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Claimant Name:	
Employer Name:	
eFile Number:	ARB-2408-799556
Case Type:	CER - CERCLA Whistleblower
Status:	Submission Received and Pending Review
Last Updated On:	08/21/2024 - 23:56 EST
Details:	View

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Appeals in Draft State

There are no appeals in draft state to display.

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Ashley M. Gjovik, JD
In Propria Persona
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legal@ashleygjovik.com

U.S. Department of Labor

Administrative Review Board

Washington, D.C.

Ashley M. Gjovik, *an employee*,

Appellant/Complainant,

vs.

Apple Inc., *a corporation & employer,*

Appellee/Respondent.

OALJ Case: 2024-CER-00001

eFile Case: ARB-2408-799556

Appellant/Complainant's

Petition for Review

Petition Filed & Served:
Aug. 21 2024.

Supplement Served:
Aug. 22 2024.
(awaiting eFile access to file.)

Appellant/Complainant's Petition for Appeal

1. Appellant/Complainant, Ashley Gjovik, respectfully submits this petition requesting review the OALJ's August 7 2024 Decision and Order for CERCLA whistleblower case 2024-CER-00001. The request for appeal was filed within 10 business days following the decision (August 7 2024), with the initial Petition for Review filed by Appellant on August 21 2024 at 11:56 PM. (*see*, eFile No. ARB-2408-799556).

2. This is a supplemental filing with the assignment of errors and objections. Copies of the initial petition and this supplemental petition are in the possession of USPS and are enroute to all required parties. Appellee was also notified through email with attached copies of all filings. Please see attached Certificate of Service.

Objections & Assignment of Issues

3. Appellant objects to the following conclusions, assertions, decisions, and orders within the August 7 2024 Decision and Order. Gjovik believes these points are all reversable errors, highly prejudicial, and all are material to the outcome of this adjudication. Gjovik also urges the ARB to take a hard look at the whole record and evaluate the matter de novo.

4. The August 7 2024 Decision and Order is contrary to all US Dept. of Labor Secretary's decisions and guidance on environmental whistleblower cases. It also directly contradicts decisions already made on the same matters between the same parties by a U.S. Judge on May 20 2024 in Gjovik's active federal civil lawsuit. (A copy of the 50-page decision was submitted to the OALJ record on May 22 2024, over two months before this dismissal.)

5. This petition will summarize the assigned errors of law, errors of fact, mixed issues, procedural errors, violations of due process, and discretionary

issues. This petition will also identify the unfortunately lengthy list of ways the ALJ's August 7 2024 Decision and Order violates the APA, CERCLA, and the U.S. Constitution (related to at least Separation of Powers, Non-Delegation, Due Process, and Judicial Restraint / Avoidance Doctrines).

6. All points made herewith-in were already expressly raised in Gjovik's Opposition, Reply, and Sur-reply filings to OALJ (other than peculiarities in the Decision itself). The ALJ referenced Gjovik's responsive filings and arguments zero times. This petition is written as an essay because there were no actual findings of fact or law in the Decision, so its difficult to assign errors in the typical format.

Issues of Fact

7. There are few issues of fact to assign because there are not many facts included in the ALJ's Decision. The ALJ does not provide a factual basis cited to the record for his decision. Further, there are ~10 references to the Amended Complaint in the Decision, and the majority of those references are citations to a range of paragraphs linked to a general assertion or cited as a basis for a legal conclusion. There are also ~10 references to the checkbox webform entry Gjovik submitted to US DOL on August 29 2021 and a second form with a paragraph of informal text that Wage & Hour wrote themselves in December 2021 without consulting Gjovik and refused to correct after. Gjovik repeatedly objected to this with OSHA and OALJ.

8. There are no references in the Decision to any of the complaints that Gjovik drafted herself in 2021. However, the ALJ does references some 'facts' from Apple's Motion to Dismiss and Opposition to Motion to Amend. The ALJ does not attempt to reconcile conflicting factual claims or evidence, but instead gives deference and priority to Apple's version of events.

9. Starting at *Section II: Motion to Amend* (following *Procedural History*), there are around 7 pages of text total in the Decision. 2 of the 7 pages are dedicated

to listing dozens of paragraphs of Gjovik's claims the ALJ improperly approved to strike from the case; atry2.5 pages discuss in detail what is essentially several rules the ALJ enacted himself and which are contrary and disruptive to the Secretary's stare decisis; and another 2 pages analyze substantive provisions of a US EPA statute that is unrelated to whistleblower retaliation and the US Dept. of Labor has no authority to try to interpret (let alone try to promulgate decisions about Apple's 'liability' under substantive enforcement provisions in those statutes which are exclusively governed by the US EPA and US DOJ.)

10. There are no findings of fact, and the legal analysis repeatedly explains the Motion to Dismiss was granted and Motion to Amend denied partially due to insufficient facts, yet concurrently acknowledges there would be enough facts to plead those claims if the ALJ had not decide to strike those facts due the rule he just came up with about street addresses and webforms.

11. Further, a detailed brief was filed by Gjovik on January 7 2024 and incorporated into the Motion to Amend, but was never referenced in the Decision either. Gjovik also tried to provide numerous exhibits to help the ALJ understand the facts and technical details, and the Decision claims the ALJ reviewed them, but the ALJ never references them, and even write that he does not want to talk about them (the evidence).

12. There are also significant facts and events the ALJ failed to acknowledge – such as the US EPA conducting a CERCLA inspection of Apple's facility in August 2021 due to Gjovik's July 2021 CERCLA disclosures. There are too many omissions to list individually so this is a general objection that the majority of material facts alleged by Gjovik were never reflected in this decision at all.

13. The ALJ did acknowledge there is an active, concurrent federal lawsuit on these matters and Gjovik submitted both the civil complaint in that lawsuit ("4AC") as well as the May 20 2024 decision approving a dozen of her

claims to move forward, including claims with similar and overlapping facts and questions as in this adjudication. She also filed a copy of the civil Joint Case Management Statement on June 23 2024 and urged coordination between the tribunal and court due to overlapping claims. Despite this, the ALJ gave no deference to the prior determination by a U.S. Judge and instead issued a Decision that is mostly the opposite of the judicial decision despite being about overlapping facts.

14. The ALJ also overstepped far outside his statutory authorization in declaring the legal status of Apple's activities under non-DOL statutes and without fact finding or an evidentiary hearing. The question of who is an "*operator*" with CERCLA strict liability, if it was even relevant here, is a question of fact that requires investigation by the U.S. EPA, not U.S. DOL.

Issues of Law (& Mixed Issues)

15. The August 7 2024 decision is fundamentally incorrect. It is not based on the facts alleged, nor does it rely on relevant or appropriate law. If an ALJ does not cite to facts in the record, then there are no findings of fact, and the decision is not supported by substantial evidence. If the ALJ does not cite relevant law as a basis for decisions, then there are also no findings of law. The ALJ did not actually issue a Decision, but instead essentially sent Gjovik a 7-page letter.

16. These environmental whistleblower cases are quite rare, especially CERCLA cases, so this may have been his first experience, and he may not have been aware of the unique, dedicated case law and procedure.

17. The August 7 2024 Decision cites CERCLA substantive provisions governed by the US EPA (not US DOL) at least 5 times, cites a SCOTUS case about substantive CERCLA law at least three times, cites to 9th Circuit decisions about CERCLA and civil procedure at least 6 times, cites to 1 California U.S. District Court case about substantive CERCLA law, and cites the FRCP at least 4 times. That might be fine if this was substantive CERCLA case at a US District

Court located in California, but this is an agency tribunal in Boston deciding retaliation claims. The ALJ also mistakes the FRCP's applicability for amending environmental whistleblower complaints, as amendment is included in the CFR for these cases and there is supporting environmental whistleblower case law which is a different standard then FRCP – so the FRCP and 9th Circuit is not applicable, and US DOL cases should have been cited instead.

18. The ALJ's Decision cites the 1st Circuit zero times, cites the CFR around six times but two of the citations are errors of law, and cites U.S. Dept. of Labor cases 3 times - but 2 of the references are only related to Motions to Dismiss generally and only 1 of the references is related to CERCLA. The ALJ cites zero U.S. Dept. of Labor cases about the CAA, TSCA, or RCRA. In total, in appears the ALJ cites one single US Dept. of Labor case as the substantive legal basis for the entire decision on four whistleblower claims.

19. The majority of the Decision is spent discussing new rules the ALJ just created himself about environmental whistleblower retaliation cases. The ALJ unilaterally restricted the coverage of environmental whistleblower statutes to now only apply to one single, physical street address - and it must be where the worker's desk is assigned, and it must be the address the worker entered when the worker submitted their first complaint to OSHA.[1] Only protected activities and retaliation that occurred at that one street address are protected – but nothing else. (This is contrary to all U.S. Dept of Labor case law and regulations).

20. The ALJ also narrowed the scope of coverage of CERLCA protections to only a facility that is an NPL Superfund site, and is the address the worker entered on the OSHA form, and it's the location where their desk is – and then the worker will only have protection if their employer is also in binding contract with the US EPA as an official Responsible Party of that specific NPL Superfund

[1] The "work site" address field is annotated in the DOL Whistleblower Manual as being entirely for OSHA regional offices to reference when they assign investigators to the matter.

site. (This is also contrary to all U.S. Dept of Labor case law and regulation).

21. Apple's assertions about the status and effect of the Record of Decision are not based on fact or law. Whistleblower protection is not limited by a Record of Decision, and factually the Record of Decision for the TRW Microwave site is expired and no longer in operation – requiring a new remedy and new Record of Decision, which Gjovik pointed out in her filings and the ALJ never read it or ignored it.

22. Further, there are only ten meritorious CERCLA whistleblower decisions since the statute was enacted and none of those cases would pass this new test. The majority of those cases involved situations where the issues occurred at a location that was not an NPL Superfund site, and/or the employer was not the Responsible Party.

23. The ALJ also created a rule where there must be 1 NPL Superfund site involved for a CERCLA claim, but there cannot be more than 1 NPL Superfund site involved. This was the ALJ's justification for 'striking' any mention made to the "*Triple Site*," which is the name for the mega-groundwater plume that the TRW Microwave office's plume is part of and thus is the same address. The content the ALJ tries to strike is incredibly disruptive, irrational, and prejudicial. He does not explain why each stricken part is irrelevant but instead essentially strikes everything Apple told him to strike, even if those facts are actual material and central to the lawsuit.

24. The ALJ also restricts CERCLA whistleblower protection to now only cover violations of CERCLA that definitely impact the public and environment. (This is actually the test only for 'releases' under CERCLA and other environmental statues – but is not the test for activities unrelated to 'releases' like violations of the statute, regulatory compliance matters, fraud, contracts, and so on.). Because the ALJ requires a formal NPL Superfund site to in order to establish coverage, and 'releases' usually create a NPL Superfund site later, and

the majority of meritorious CERCLA cases have not been about releases – this is another way the ALJ essentially nullifies the CERCLA whistleblower protection statute.

25. The ALJ's Decision also includes errors of law that were less novel, and which Gjovik had cited extensive U.S. Dept. of Labor case law trying to explain and correct to no avail. The ALJ fell for Apple's argument that Apple must be liable under the substantive environmental statute in order for there to be whistleblower protection coverage. There are a number of cases where employers made this argument and ALJ's went along with it, but then ARB explained that coverage of retaliation statutes and liability under the substantive statutes are completely different things. The ALJ errored in not researching the law and also not reading Gjovik's arguments and/or ignoring the law she provided.

26. Another common pitfall in these cases that this ALJ fell into is going along with an employer's argument to narrow the claims as much as possible at the start of the proceeding. Instead, the U.S. Dept. of Labor precedent is to ensure the complaint conforms to the evidence – not the other way around. Similarly, the ALJ went along with the employer's arguments that things OSHA did to the employee or said about the employee should gatekeep the employee from getting a truly de novo hearing. The ALJ also went along with the employer's claims that the employee's complaint is not based on evidence of what the employee actually complained about. Here, Gjovik repeatedly tried to get the ALJ to review evidence, provide an evidentiary hearing, or otherwise review what was actually said in order to determine the complaint scope – but the ALJ refused. OSHA's determinations are supposed to be irrelevant following the request for a hearing, but the ALJ insisted that OSHA defined the scope of the proceeding with the August 29 2021 webform.

27. Despite the ALJ's Judicial Activism, there was not much actual policy analysis (despite Gjovik detailing relevant public policy and the legislative history

extensively her responses).

28. Many of the mixed fact/law issues are practical and common sense, but the ALJ must have been swept up in the passionate yet completely irrational legal arguments made by Apple's counsel. For example, below are corrections of a few of the ALJ's false assertions from the Decision:

- Evidence that the employee's reports of CERCLA non-compliance to the EPA led to an onsite EPA CERCLA inspection of the site, about those issues, formally due to the whistleblower's disclosures – is not completely irrelevant to a CERCLA whistleblower claim.
- Concerns about compliance with the administrative controls (including CERCLA covenants and the Records of Decision – contracts) do not "relate entirely to the safety of [the employees] workplace."
- Complaints and concerns about noncompliance with the employer's CERCLA EPA reporting requirements, via explicit instructions in a CERCLA Land Use Covenant about compromised engineering controls, do not "relate entirely to the safety of [the employees] workplace" (instead of CERCLA).
- Concerns about the tenant/operator at a Superfund site not informing the Responsible Party and US EPA about issues with the CERCLA engineering controls does not "relate entirely to the safety of [the employees] workplace" (instead of CERCLA).
- If contractors or visitors (such as small children) come to the Superfund site and occupy areas of the building/site with known releases, it is not "unrelated" to the impact to the public from the site.
- Vapor intrusion is impacting the public when vapor intrusion from the Superfund site is occurring outside the parcel the building is on and impacting the surrounding community.

29. Another mixed issue was the assertion that all of Gjovik's activities

were only related to safety. This assertion was made a few times but was not based on any findings of fact from Gjovik's pleadings, and instead was repeating Apple's unsupported arguments. Gjovik also researched and cited extensive U.S. Dept. of Labor case law about this topic, but the ALJ never addressed it. CERCLA is a very unique statute as it focuses on a noun, not a verb – its focus is toxic waste dumps. It's similar to the ERA in that sense, and similarly has large overlaps with safety concerns (i.e., HAZWOPER, etc.) Gjovik also engaged in numerous protected activities that were not safety related.

30. Finally, the ALJ failed to identify and analysis the correct legal standards for Motions to Dismiss environmental whistleblower cases – which is based on *Varnadore*. The ALJ also failed to identify the test for prima facie complaints, including explaining the two reasonableness tests. Gjovik explained these tests in her filings, citing to the appropriate US Dept. of Labor case law, but the ALJ either did not read her filings or ignored her arguments.

31. In outlining the prima facie case with the objective and subjective reasonableness tests, it quickly becomes clear that Apple's strawmen and red herring with the "*operator*" and "*record of decision*" arguments are irrelevant to a motion to dismiss.

Issues with Procedure and Due Process

32. This section also integrates all the other sections in this petition, as almost all of the issues were a mistake of procedure, abuse of discretion, and/or violation of Gjovik's due process rights. In addition, there are a few glaring policy and practice points worth highlighting:

- CERCLA whistleblower cases at US DOL cannot be decided almost entirely on federal civil precedent and statutes unrelated to the whistleblower provisions and Dept. of Labor precedent.
- The employee's prior experiences with environmental issues show the employee's reasonableness, and those experiences should not be stricken

nor should evidence be excluded.

- Similarly, generally, evidence relevant and important to a CERCLA claim should not be excluded, and stricken from a complaint, if that evidence happens to mention other environmental statutes.
- Similarly, evidence relevant and important to a retaliation claim should not be excluded, and stricken from a complaint, because that evidence did not physically occur at the street address where the employee's desk is assigned.
- If there is already evidence that some of the unlawful retaliation was due the employee's protected activities under other environmental statutes, that evidence should not be excluded and stricken, but instead the complaint and claims should be amended to reflect what actually happened.
- An environmental whistleblower's request to amend their complaint should be granted if conforms the complaint to the evidence.
- Motions for Judicial Notice should be granted to support Opposition to a Motion to Dismiss in an environmental whistleblower case when the documents to be Judicially Noticed are proper and directly relevant to the matter at hand and would otherwise change the outcome of the decision.
- It was improper to deny or ignore Gjovik's requests to provide evidence of the substance of her initial communications with OSHA about her whistleblower complaints as that was part of her initial complaints and precedent reflects that as a typical process at the start of adjudication.
- Environmental whistleblowers are allowed to add additional claims and adverse actions once they get to OALJ, as long as it's generally related and not unreasonable. The OSHA process is not 'litigation', and the adjudication starts with the OALJ docketing. (Gjovik requested to amend immediately when she requested her OALJ hearing).'
- It is improper to base the majority of the Decision on unilateral statements made by Apple in their motions and other filings.

- Environmental whistleblower cases are not bound to legal theories from the initial stages of OALJ proceedings and are absolutely not bound by anything Wage & Hour did or did not do.
- An employer is not unduly prejudiced by amending a complaint to conform to the evidence where the employer knew it did the things to be amended, tried to hide them, it was one of the reasons they retaliated, they literally almost killed the employee due to those activities, it's the subject of a large ongoing federal lawsuit, the US EPA is actively investigating the employer over those exact issues, and the US EPA released an inspection report finding at least 19 unique violations of federal environmental laws – directly related to the whistleblower's disclosures and injuries.

33. In addition, as mentioned, there were some very basic procedural failures including failure to make findings of fact or findings of law, failure to cite relevant law, failure to conduct legal research, failure to read Gjovik's arguments and response, and also failure to provide a detailed decision as required under 24.109(a) and 5 USC Section 557. There were other violations of APA formal adjudication requirements here as well, in addition to the apparent improper attempt at adjudicative rulemaking.

34. Further, the Motion to Strike should have never been granted. First, if the ALJ found there was no CERCLA claim, and he believed it was only an OSHA claim, then he had no jurisdiction. There was no reason for him to strike the majority of the complaint if he was going to dismiss anyways, among many other issues with his decision to strike. Judicial restraint encourages making assumptions where decisions are not required leading up to a dismissal and to limit the impact made. Further, if there was no jurisdiction, then the ALJ's issuance of an unauthorized, impermissible decision on substantive CERCLA liability for a California company under corrective actions managed by a west coast US EPA office is especially wild.

Other Issues in Discretionary Decisions

35. The environmental whistleblower case law makes clear that most environmental whistleblowers who make it to OALJ do not have a 'complaint.' Emerging battered & bruised from Wage & Hour, they usually draft their first complaint at the start of the adjudication. The initial complaint and accrual is based on the retaliation that caused the employee to file a charge with OSHA. After that, then the complaint is supposed to conform to the evidence. The ALJ's unilateral declaration that the August 29 2021 webform entry (with no actual complaint described) was the "operative complaint," had no basis in law, fact, or procedure. Gjovik objected repeatedly.

36. The ALJ's apathy and irritation towards Gjovik trying to communicate the facts of what occurred is not effective for these times of adjudications. The ALJ's Decision expressed some confusion and uncertainty, which should have triggered him to schedule oral arguments and/or an evidentiary hearing – and ask questions of the parties – not scolding Gjovik for simply telling him what happened to her.

37. This is for the ARB to decide, but there were a number of signals that the ALJ may have been relying too much on Apple's statements, as if what the employer said was fact and law, instead of US Dept of Labor case law. Many of the errors raised here would have been identified by the ALJ with basic legal research within the U.S. Dept. of Labor case libraries – and most or all of the errors were addressed with relevant law in Gjovik's filings, which it seems like the ALJ may have never read. To make matters worse, Apple's counsel was lobbying the ALJ with completely irrelevant and incorrect legal theories but made them sound convincing if there was no fact checking. This also led to the ALJ essentially flipping roles for motion to dismiss, and giving deference to Apple's claims instead of Gjovik's allegations, while also concurrently prohibiting Gjovik from providing evidence. It was not ideal.

38. Similarly, it was strange the ALJ went along with citing only 9th Circuit law as a CERCLA claim is ultimately appealed to a US District Court in the region where the issue occurred (note: the ALJ incorrectly says CERCLA claims are appealed to appellate courts – this is not true), yet the court where Gjovik's claim would be appealed is the U.S. District Court where she has her pending civil litigation of employment and labor claims, toxic torts, and antitrust claims – and which the ALJ issued contradictory and confusing decisions on overlapping issues in the cases. There is no point in citing the 9th Circuit while an executive tribunal concurrently encroaches on the same judiciary and directly interferes with their active civil litigation, exactly where the claim would land.

Material Omissions

39. One of the most glaring omissions in this Decision was the failure to identify what the alleged protected activity was. The ALJ offers legal conclusions and vague assertions about safety but fails to identify even one factual scenario that Gjovik alleged was protected activity – and to explain why it was not, reconciling conflicting arguments and evidence.

40. Similarly, the ALJ appears to have denied Gjovik's request to amend to add additional adverse employment actions, but did not explain why. For example, instead of explaining why he denied her request to add denylisting, he just listed it in the content he wanted to strike from the case. It appears he may be enforcing a rule that if the adverse action was not included on the original OSHA webform filing then it cannot be added later (but denylisting happens later) – which would essentially nullify most denylisting claims if applied.

41. The ALJ also ignored a discovery dispute between Gjovik and Apple. Following the ALJ telling Apple they had to participate in discovery but Apple still refusing, Gjovik filed a Motion to Compel. In response, Apple filed a response so incorrect and offensive that Gjovik filed another NLRB charge over it and filed notice of that in the case record. None of this was acknowledged by the ALJ, and

the motion to compel was never ruled on or acknowledge. When an employer is actively retaliating against the employee during the retaliation proceeding, it seems relevant for credibility determinations at least.

Violations of the U.S. Constitution & Tribunal Activism

42. In addition to violating the requirements of the APA for formal adjudications and the prohibition on extralegal rulemaking – the Decision also exceeded the ALJ's statutory authority when 'issuing' substantive decisions about EPA statutes and resulting civil liability, and unreasonably encroached into civil litigation under an Article III Judge. This Decision unreasonably invaded Legislative and Judicial functions, actively interfered with two open US EPA investigations, and also managed to disrupt Executive branch functions (its own branch).

43. Administrative agencies have narrow statutory authority, and within that, they have their own rules and procedures they must follow. A tribunal is not authorized to alter, repeal, or disregard statutes and regulations – nor is it authorized to adjudicate other agencies statutes absence clear direction from Congress. Congress gave exclusive jurisdiction of all CERCLA cases and controversies to US District Courts. The *Ashwander* principles are instructive for this tribunal – maintain stare decisis, aim for minimalism, and avoid any major decisions that are not required to be decided. Judicial Activism is not appropriate for an ALJ at the OALJ overseeing statutorily defined adjudications.

Remedy & Conclusion

44. The August 7 2024 Decision relies on impermissible factors, omits consideration of factors entitled to substantial weight, does not make findings of fact, does not making findings of law, cites incorrect legal rules, ignores Gjovik's factual allegations and legal arguments, makes material errors of law, has no evidentiary basis, ignores all conflicting evidence, and oversteps into functions of

other branches of the government. The Decision is currently so far from relevant facts and law, it cannot be located within the range of permission decisions, and thus must be swiftly reversed.

45. Stare decisis is crucial for ensuring consistency, predictability, and stability in the law. It allows individuals and entities to rely on judicial decisions with the confidence that similar cases will be treated similarly, fostering fairness and clarity in the legal system. When a judge issues a decision that is not grounded in law and fails to cite relevant legal authority, it undermines this stability and predictability. Such decisions not only erode trust in the judicial process but also create uncertainty, as future cases lack clear guidance on how the law should be applied. This deviation from legal principles can lead to inconsistent rulings and disrupt the orderly administration of justice.

46. The grant of a Motion to Dismiss should be reversed, the partial denial of a Motion to Amend should be reversed, the Motion to Strike should be reversed, the case re-opened, and the prior denials of critical legal arguments should be reversed and the papers reconsidered. Gjovik requests de novo review of the whole record, reversal of the identified errors and any other errors identified by the ARB, and remand to continue the adjudication process (or summary decision from ARB in her favor on issues, claims, or the case).[2]

47. Gjovik also requests, if possible and permissible, following the reversal and correction of law, to then be allowed to "kick-out" her CERCLA claim from U.S. Dept. of Labor and to consolidate it with her civil lawsuit in the U.S. District Court, if the U.S. Judge also approves, for the sake of judicial economy and efficiency. Gjovik has been severely prejudiced for all the reasons mentioned, following a very flawed Wage & Hour experience, and would like to expedite a resolution in the matter if possible.

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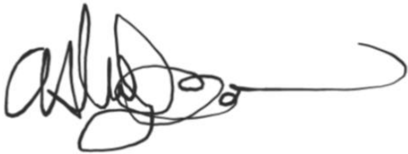
[2] Plaintiff is seeking her compensatory damages through her civil lawsuit. In the U.S. Dept. of Labor adjudication, she is only seeking declaratory & injunctive relief, & punitive if available.

Thank you.

Dated: August 22, 2024.

Signature:



/s/ Ashley M. Gjovik
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New Appeal Received and Pending Review for Ashley Gjovik in OALJ Case 2024-CER-00001 (21-Aug-24 11:57 PM)

From DOL eFile-eServe <noreply@dol.gov>

To Ashley Gjovik<ashleymgjovik@protonmail.com>

Date Thursday, August 22nd, 2024 at 12:01 AM

eFile and eServe

This is an automated email; **DO NOT RESPOND TO THIS EMAIL.**

Dear Ashley Gjovik,

On 21-Aug-24 11:56 PM, the Administrative Review Board received your notice of appeal related to the matter referenced below. As we must still conduct an initial review of the notice, we have not yet officially docketed your appeal. We will notify you by email when we accept your appeal and officially docket it. Following that email, we will serve an official acknowledgement letter on all parties to the appeal.

Appealed Case Details

Petitioner Name:	Ashley Gjovik
OALJ Case Number:	2024-CER-00001
Lower Court Decision Date:	07-Aug-24

Parties on Appeal

Name	Email Address	Registered in EFS
Ashley Gjovik	ashleymgjovik@protonmail.com	Yes
Ryan Booms	rbooms@orrick.com	Yes
MELINDA RIECHERT	mriechert@orrick.com	Yes
Kathryn Mantoan	kmantoan@orrick.com	Yes
Kate Juvinall	kjuvinall@orrick.com	Yes
Jessica Perry	jperry@orrick.com	Yes

Filing Details

Filing:	New Appeal
Filed Date:	21-Aug-24 11:56 PM
eFile Number:	ARB-2408-799556
Status:	Received and Pending Review

***** This email notifies you of the receipt of this filing, but you are still responsible for serving the notice of appeal and all other filings on those required to be served under the Board's rules. See 29 C.F.R. §26. EFS-validated parties appear as a "Yes" in the above column labelled "Registered in EFS." For those not registered and/or un-represented parties in EFS, the Board will affect paper service of the appeal filing to the mailing address provided. You are also required to attach a certificate of service to all your filings. *****

Thank you,
Administrative Review Board
U.S. Department of Labor

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U.S. Department of Labor

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Appellant/Complainant,

vs.

Apple Inc., *a corporation & employer,*

Appellee/Respondent.

OALJ Case: 2024-CER-00001

Appellant/Complainant's Petition for Reveal

Petition Filed: Aug. 21 2024.

Appellant/Complainant's Petition for Appeal

Appellant/Complainant, Ashley Gjovik, respectfully submits this petition requesting review the OALJ's August 7 2024 decision for case 2024-CER-00001.

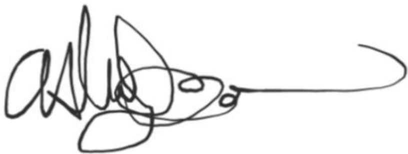
This request is filed within 10 business days following the decision.

A subsequent notice of assigned issues will be filed shortly, but could not be finished prior to midnight.

Appellant challenges the entire decision and order for multiple reasons which will be detailed in the subsequent filing.

Dated: August 21, 2024.

Signature:



/s/ Ashley M. Gjovik

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OALJ Case: 2024-CER-00001

eFile Case: ARB-2408-799556

Appellant/Complainant's Declaration in Support of Petition for Appeal

Petition Filed: Aug. 21 2024.

Declaration of Appellant Ashley Gjovik

Pursuant to 28 U.S.C.§ 1746, I, Ashley M. Gjovik, hereby declare as follows:

1. My name is Ashley Marie Gjovik. I was an Employee of Apple Inc, the Respondent in this case. I am a self-represented Complainant in this above captioned matter. I make this Declaration based upon my personal knowledge and in support of Complainant / Appellant's Petition for Review. I have personal knowledge of the facts stated in this declaration, and if called to testify, I could and would testify competently thereto.

2. I apologize I did not complete the full Petition before midnight. I filed the initial Petition notice as I had seen that approved in similar situations where the Appellant was able to quickly file the rest of the material after. I tried to complete it all on time, but at the same time this dismissal was issued, I also had to respond to complicated, stressful matters in my civil lawsuit (where I'm also pro se) that took all of my time for over a week. Then it took days of research to prepare the analysis and legal theories for this Petition, due to the novel issues raised by the Decision.

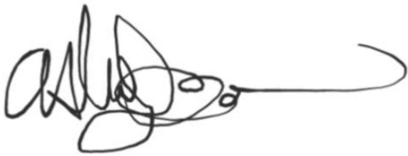
3. I've been unable to upload the full Petition as the case is not docketed yet. I tried call the Office of the Clerk of the Appellate Boards, but the number listed on the Order went to the BRB, not ARB. I also tried the ARB main number, but no one picked up. I've kept checking the status of the ARB petition all day to see if it will allow me to file the additional paperwork, but so far it still shows as pending and prohibits me from uploading any documents.

4. Because I do not know how long the process will take, and I want to ensure a copy of the full Petition is served on the Appellee as soon as possible, I am going to send the *Petition Notice, Petition Supplement, Declaration*, and copy of the filing confirmation to the Respondent/Appellee via electronic mail and USPS mail today before 5PM ET, in addition the electronic service they received per the US DOL efiling system last night.

5. I will also provide copies of the same documents in USPS mail addressed to the FLS and Regional solicitors noted on the Service Sheet for the Decision and Order, and a copy to the Chief Judge of the OALJ at the mailing address on the OALJ website (it's not included in the Decision), to serve all parties as requested in the appeal instruction for the order. I will drop the envelopes in a USPS blue box by 5pm ET today.

6. I declare under penalty of perjury under the laws of the United States that the foregoing is true & correct. Executed on: August 22, 2024 in Boston, MA.

Signature:



/s/ Ashley M. Gjovik
Pro Se Appellant

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Before the
United States Department of Labor
Administrative Review Board

OALJ Case No.: 2024-CER-00001

eFile Case: ARB-2408-799556

In the Matter of:

Ashley Gjovik
Appellant/Complainant/Employee

v.

Apple Inc
Appellee/Respondent/Employer

Certificate of Service

I Hereby Certify that on this **21st of August 2024** a copy of the documents entitled, "*Petition Requesting Appeal - Placeholder*" was served on the following party via e-Filing as shown below.

Service to Apple Inc (Appellee)
e-Filed to:
Jessica Perry, esq., jperry@orrick.com
Kate Juvinall, esq., kjuvinall@orrick.com
Kathryn Mantoan, esq. kmantoan@orrick.com
Melinda Riechert, esq., mriechert@orrick.com
Ryan Booms, esq., rbooms@orrick.com

I Hereby Certify that on this **22nd of August 2024** a copy of the documents entitled, "*Petition Requesting Appeal – Placeholder,*" "*Petition Requesting Appeal – Supplement*" and "*Appellant Declaration*" were served on the following parties shown below.

Service to Apple Inc (Appellee)

Emailed to:

Jessica Perry, esq., jperry@orrick.com
Kate Juvinall, esq., kjuvinall@orrick.com
Kathryn Mantoan, esq. kmantoan@orrick.com
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Ryan Booms, esq., rbooms@orrick.com

Service to Apple Inc (Appellee)

USPS mail to:

CT Corporation System
Attn: Apple Inc Service
155 Federal Street
Suite 700
Boston, MA 02110

Service to U.S. Dept. of Labor

USPS mail to:

Chief Administrative Judge, OALJ
U.S. Department of Labor
200 Constitution Ave NW
Room S-4325
Washington DC, 20210

Associate Solicitor
Division of Fair Labor Standards
U. S. Department of Labor
Room N-2716, FPB
200 Constitution Ave., N.W.
Washington DC, 20210

San Francisco Regional Solicitor
U. S. Department of Labor
Suite 3-700
90 Seventh Street
San Francisco, CA 94103

/s/ Ashley M. Gjovik, *(pro se)*
Signature and Title of Person Providing Certification

Ashley M. Gjovik *(pro se)*
Name of Party or Representative of Party Filing the Document

Date: August 22 2024.

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 07 August 2024

OALJ NO.: 2024-CER-00001

In the Matter of:

ASHLEY GJOVIK,
Complainant,

v.

APPLE INC.,
Respondent.

OMNIBUS ORDER AND DISMISSAL

This proceeding arises from a complaint filed by Ashley Gjovik ("Gjovik" or "Complainant") against Apple Inc. ("Apple" or "Respondent") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "the Act"), 42 U.S.C § 9601 *et seq.*, and the implementing regulations found at 29 C.F.R. Part 24. The matter is currently set for formal hearing beginning the week of March 3, 2025.

I. Procedural History

This Order addresses several interconnected motions from the Parties that are pending before this Tribunal. On April 2, 2024, Gjovik filed a Motion to Amend the Complaint ("Mot. Am."), along with a memorandum in support of the motion ("Memo. Am."), a Declaration, and Exhibits A through S ("Mot. Am. Exh."). On April 16, 2024, Apple filed its opposition ("Opp. Mot. Am."), a declaration from one of its attorneys ("Perry Decl."), and Exhibits A through D ("Resp. Opp. Exh.").

On the same day, Apple filed a Motion to Dismiss ("Mot. Dis."), as well as a declaration from another of its attorneys ("Reichart Decl."), and a Request for Judicial Notice in support of the Motion to Dismiss and Opposition to Amend the Complaint. The Request for Judicial Notice included three exhibits: Gjovik's second amended complaint in a separate ongoing federal civil case filed by Gjovik, *Gjovik v. Apple*, No. 3:23-CV-04597-EMC (N.D. Cal. Dec. 21, 2023), and two pages from the U.S. Environmental Protection Agency ("EPA") website concerning Superfund sites.

On May 1, 2024, Gjovik filed her opposition to Apple's motions, which included a Memorandum ("Opp. Memo") detailing her response to the Motion to Dismiss and her objections to the Request for Judicial Notice, the Perry Declaration, the Reichart Declaration,

Respondent's Exhibits A through D from its opposition the Motion to Amend, and Respondent's Exhibit A from the Request for Judicial Notice. Gjovik attached more than fifty exhibits. While the Court has reviewed Gjovik's exhibits in their entirety, they will not be further summarized here.

On May 10, 2024, Apple filed a Motion for Leave to Reply to Gjovik's opposition and its responses to Gjovik's objections to the Perry Declaration. Gjovik then filed a Motion for Leave to Respond if Apple's motion was granted. Given the extensive filings and arguments already made by both Parties, this Tribunal **DENIES** both of these motions as unnecessary to decide the issues.

After several requests for clarification of issues from the Parties, on May 23, 2024, this Tribunal issued an Order on the Operative Complaint ("Order"), in which it held that, under 29 C.F.R. Part 24, the operative complaint in this matter was the August 29, 2021, online complaint filed by Gjovik with OSHA ("Operative Complaint"). *See* Mot. Am. Exh. D at 9; Resp. Opp. Exh. A. The Order noted that the Operative Complaint did not include the subsequent alleged adverse action of termination, which was included in a case activity worksheet from OSHA dated December 10, 2021 ("Case Summary"), *see* Mot. Am. Exh. C at 7; Mot. Am. Exh. D. at 10, and it did not address additional environmental statutes beyond CERCLA that Gjovik argued had been raised with OSHA during the initial investigation of her claim, and was now attempting to address before this Tribunal. *See* Mot. Am. Exh. A at 3.

The Order allowed Gjovik to file a proposed Amended Complaint with this Tribunal within 14 days, while the Motion to Amend and Motion to Dismiss, as well as all other motions pending with the Court, were held in abeyance. The Court's directions spelled out very specific parameters (discussed further below) within which an Amended Complaint would be expected to stay.

On June 7, 2024, Gjovik filed a proposed Amended Complaint ("Am. Compl."), and on June 20, 2024, Apple filed its opposition ("Opp. Am. Compl."), in which it renewed its request to dismiss the case. On June 21, 2024, Gjovik filed a motion requesting leave to reply to Apple's opposition. This Tribunal **DENIES** this motion, again, given the extensive arguments already made in the Motion to Amend and the numerous exhibits filed in support of it.

II. Motion to Amend

This Tribunal will first address the motion to amend the Operative Complaint. A complaint under CERCLA must be filed within 30 days after an alleged violation of the Act. 29 C.F.R. § 24.103(d)(1). However, under the procedural rules governing matters before the Office of Administrative Law Judges ("OALJ"), a complainant may seek to amend a complaint before OALJ with permission from the Court. 29 C.F.R. § 18.36. The OALJ rules further state that the "Federal Rules of Civil Procedure (FRCP) apply in any situation not provided for or controlled by these rules or a governing statute, regulation, or executive order." 29 C.F.R. § 18.10(a).

FRCP 15 instructs that a complaint may be amended within 21 days as a matter of course; otherwise, a party "may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." FRCP 15(a)(1), (2). An otherwise untimely amended complaint may be accepted where it relates back to the date of the original complaint by asserting "a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." FRCP 15(c)(1)(B); *see Ross v. Williams*, 950 F.3d 1160, 1165-66 (9th Cir. 2020). In other words, the amended complaint must rely on the same common core of operative facts as the original complaint. *Ross*, 950 F.3d at 1167, *citing Mayle v. Felix*, 545 U.S. 644, 656-57 (2005).

The Ninth Circuit, whose precedent controls in this case,[1] has explained that amendments to complaints should be permitted if an amendment does not come after undue delay, is not made in bad faith, does not result in prejudice to the nonmoving party, and is not futile. *See Center for Biological Diversity v. U.S. Forest Serv.*, 80 F.4th 943, 955-56 (9th Cir. 2023), *citing Benko v. Quality Loan Serv. Corp.*, 789 F.3d 1111, 1117 (9th Cir. 2015). An amendment is futile where it is clear in de novo review that the complaint "could not be saved by any amendment." *Armstrong v. Reynolds*, 22 F.4th 1058, 1071 (9th Cir. 2022).

In her Motion to Amend, Gjovik argues that the Operative Complaint failed to include additional claims she had raised during the OSHA investigation related to the Clean Air Act, 42 U.S.C. § 7622 ("CAA"), and the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act ("SWDA/RCRA"), 42 U.S.C. § 6971, among other omissions. *See* Memo. Am. at 2-6. Apple, in turn, argued that Gjovik's Motion to Amend should be denied on the grounds that Gjovik was attempting to raise claims not raised before OSHA in her original complaint; such claims were time barred, and Gjovik's administrative remedies for these claims have not been properly exhausted, in that they were never addressed by OSHA in the first instance. Opp. Mot. Am. at 1-3. Apple further argued that raising such claims now would also prejudice them in their ability to defend the claims. Opp. Mot. Am. at 12-13.

In light of these arguments, and upon reviewing the numerous filings in support of them, this Tribunal set clear parameters in its Order for any proposed Amended Complaint so it would properly relate back to the Operative Complaint, namely: that all proposed amendments must pertain to the workplace address at 825 Stewart Drive, Sunnyvale, California, the only address referenced in both the Operative Complaint and the Case Summary; and that any alleged adverse actions, protected activity, and statutory violations must also relate to this address and be supported by the initial allegations made in the Operative Complaint and Case Summary.

Gjovik timely filed a proposed Amended Complaint in response to the Order. In opposition, Apple asserts that Gjovik's amendments, particularly with respect to any additional environmental statutes beyond CERCLA, are futile and should not be allowed. Opp. Am. Compl. at 2. Apple specifically argues that the amendments detailing additional claims under the CAA and SWDA/RCRA, as well as those invoking the Toxic Substances Control Act ("TSCA"),

[1] Under 29 C.F.R. § 24.112(d), any person affected by a final order under CERCLA may file a petition for review in the U.S. Court of appeals "for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation"—in this case, the Ninth Circuit.

15 U.S.C. § 2622, fail to adhere to the parameters set by this Tribunal's Order by including facts and allegations outside of the scope of the Operative Complaint or Case Summary. Opp. Am. Compl. at 15-17.

Upon careful review of the Amended Complaint, this Tribunal finds that Gjovik has, in fact, failed to adhere to the limitations set by the Court repeatedly and throughout the proposed Amended Complaint. Many of Gjovik's amendments relate to an entirely different address (3250 Scott Boulevard, Santa Clara, California), which is apparently an Apple-owned facility located near an apartment building in which Gjovik resided in 2020. Gjovik's amendments adding a claim under the CAA, for example, relate entirely to the Scott Boulevard address. *See* Am. Compl. ¶¶ 110-19. As a result, all of the CAA claims in the Amended Complaint fall outside of this Tribunal's order.

Similarly, Gjovik's claims under SWDA/RCRA and the TSCA primarily involve alleged protected activity connected with the Scott Boulevard address. *See* Am. Compl. ¶¶120-145. The Stewart Drive address is mentioned, but it is done almost in passing, and without any clear connection to the claims under these statutes. Gjovik's descriptions of her protected activity here are vague, and unrelated to the protected activity as originally alleged in the Operative Complaint and Case Summary. *See* Am. Compl. ¶¶120-145. Additionally, other amendments lay out concerns Gjovik supposedly raised with environmental violations at other Apple buildings in Santa Clara County—again, none of which were her workplace address on Stewart Drive as directed by this Tribunal.

This Tribunal finds that any alleged violations, adverse actions, or protected activity related to a different location or occurring during a different time period do not rely on the common core of operative facts as set out in the Operative Complaint and Case Summary, and are therefore inappropriate for the Amended Complaint. These portions of the Amended Complaint go well beyond the Complaint filed before OSHA and are thus both untimely and prejudicial, as they are introduced for the first time here, and posed against Apple without any chance for the Respondent to challenge or investigate them under the normal administrative process. While the de novo review before OALJ may be a place to clarify or sharpen allegations brought before the administrative agency, and this Tribunal may allow amendments in the interest of justice, such an allowance is not meant as an open floodgate for a Claimant to add numerous new factual and legal scenarios that have never previously been part of the action for the first time well into litigation. There must be a limit, and that limit has been exceeded here in the Amended Complaint.

Despite these concerns, there are portions of the Amended Complaint that adhere to the Order of this Tribunal and thus survive. Accordingly, Gjovik's Motion to Amend is **GRANTED IN PART** and **DENIED IN PART**. The following sections are stricken from the Amended Complaint for the above given reasons, as untimely, prejudicial, futile, or a combination thereof:

- Paragraph 1: "multiple federal environmental statutes"; "CAA, RCRA, TSCA"; "conducting … more tests"; "meetings with elected officials";
- Paragraph 2: "and RCRA"; "and where Apple severely injured Gjovik in 2020"; "for both sites. … and/or their families";

- Paragraph 9: “and included facts from September 2020 … CERCLA claim against Apple”;
- Paragraph 10 in its entirety;
- Paragraph 14: “arising from semiconductor activities at 3250 Scott Blvd … Emotional Distress”;
- Paragraph 17: “and ‘Triple Site’ triple NPL Superfund sites”; “During Gjovik’s work … double NPL Superfund site)”;
- Paragraphs 20 through 24 in their entirety;
- Paragraph 26: “and disclosing to them the reason … air around 3250 Scott Blvd”;
- Paragraph 27: “Gjovik also asked … is contaminated”;
- Paragraph 28: “including the HazMat EH&S manager at 3250 Scott Blvd”;
- Paragraph 31: “referencing the PTSD … dumping at 3250 Scott Blvd”;
- Paragraph 32: “and told him more victims …. would just tell them to get therapy too”;
- Paragraph 33: “Gjovik shared the SF Bay View article about 3250 Scott Blvd … matter that day”;
- Paragraph 38: “was at the apartment where she was exposed to toxic waste”;
- Paragraph 43: “Gjovik also attached a PDF … including other Superfund sites”;
- Paragraph 44: “updates about 3250 Scott Blvd.”;
- Paragraph 45: “(referencing Gjovik’s comments … around 3250 Scott Blvd)”; “On April 30 2021, … explosion at 3250 Scott Blvd.”;
- Paragraph 50: “On May 22 2021, Apple’s leave and worker’s comp ... medical symptoms while living next to 3250 Scott Blvd. … hallucinations”;
- Paragraph 54: “she was moving apartments …. She also noted”;
- Paragraph 59: “who Gjovik spoke with about 3250 Scott Blvd back in September 2020”; “The notes also documented … her questions about other buildings”;
- Paragraph 64: “treatment/storage/disposal … under the TSCA”;
- Paragraph 67: “and also mentioned her illness next to 3250 Scott Blvd … SF Bay View”;
- Paragraph 68 in its entirety;
- Paragraph 75 in its entirety;
- Paragraph 76: “She has this wisdom through her experience next to 3250 Scott Blvd, …. CalEPA”;
- Paragraph 78: “and about what happened … 3250 Scott Blvd.”;

- Paragraph 80: "Gjovik also created a document listing a number of Apple's buildings … details on the contamination";
- Paragraph 82: "but also concerns with … offices on remediation sites";
- Paragraphs 83 through 85 in their entirety;
- Paragraphs 87 and 88 in their entirety;
- Paragraph 89: "and the hazardous waste issues next to 3250 Scott Blvd";
- Paragraph 91 in its entirety;
- Paragraph 99: "3250 Scott and"; "and were found in her … 3250 Scott Blvd)";
- Paragraph 103: "and she even had other victims … article she wrote";
- Paragraph 106, subheading b. through the end of the paragraph;
- Paragraph 109 in its entirety;
- Paragraphs 110-19 in their entirety (CAA claim);
- Paragraphs 120-35 in their entirety (SWDA/RCRA claim);
- Paragraphs 136-45 in their entirety (TSCA claim);
- Paragraph 146: "RCRA, Clean Air Act, and TSCA", both instances, and "blacklist";
- Paragraph 152: "as Apple's lawyers directly demanded the employer terminate its relationship with Gjovik … Gjovik is";
- Paragraph 153: "RCRA, and CAA"; and
- Paragraphs 156 to 159 in their entirety.

With these changes made, Gjovik has retained her CERCLA complaint, albeit with a sharpened set of facts. The Court is now in a position to consider Apples' Motion to Dismiss the Complaint based on the remaining portions of the Amended Complaint, as the original Motion to Dismiss is focused on the legal basis on which a CERCLA claim can be brought.

III. Motion to Dismiss

Under the applicable OALJ regulations, a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. 29 C.F.R. § 18.70(c); *see Gross v. Saint-Gobain Corp.*, ARB No. 2022-00005, PDF at 4 (ARB Apr. 18, 2022). In considering a motion to dismiss, an ALJ must accept the factual allegations made in the complaint as true and draw all reasonable inferences from them in the complainant's favor. *Gross*, PDF at 4-5. The Administrative Review Board ("Board") has explained that in considering a motion a dismiss, a tribunal should focus "solely on the allegations in the complaint, its amendments, and the legal arguments … not whether evidence exists to support such allegations." *Gross*, PDF at 5-6, *quoting Evans v. U.S. EPA*, ARB No. 2008-0059, PDF at 10-11 (ARB July 31, 2012). The "fair notice" standard is used, which requires only a sufficient statement of the claims providing

(1) some facts about the protected activity and its relatedness to the law or statute in question; (2) some facts about the adverse action; (3) a general assertion of the connection between the two; and (4) the relief that is sought. *Id.*

When discussing a Motion to Dismiss, the ALJ should "not consider new evidence submitted by the moving party" unless the motion is converted to one for summary decision and the non-movant is allowed an opportunity to respond in kind. *Gross*, PDF at 5-6, *citing Evans*, PDF at 10-11. As such, Apple's Request for Judicial Notice filed on April 16, 2024, in support of its Motion to Dismiss and Opposition to the Motion to Amend is **DENIED.**

In its initial Motion to Dismiss, Apple argues that Gjovik has failed to state a claim under CERCLA for which relief may be granted on two grounds: First, Apple argues that it is not an "owner" or "operator" subject to the provisions of CERCLA and therefore a claim under the Act cannot be brought as a matter of law. Second, Apple argues that Gjovik's allegations of protected activity do not include activity covered under the Act. Mot. Dis. at 2-3. Apple renews these arguments and its request to dismiss the CERCLA claim in its response to the Amended Complaint. Opp. Am. Compl. 17-18. The Court will address each of these arguments in turn.

Apple first asserts that CERCLA's whistleblower statutes and implementing regulations only apply to an employer if that employer is a covered "person" subject to the liability imposed by CERCLA for the costs of remediation at specific hazardous waste sites. Mot. Dis. at 5-6. Apple points out that, under 29 C.F.R. Part 24, no "employer **subject to the provisions of any of the statutes [listed in 29 C.F.R. § 24.100(a)]** … may discharge or otherwise retaliate" against an employee. Mot. Dis. at 5, *citing* 29 C.F.R. § 24.102(a). As a tenant of 825 Stewart Drive (also referred to by the Parties as the TRW Microwave Superfund Site), Apple argues that it is neither an owner nor an operator subject to the provisions of CERCLA, nor is it any other "covered person" under the Act, as it neither has ownership of the site nor did it manage or actively participate in the operations of the facility during the period of environmental contamination. Mot. Dis. at 5-6, *citing U.S. v. Bestfoods*, 524 U.S. 51, 66-67 (1998); *Carson Harbor Vill., Ltd. V. Unocal Corp.*, 287 F. Supp. 2d 1118, 1194 (C.D. Cal. 2003). Northrup Grumman is, in fact, the statutorily defined responsible party. Mot. Dis. 3-4.

Gjovik asserts that Apple, as Gjovik's former Employer, is a "person" referenced under the employee protection provisions of the statute found at 42 U.S.C. § 9610, and further states that the U.S. Department of Labor's jurisdiction under the employee protection provisions "is not related to the U.S. EPA's jurisdiction over the Employer with respect to the subject matter of CERCLA." Am. Compl. ¶ 100. Gjovik additionally argues that the term "owner or operator" applies to Apple as a tenant under § 9601(20)(A), and the Superfund Site qualifies as a "facility" where "a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." Am. Compl. ¶ 107. In her statements detailing her communications with reporters, however, Gjovik notes that "Gjovik told Apple and the US EPA she was doing this, and US EPA even informed the Superfund responsible party, Northrup Grumman, providing them the name of the reporter." Am. Compl. ¶ 89.

In considering whether Apple is a "person" bound by the employee protection statutes of CERCLA, this Tribunal first notes that the Act defines a "person" as "an individual, firm,

corporation, association, partnership, consortium, joint venture, commercial entity, United States government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21). The Act further indicates that "covered persons" include not only previous owners and operators of a hazardous waste facility, but current owner and operators of said facilities. *Id.* § 9607(a)(1),(2). The Ninth Circuit has observed that the "circularity" of the definition of an owner and operator in § 9601(20)(A) as "any person owning or operating" a facility "renders it useless." *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp*, 976 F.2d 1338 (9th Cir. 1992). However, the Supreme Court has explained that "for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, 524 U.S. at 52.

Even accepting Gjovik's factual allegations as true and drawing all reasonable inferences therefrom, she has not alleged sufficient facts to find that Apple is an "operator" covered by the employee protection provisions of the Act. Gjovik asserts that after Apple made renovations in preparation for its tenancy of the Superfund Site, the U.S. EPA found "a number of issues including missing and compromised sub-slab vent ports, concerning slab penetrations, and toxic waste fumes being pipes into the HVAC system." Am. Compl. ¶ 108. However, the fact that Apple made renovations prior to occupying TRW Microwave does not lead to the inference that Apple's operations dealt with the "leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *See Bestfoods*, 524 U.S. at 52. Despite Gjovik's attempts to allege Apple should be found liable as the current "operator" of the Superfund Site, she herself acknowledges Northrup Grumman as the site's responsible party. Am. Compl. ¶ 89. Accordingly, this Tribunal finds that, under the Amended Complaint, Apple is not an employer or operator subject to the provisions of the Act. *See* 29 C.F.R. § 24.102(a).

Turning to the second argument in support of the Motion to Dismiss, Apple argues that Gjovik's alleged protected activity is not covered under CERCLA for two reasons: First, the Act concerns the remediation of environmental waste endangering the public and does not address hazards limited to a workplace. Second, complaints about a remediation plan already in effect are not protected activity. Mot. Dis. 7-10; Opp. Am. Compl. 17-18.

The Act states that the release of hazardous chemicals that CERCLA is concerned with purposefully "excludes … any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons." 42 U.S.C § 9601(22). The Board has explained that the purpose of CERCLA is the protection of the public health and the environment and, even if a workplace is located on a Superfund Site, when there are no allegations related to the release of hazardous substances beyond the workplace, CERCLA is not implicated. *See Devers v. Kaiser-Hill Co.*, ARB No. 03-113, PDF at 14-16 (ARB Mar. 31, 2005).

In her Amended Complaint, Gjovik asserts that she contacted her supervisors multiple times in 2021 with safety concerns about the Superfund Site at 825 Stewart Drive. Am. Compl. ¶¶ 79-82, 86. However, Gjovik's concerns relate entirely to the safety of her workplace and her belief she and other coworkers were potentially being exposed to toxic vapors within the

building. *See* Am. Compl. ¶¶ 25-54. Gjovik's only potential references to the exposure of the public in the Amended Complaint are in Paragraphs 83 and 143, which mention "contractors" or "visitors." However, both of these paragraphs have been stricken as unrelated to 825 Stewart Drive or otherwise unrelated to the Operative Complaint and Case Summary, as discussed above. Gjovik does not allege that any waste or vapors from 825 Stewart Drive affected the surrounding area.

Again, accepting Gjovik's factual allegations as true and drawing all reasonable inferences in her favor, Gjovik's activities concerning the safety of her workplace at 825 Stewart Drive as outlined in her Amended Complaint fall outside of the scope of CERCLA. *See Gross*, PDF at 5-6. Accordingly, this Tribunal need not further address whether Gjovik's safety complaints fall under the employee protection provisions of the Act.

Gjovik may have possible grievances against Apple, and she may have potential legal routes for pursuing remedies to them, but a whistleblower complaint under CERCLA is not one of them. The Amended Complaint here fails to state a claim as a matter of law.

For the foregoing reasons, the matter is **DISMISSED** for failure to state a claim upon which relief can be granted, 29 C.F.R. § 18.70(c), and the scheduled hearing is cancelled. All other pending motions filed by both Gjovik and Respondent are **DENIED AS MOOT**.

SO ORDERED.

JERRY R. DeMAIO
Administrative Law Judge

Boston, Massachusetts