



In the Matter of:

**DAVID MARSHALL HIGH,**  
**COMPLAINANT,**

v.

**LOCKHEED MARTIN ENERGY SYSTEMS,**  
**INC.,**

and

**LOCKHEED MARTIN CORPORATION,**  
**RESPONDENTS.**

**ARB CASE NO. 03-026**  
**(formerly ARB 98-075)**

**ALJ CASE NO. 96-CAA-8**

**DATE: September 29, 2004**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Edward A. Slavin, Jr., Esq., St. Augustine, Florida**

*For the Respondents:*

**Charles W. Van Beke, Esq., Wagner, Myers & Sanger, P.C., Knoxville, Tennessee**

**Kenneth M. Brown, Esq., Oak Ridge, Tennessee**

**FINAL DECISION AND ORDER OF DISMISSAL**

This matter is on appeal before us under the Energy Reorganization Act, 42 U.S.C.A. § 5851 (West 1995) (ERA). The Administrative Law Judge's Recommended Decision and Order (R. D. & O.) granted summary judgment for Lockheed. We adopt that recommendation with the modifications discussed below.

## FACTUAL AND PROCEDURAL HISTORY

David High was a physical training coordinator who supervised the physical training of security guards at Department of Energy (DOE) Facilities in Oak Ridge Tennessee. Lockheed Martin Energy Systems, Inc. was High's employer. Lockheed Martin Energy Systems, Inc. (Lockheed) was a wholly-owned subsidiary of Lockheed Martin Corporation and contracted with DOE to manage Oak Ridge, including providing security services. High complained that some security guards were not participating in a mandatory exercise program and asserted that, in retaliation for those complaints, Lockheed violated the ERA when, for instance, it allegedly gave him adverse performance appraisals and unequal pay, denied him promotions, and labeled him a troublemaker. R. D. & O. at 1-2.

High filed his Complaint with the Department of Labor (DOL) on December 12, 1995. After the Wage and Hour Division investigated and concluded that High's Complaint had no merit, he requested that an Administrative Law Judge review that decision. On July 9, 1997, Lockheed filed a motion to dismiss the complaint, and on January 29, 1998, the ALJ recommended dismissal. *High v. Lockheed Martin Energy Systems, Inc.*, 96-CAA-0008, slip op. at 4 (ALJ January 29, 1998).

On appeal to the Administrative Review Board (ARB or Board), the ARB on March 13, 2001, issued a Decision and Order of Remand. *High v. Lockheed Martin Energy Systems, Inc.*, ARB No. 98-075, ALJ No. 96-CAA-8 (ARB March 13, 2001). The Board dismissed High's claims arising under the whistleblower protection provisions of environmental acts.<sup>1</sup> *Id.* at 5. The ARB also dismissed all claims against DOE and the Oak Ridge Operations Office. *Id.* at 6.

However, the Board declined to dismiss the ERA claims against Lockheed Martin Energy Systems, Inc., and Lockheed Martin Corporation. Under the Atomic Energy Act of 1954, 42 U.S.C.A. § 2011 (West 2003) (AEA), DOE promulgated regulations governing the physical protection of security interests and establishing physical fitness standards for contractor security personnel at DOE facilities, such as Oak Ridge. See 10 C.F.R. § 1046.12 (2004).<sup>2</sup> Because the ERA provided employee whistleblower

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<sup>1</sup> The Clean Air Act, 42 U.S.C.A. § 7622 (West 1995) (CAA), the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 1998) (TSCA), the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9610 (West 1995) (CERCLA), the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 1995) (SWDA), and the Safe Drinking Water Act, 42 U.S.C.A. §§ 300j-9(I) (West 1991) (SDWA).

<sup>2</sup> 10 C.F.R. §1046.12 provides in pertinent part:

- (a) Each incumbent security police officer, who has not met the applicable physical fitness qualification standard, *shall*

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protection for employees alleging violations of Section 5851(a)(1) of the AEA, and its implementing regulations, the ARB determined that High's complaint that security guards were failing or refusing to participate in the mandated physical fitness program might constitute protected activity under the ERA. *High*, slip op. at 7. Accordingly, the Board remanded that portion of the complaint to the ALJ for resolution on the merits. *Id.* at 9.

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*participate in a DOE approved physical fitness training program.* Once an incumbent security police officer has begun a physical fitness training program, it must be completed before the security police officer may take the applicable physical fitness qualification standards test. Once a physical fitness training program is completed, an incumbent security police officer has thirty (30) days to meet the applicable physical fitness qualification standards.

(b) An incumbent security police officer who fails to qualify within thirty (30) days of completing a physical fitness training program *shall participate in an additional training program.* Upon completion of the additional physical fitness training program the security police officer has thirty (30) days to meet the applicable physical fitness qualification standard. No additional training or time extension to meet the standards is permitted except for unusual circumstances as set forth in appendix A to this subpart, paragraph G(2).

(c) A security police officer who fails to requalify within thirty (30) days after his or her yearly anniversary date of the initial qualification *shall participate in a physical fitness training program.* Security police officers have a maximum of six (6) months from the anniversary date to requalify.

(d) After his or her initial qualification, each incumbent security police officer *shall participate in a DOE-approved physical fitness training program on a continuing basis.* This training is for the purpose of ensuring that security police officers maintain the requisite physical fitness for effective job performance and to enable the individual security police officer to pass the applicable annual physical fitness requalification test without suffering any undue physical injury.

(Emphasis added).

On remand, the ALJ ruled: (1) Because High failed to submit discovery requests by a September 27, 2002 discovery deadline, he was not entitled to additional discovery and the ALJ could rule on Lockheed's pending motion for summary decision, R. D. & O. at 6; (2) Lockheed's motion for summary decision would be granted because High "fail[ed] to offer anything more than conjecture as to possible danger [to nuclear safety of physically unfit guards], . . . fail[ed] to allege a nexus between the expression of his concerns [about physical fitness] and retaliation by [Lockheed], and . . . fail[ed] to identify specific instances and dates of retaliatory measures taken against him," *id.* at 10; (3) without dates upon which the alleged adverse actions occurred, High did not prove that his complaint was timely filed within 180 days, *id.* at 12; and (4) because Lockheed Martin Energy Systems, Inc. was High's employer, Lockheed Martin Corporation, should be dismissed, *id.* at 12.

### ISSUE PRESENTED

We now consider whether Lockheed was entitled to summary decision.

### JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review the ALJ's recommended decision pursuant to 29 C.F.R. § 24.8 (2003) and Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases under the statutes listed in 29 C.F.R. § 24.1(a), including the whistleblower protection provisions of the ERA). *Demski v. Indiana Mich. Power Co.*, ARB No. 02-084, ALJ No. 01-ERA-36, slip op. at 3 (ARB Apr. 9, 2004); *Kelly v. Lambda Research, Inc.*, ARB No. 02-075, ALJ No. 2000-ERA-35, slip op. at 2 (ARB Mar. 31, 2004).

The ARB reviews an ALJ's limitation on the scope of discovery under an abuse of discretion standard. *Plumlee v. Corporate Express Delivery Sys., Inc.* ARB No. 99-052, ALJ No. 98-TSC-9, slip op at 4-5 (ARB June 8, 2001); *Hasan v. Burns & Roe Enters., Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op at 4 (ARB Jan. 30, 2001).

However, we review an ALJ's recommended grant of summary judgment (summary decision) under 29 C.F.R. § 18.40, 18.41, *de novo*. *Seetharaman v. General Elec. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-21, slip op. 3 (ARB May 28, 2004); *Demski*, slip op. at 3. Pursuant to 29 C.F.R. § 18.40(d), the ALJ may issue summary decision if the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *Seetharaman*, slip op. at 4, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Once the moving party has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. *Seetharaman*, slip op. at 4. At this stage of summary decision, the non-moving party may not rest upon mere allegations, speculation, or denials of the moving party's pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof. *Id.*, citing *Anderson*, 477 U.S. at 256; *see also* Fed. R. Civ. P. 56(e).

If the non-moving party fails to establish an element essential to his case, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” *Seetharaman*, slip op. at 4, quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Accordingly, the Board will affirm an ALJ’s recommendation that summary decision be granted if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact and that the ALJ correctly applied the relevant law. *Seetharaman*, slip op. at 4; *Demski*, slip op. at 3.

## DISCUSSION

We proceed to the issues that are dispositive of this case: High’s failure to submit timely discovery requests; the untimeliness of his ERA discrimination complaint; his failure to create genuine issues of material fact on his underlying claim of discrimination; and dismissal of Lockheed Martin Corporation as a respondent.

### 1. Discovery requests

High contends that the ALJ improperly denied him discovery. Complainant’s Opening Brief, at 2-3. The record is contrary. We adopt and summarize the ALJ’s findings. R. D. & O at 4-6.

High initially made discovery requests on September 4, 1996. Lockheed responded to the requests and interposed objections on December 30, 1996, and filed a motion for protective order on February 21, 1997. On June 19, 1997, the ALJ issued an order to High directing him to show cause why his Complaint should not be dismissed for failing to state a claim upon which relief could be granted. Lockheed filed a motion to dismiss on July 9, 1997. Although High responded to the show cause order, the ALJ issued a Recommended Decision and Order of Dismissal on January 29, 1998.

On March 13, 2001, the ARB dismissed High’s environmental whistleblower claims, but remanded the ERA claim. Thereafter, the case record was lost and had to be reconstructed. Although the ALJ had directed that the parties cease filing motions, High’s counsel filed a motion on March 20, 2001, to correct the list of counsel and service sheet and a motion on April 8, 2001, to compel answers to the September 1996 discovery.

The ALJ issued an order dated April 26, 2002, that, among other things, reopened discovery. A June 7, 2002 order set September 27, 2002, as the deadline for the completion of discovery. High’s counsel failed to serve or renew discovery requests. *Id.* On July 26, 2002, Lockheed filed a motion for summary decision with supporting documentation. On August 1, 2002, High filed a motion to strike and stay summary judgment, but no opposition to Lockheed’s underlying motion. Lockheed responded, and

on August 15, 2002, the ALJ issued an order to show cause why summary judgment for Lockheed should not be granted.

At High's request, the ALJ extended the time for response to September 30, 2002. After the deadline, on October 7, 2002, High's counsel requested a further extension, claiming he was unable to respond to the pending show cause order because he was awaiting rulings on his March 20, 2001, and April 8, 2001, motions to compel and for a protective order. R. D. & O. at 5, citing Complainant's Motion to Enlarge Time to Respond to Show Cause Order, at 1-2. Meanwhile, High's counsel still failed to file a substantive opposition to the motion for summary judgment or any further response to the show cause order.

On these facts and rulings, we find no unfair prejudice to High. High has not made clear how additional discovery from Lockheed would have avoided summary decision. We concur with the ALJ that the March 20, 2001 motion was unrelated to discovery and that the January 29, 1998 dismissal rendered discovery requests outstanding as of that time, if any, moot. Following remand from the ARB, when the ALJ reopened discovery, High did not avail himself of that opportunity. R. D. & O. at 6. Accordingly, we conclude that ALJ did not abuse his discretion. *Plumlee; Hasan.*

## **2. Timeliness of the Complaint**

The ALJ determined that summary decision was appropriate on High's allegations of retaliation because they were time-barred or not identified with sufficient specificity to find that they occurred within 180 days of the filing of his complaint. R. D. & O. at 11-12.

Under 42 U.S.C.A. § 5851(b)(1), "Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, *within 180 days after such violation occurs*, file . . . a complaint with the Secretary of Labor . . ." (Emphasis added). Additionally, 29 C.F.R. § 24.3(c) requires that "a complaint must be in writing and should include a full statement of the acts and omissions, *with pertinent dates*, which are believed to constitute the violation." (Emphasis added). Thus, a complaint must be filed within 180 days of a discriminatory act and it must state when the act occurred.

In its motion for summary decision, Lockheed attempted to scrutinize High's Complaint and reiterations of his allegations and identified putative acts of discrimination that were time-barred because they occurred more than 180 days before High's Complaint was filed. High claimed Lockheed or its employees: shouted at him; cut staff and resources in the physical fitness program; moved High's office; intimidated him; halted or impeded an investigation of the K-25 physical fitness program; warned him twice about his use of the email system; "downgraded" High's rating to CM or consistently meets energy systems' standards; told his friends that he was a troublemaker and not a team player; responded inadequately to High's complaints to the Ethics Office

and DOE; and denied his request for an upgrade in his job level. Memorandum in Support of Lockheed Martin Respondents' Motion for Summary Decision, at 39-60.

Lockheed submitted admissible evidence that these actions not only did not have tangible job consequences or were not motivated by High's complaints about security guards' failure to participate in physical training, but also that they occurred more than 180 days before he filed his Complaint. Under the summary decision procedure, the burden shifted to High to produce enough evidence to create a triable issue of fact regarding Lockheed's defenses. In other words, High had to submit facts-through affidavits, depositions, or other evidence-that refuted, disputed, or otherwise challenged Lockheed's proof. High submitted no affidavits or other documents in opposition to the Motion for Summary Decision or in response to the ALJ's show cause order. Therefore, Lockheed's facts are unopposed, and Lockheed is entitled to summary decision on the allegations of discrimination that were not timely filed. *Seetharaman*, slip op. at 6.

### **3. Merits of the Complaint**

We next address the merits of the remaining allegations in High's Complaint that Lockheed treated as timely filed. See Memorandum in Support of Lockheed Martin Respondents' Motion for Summary Decision, at 39-60.

To prevail under the ERA, a complainant must prove by a preponderance of the evidence that he was an employee who engaged in protected activity, that the employer knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action the employer took. 42 U.S.C.A. § 5851(b)(3)(C); *Demski*, slip op. at 3; *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 5-8 (Sept. 30, 2003). However, "[r]elief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior [i.e., the protected activity]." 42 U.S.C.A. § 5851(b)(3)(D); *Demski*, slip op. at 3; *Kester*, slip op. at 7.

We start with the question of protected activity. In remanding the ERA claim, the ARB suggested that High's contention that security guards were not fulfilling the requirements of the physical fitness program might be protected under the Act. Lockheed argued that High's complaints related to unprotected claims of waste, fraud, and abuse, and to unsafe working conditions, but were too remotely related to nuclear safety to be covered. See Memorandum in Support of Lockheed Martin Respondents' Motion for Summary Decision, at 8-28, 32-36. The ALJ granted summary judgment for Lockheed on that basis, and because High merely speculated that the security force would be unable to perform their duties in an emergency. R. D. & O. at 10.

We disagree. There is an obvious correlation between physically fit security guards and nuclear safety,<sup>3</sup> and High's expressions of concern did not have to be borne out later in catastrophe to have protected status. Accordingly, we hold that High at least raised the inference that he engaged in protected activity. It is unnecessary to rule on whether he preponderated on that element of his claim, because he has failed to rebut Lockheed's evidence that no adverse action was taken against him for engaging in that activity.

An adverse employment action does not encompass every decision that an employer makes that renders an employee unhappy. To be actionable, a decision must constitute a tangible employment action, for example a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 19 (ARB Feb. 28, 2003).

In Lockheed's Motion for Summary Decision, it identified the four supposed adverse actions that occurred within 180 days of High's Complaint: (1) Butch Clements allegedly raised his voice during a meeting that High attended; (2) someone opened a package addressed to High; (3) High was excluded from benchmark trips and meetings; and (4) High was forced to write a new physical fitness program with which he did not agree. Memorandum in Support of Lockheed Martin Respondents' Motion for Summary Decision, at 60-68. As to each, Lockheed proffered admissible evidence as to what actually occurred and how it resulted in no adverse action, i.e., no tangible job consequences, to High.

The record supports Lockheed's factual averments, and because High has not effectively opposed them, we adopt them as conceded. Neither High's Complaint nor his briefs to us, *see, e.g.*, Complainant's Opening Brief, satisfy his burden on summary decision. As we have said, allegations, bare denials, or speculative theories do not create a genuine issue of material fact that would entitle the non-moving party to an evidentiary hearing. *Seetharaman*, slip op. at 6. At summary decision, High must produce affidavits

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<sup>3</sup> For example, in background for issuing 10 C.F.R. Part 1046, DOE stated:

The threat of terrorist or other malevolent activities at sites where nuclear materials and weapons are located presents a real and present danger. DOE's protective force is the first line of human defense against terrorist or other assault on this Nation's nuclear facilities, weapons, materials, and technologies.

58 Fed. Reg. 45787-88 (Aug. 31, 1993).

or other admissible evidence that he suffered employment discrimination because of his safety complaints. Having failed to do so, Lockheed is entitled to summary decision.

#### **4. Dismissal of Lockheed Martin Corporation**

Finally, we address summary decision in favor of Lockheed Martin Corporation as a respondent.

An essential element of a whistleblower claim under the ERA is an employee-employer relationship between the complainant and the respondent. *Demski*, slip op. at 3. If the respondent is not the complainant's direct employer, the complainant must prove that the respondent exercised control over the terms, conditions, or privileges of his employment. *Seetharaman*, slip op. at 5; *Lewis v. Synagro Technologies, Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-12, 14, slip op. at 8 n.14, 9-10 (ARB Feb. 27, 2004). The ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is evidence of the requisite degree of control. *Seetharaman*, slip op. at 5; *Lewis*, slip op. at 7. The mere fact that a proposed respondent is the parent company of the complainant's employer is not. *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-12, slip op at 1, n.1 (ARB Apr. 8, 1997) (dismissing Martin Marietta Corporation and Martin Marietta Technologies on the ground that Lockheed Martin Energy Systems was immediate employer).

The undisputed facts are that Lockheed Martin Energy Systems, Inc. was a wholly-owned subsidiary of Lockheed Martin Corporation. Lockheed Martin Energy Systems, Inc. was High's employer. High has proffered no evidence to show that Lockheed Martin Corporation exercised control over his employment or caused adverse action to be taken against him. Memorandum in Support of Lockheed Martin Respondents' Motion for Summary Decision, at 68-69. Therefore Lockheed Martin Corporation is not a proper respondent and is dismissed from this case.

#### **CONCLUSION**

For the foregoing reasons, Lockheed is entitled to summary decision as a matter of law. Therefore, we **DISMISS** High's Complaint.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**