R. Brann, Esq., James R. Staley, Esq., Beth K. Neese, *Baker & Botts, L.L.P., Houston, Texas*

FINAL DECISION AND ORDER

On April 16, 1998, Linda L. Plumlee filed a complaint with the Secretary of Labor against Respondent Dow Chemical Co. ("Dow") and Corporate Express Delivery Service ("Corporate Express")[1/] under the employee whistleblower protection provisions of the Toxic Substances Control Act, 15 U.S.C. §2622 (1994); the Federal Water Pollution Control Act, 33 U.S.C. §1367 (1994); the Solid Waste Disposal Act, 42 U.S.C. §6971 (1994); and the Clean Air Act, 42 U.S.C. §7622 (1994) (collectively the "Environmental Acts"). Plumlee claimed that Dow and Corporate Express wrongfully terminated her employment because she had engaged in activities protected under the Environmental Acts. Both Dow and Corporate Express opposed Plumlee's claim because they maintained that she was an independent contractor rather than a covered employee.

Although Plumlee filed one complaint, the Occupational Safety and Health Administration ("OSHA") conducted two investigations and issued two decisions which separately addressed

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[1/] This Final Decision and Order is one of two related final decisions issued simultaneously by the Administrative Review Board following appeal by Complainant Plumlee from Recommended Decisions and Orders of Dismissal entered February 25, 1999, in ALJ Nos. 1998-TSC-8 and 1998-TSC-9. The related Final Decision and Order of the ARB is entered in *Plumlee v. Corporate Express Delivery Service*, ARB No. 99-051.

Plumlee's claims against Dow and Corporate Express. OSHA dismissed Plumlee's complaint against Dow because it found that she was not employed by Dow. Plumlee appealed OSHA's determination and requested a hearing before a Department of Labor Administrative Law Judge ("ALJ"). Before the ALJ, Dow filed a motion to dismiss asserting that Plumlee was an independent contractor and not its employee within the meaning of the Environmental Acts. After limited discovery, and after allowing the parties to fully brief the issue,[2/] the ALJ issued a Recommended Decision and Order (R.D.&O.) finding that Plumlee was not an employee of Dow and dismissing Plumlee's complaint on the grounds that she had not established that the Department of Labor had jurisdiction over her claims under the Environmental Acts. Plumlee filed a timely appeal of the ALJ's R.D.&O. with this Board. We have jurisdiction over this matter pursuant to 29 C.F.R. §24.8 (2000).

STANDARD OF REVIEW

The Board engages in *de novo* review of the recommended decision of the ALJ. *See* 5 U.S.C. §557(b) (1994); 29 C.F.R. §24.8 (2000); *see also Overall v. Tennessee Valley Auth.*, ARB Nos. 98-111, 98-128, ALJ No. 97-ERA-53, slip op. at 13 (ARB Apr. 30, 2001), and the cases cited therein.

BACKGROUND

Dow owns a facility in Freeport, Texas where it produces various chemical products. The Freeport facility is composed of three chemical plants, warehouses and other support buildings. The warehouses store equipment and materials required for operating (MRO) the plants.

Dow contracted with U.S. Delivery Systems, Inc. to deliver the MRO among its plants and warehouses ("Dow Contract"). Under the Dow Contract Corporate Express Delivery Systems, Inc., an affiliate of U.S. Delivery Systems, agreed to provide 8 hours of delivery service daily at the Freeport facility. Corporate Express agreed to supply Dow with a specific number of drivers and vehicles on a daily basis to handle the deliveries. According to the Dow Agreement, the drivers worked at the direction and discretion of Dow's warehouse management. Dow Contract, Exhibit B. For these services, Corporate Express charged Dow $25 per hour for each full-sized pickup truck with driver. Aside from general oversight Dow did not supervise Corporate Express or its drivers.

Plumlee filed several complaints with Dow regarding safety and environmental concerns at the Freeport facility. Dow investigated the complaints and took corrective action. Plumlee continued to make safety complaints. In an effort to address Plumlee's complaints Dow tried to meet with Plumlee, however, she refused to attend any meetings. Because Dow determined that Plumlee would not attend a meeting to discuss her safety issues and because Plumlee continued making safety allegations, Dow determined that Plumlee could not continue working at its facility. On April 6, 1998, pursuant to section 3 of the Dow Contract, Dow informed Corporate Express's Freeport manager that it wished Plumlee reassigned. Because Corporate Express had no other delivery contracts in the Freeport area it terminated its contract with Plumlee on the same day.

[2/] The ALJ, upon acceptance of affidavits and other relevant documents submitted by Dow, properly converted the motion to dismiss into one for summary decision pursuant to 29 C.F.R. §18.40.

The dispositive issue in this case is whether Plumlee was a covered employee within the meaning of the Environmental Acts, or, instead was an independent contractor. Based upon our review of the ALJ's Recommended Decision and Order and the record and the briefs and arguments of the parties on appeal, the Board concludes that the ALJ's Recommended Decision and Order holding that Plumlee was not an employee of Dow is legally correct. Subject to the following discussion we adopt the ALJ's decision, and append a copy of it to our decision.

DISCUSSION

I. Discovery

Plumlee argues that the ALJ committed reversible error by unduly restricting discovery. Brief of Complainant at 6. We disagree.

Plumlee was represented by her husband, Glen Plumlee, who obtained several subpoenas from the presiding ALJ. On November 5, 1998, Plumlee served subpoenas on employees of Dow and Corporate Express for the purpose of deposing them. On November 6, 1998, Plumlee served Dow and Corporate Express with Requests for Interrogatories and Production of Documents. Dow then filed a Motion to Stay Discovery And For Preliminary Determination of Claimant's Employment Status with Dow. Dow also filed a Motion to Quash the Subpoenas served by Plumlee.

In its Motion to Quash, Dow objected to the subpoenas because Plumlee had failed to give notice of the depositions as required by 29 C.F.R. §18.22, to pay the witness fees and mileage required by 29 C.F.R. §18.24 and because Glen Plumlee was not a qualified representative under 29 C.F.R. §18.34(g)(2). In its Motion to Stay Discovery, Dow argued that, because OSHA dismissed Plumlee's complaint on the grounds she was not Dow's employee, Plumlee's discovery should be limited to that threshold issue.

On November 18, 1998, the ALJ conducted a telephone conference with all the parties in this case and the case against Corporate Express. As a result the ALJ granted the Motions to Quash Plumlee's subpoenas. The ALJ had another telephone conference with all the parties on November 25, 1998, to discuss Dow's pending Motion to Stay Discovery. The parties agreed that limited discovery should be permitted and the ALJ issued a discovery order in both cases. Accordingly, discovery was limited to the issue whether Plumlee was a covered employee under the Environmental Acts. The order also established a briefing schedule in both cases for the Respondents' Motions to Dismiss. Plumlee was given an opportunity to conduct discovery and to file a brief responding to the Motions to Dismiss.

Plumlee argues that the ALJ erred by restricting discovery to the issue whether Plumlee was a covered employee. We disagree. "ALJs have wide discretion to limit the scope of discovery and will be reversed only when such evidentiary rulings are arbitrary or an abuse of discretion." *Hasan v. Burns & Roe Enters., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 4 (ARB Jan. 30, 2001). Previously, we have held that it is appropriate to suspend discovery pending a decision on a motion potentially dispositive of the case. *Rockefeller v. Carlsbad Area Office, U.S. Dep't of Energy*, ARB Nos. 99-002, 99-063, 99-067, 99-068, ALJ Nos. 98-CAA-10, 98-CAA-11, 99-CAA-1, 99-CAA-4, 99-CAA-6, slip op. at 18 (ARB Oct. 31, 2000). In this case it was entirely appropriate

for the ALJ to suspend full discovery until Plumlee established the threshold issue of whether she was covered by the Environmental Acts. Considering the circumstances and facts of this case the ALJ did not err in limiting discovery.[3/] *Compare Reid v. Methodist Med. Ctr. of Oak Ridge*, No. 93-CAA-4 (Sec'y Apr. 3, 1995) *aff'd sub nom. Reid v. Sec'y of Labor,* 106 F.3d 401 (6th Cir. 1996) (table) (ALJ's refusal to order any discovery pending resolution of the complainant's employee status not reversible error).

II. Jurisdiction

Having found that Plumlee was not a covered employee, the ALJ recommended that her claim be dismissed for lack of jurisdiction. R. D. & O., slip op. at 7. However, by filing a complaint alleging a violation of the whistleblower protection provisions of the Environmental Acts, Plumlee properly invoked the Department of Labor's jurisdiction to adjudicate the complaint. *Sasse v. U.S. Dep't of Justice*, ARB No. 99-053, ALJ No. 98-CAA-7, slip op. at 4 (ARB Aug. 31, 2000). The ALJ should have dismissed Plumlee's complaint because she was not a covered employee under the Environmental Acts.

CONCLUSION

We adopt the ALJ's Recommended Order and **DISMISS** Plumlee's complaint.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member

[3/] Plumlee raised several other arguments in her brief which are without merit and do not warrant a separate discussion in this order.