U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

SYED M.A. HASAN,	**ARB CASE NO. 00-028**
COMPLAINANT,	**ALJ CASE NO. 00-ERA-01**
v.	**DATE: December 29, 2000**

COMMONWEALTH EDISON CO.
AND THE ESTES GROUP, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:
For the Complainant:
Syed M.A. Hasan, *Pro Se, Madison, Alabama*

For the Respondent:
Burr Anderson, Esq., *Winston & Strawn, Washington, DC*

FINAL DECISION AND ORDER

I. INTRODUCTION

This case arises under the employee protection provisions of the Energy Reorganization Act ("ERA"), 42 U.S.C.A. §5851 (West 1995).[1/] This is the second complaint that Syed Hasan has filed against Respondents. In his first complaint, Hasan alleged that Respondents violated the employee protection provisions of the ERA by terminating his employment and refusing to re-employ him.[2/] The only

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[1/] The ERA prohibits an employer from discriminating against or otherwise taking unfavorable personnel action against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in protected whistleblowing activity.

[2/] *Hasan v. Commonwealth Edison and The Estes Group,* ARB Case No. 00-043, ALJ Case No. (continued...)

difference between the second complaint and the first is his assertion that he remains unemployed. The relevant facts follow.

In 1996, Respondent Commonwealth Edison Company ("ComEd") shut down one of the units in its Illinois nuclear plant so that the reactor fuel could be replaced. As part of its two-year effort to restart that part of the plant, ComEd obtained the temporary services of over 300 contract engineers from Respondent The Estes Group ("Estes"), a company that supplies temporary personnel to the nuclear power industry.[3/] Hasan, a civil design engineer, was among the engineers that Estes sent to ComEd on a temporary assignment. Hasan clearly understood that his assignment at ComEd was temporary and would end once the unit was ready to be restarted.

Shortly after arriving at ComEd, Hasan raised questions regarding the modeling assumptions for a pipe support connection and ComEd addressed those concerns. When it came time to restart the unit, ComEd released Hasan along with hundreds of other contract engineers. Hasan responded in April 1999 by filing an ERA whistleblower complaint with the Occupational Safety and Health Administration ("OSHA")[4/] against both ComEd and Estes alleging that the real reason for his termination, and subsequent inability to obtain further employment from either Respondent, was that he raised a concern regarding ComEd's pipe support connection. OSHA found no merit to his claim, and ultimately this Board agreed with that determination. *See Hasan I*.

While the Board was reviewing the ALJ's decision on Hasan's first complaint, Hasan filed the instant complaint in October 1999 essentially alleging that Respondents continue to violate the ERA by refusing to employ him. OSHA found no merit to the second complaint. Hasan objected to that determination and the matter was referred to an ALJ.

Once the matter was before the ALJ, both Respondents filed motions to dismiss asserting that the new complaint was merely a rehashing of the issues litigated in connection with the April 1999 complaint and, in any event, did not allege facts necessary to establish a *prima facie* case under a "refusal to hire" theory. The ALJ ordered Hasan to show cause why Respondents' motions should not be granted. After considering Hasan's response to the show cause order, the ALJ found that Hasan had not alleged facts sufficient to establish a *prima facie* case and, as a result, failed to state a viable claim. In the absence of a viable claim, the ALJ saw no need for discovery or an evidentiary hearing. Therefore, by Recommended Decision and Order issued January 10, 2000, the ALJ recommended that the Board dismiss Hasan's complaint. This appeal followed.

(...continued)
99-ERA-17, Fin. Dec. and Ord., December 28, 2000 ("*Hasan I*").

[3/] Estes maintains an employment relationship with a temporary worker only so long as that worker is on an assignment with an Estes contract employer. Once the assignment ends, the temporary worker's relationship with Estes is automatically severed and the worker is removed from its payroll. *See Hasan I*.

[4/] OSHA is the agency within the Department of Labor responsible for receiving and investigating such complaints. 29 C.F.R. §§29.3 and 29.4 (2000).

II. JURISDICTION

We have jurisdiction pursuant to 42 U.S.C.A. §5851 and 29 C.F.R. §24.8 (2000).

III. STANDARD OF REVIEW

Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions. *See* 5 U.S.C. §557(b) (West 1996). As a result, the Board is not bound by the conclusions of the ALJ, but retains complete freedom to review factual and legal findings *de novo*. *See Masek v. Cadle Co*., ARB Case No. 97-069, ALJ Case No. 95-WPC-1, Dec. and Ord., Apr. 28, 2000, slip op. at 7.

IV. DISCUSSION

Hasan, appearing *pro se*, has submitted a brief in opposition to the ALJ's recommended decision.[5/] However, Hasan's only substantive challenge to the ALJ's proposed disposition of this matter is his suggestion that dismissal would be contrary to the Secretary's earlier decision in *Studer v. Flowers Baking Company of Tenn., Inc*., Case No. 93-CAA-00011, Sec'y Dec. and Rem. Ord., June 19, 1995. According to Hasan, he would have been able to establish the facts in support of his claim if the ALJ had granted him discovery and an evidentiary hearing.[6/]

In *Studer*, the ALJ recommended that the complaint be dismissed on the ground that the complainant did not allege a discriminatory act that could possibly violate the employee protection provisions of the Clean Air Act, 42 U.S.C. §7622 (1988). The Secretary reasoned that a dismissal of this type was similar to one under Fed. R. Civ. P. 12 (b)(6), and looked to the federal courts for guidance as to the circumstances under which dismissal is appropriate. Relying on *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980), the Secretary held that such a dismissal is only appropriate when it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the complaint.

In order to prevail in an ERA whistleblower case, a complainant must prove that he engaged in protected conduct and that the employer took some adverse personnel action against him because of that protected conduct. *Carroll v. Bechtel Power Corp*., Case No. 91-ERA-46, Sec'y Fin. Dec. and Ord., Feb. 15, 1995 slip op. at 11, n.9, *aff'd sub nom Carroll v. Department of Labor,* 78 F.3d 352 (8th Cir. 1996). As an initial matter, the ERA requires that "[a]ny employee who believes that he has been discharged or otherwise discriminated against by any person in violation of [the ERA] file . . . a complaint with the Secretary of Labor . . . **alleging such discharge or discrimination**. 42 U.S.C. §5851(b)(1) (emphasis added). At a minimum, the complainant must allege the elements of a *prima facie* case, *i.e.* that: (1) the complainant engaged in protected conduct; (2) the employer was aware of that conduct; (3) the

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5/ Pro Se Complainant Syed M.A. Hasan's Initial Brief filed Feb. 14, 2000.

6/ Hasan's Initial Brief at 14.

employer took some adverse action against him; and (4) there is evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action. *Carroll, supra,* slip op. at 9, citing *Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec'y Dec., Apr. 25, 1983, slip op. at 7-8. *See also McCuistion v. TVA*, Case No. 89-ERA-6, Sec'y Dec., Nov. 13, 1991, slip op. at 5-6; *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983).

Assuming that Hasan satisfied elements one and two,[7/] he has not alleged the existence of any facts that would satisfy elements three and four. With regard to element three, the Secretary has previously determined that there are four factors that must be considered in determining whether a refusal to hire constitutes an adverse action. *Samodurov v. Niagara Mohawk Power Corp. and General Physics Corporation*, Case No. 89-ERA-20 Sec'y Dec. and Ord., Nov. 16, 1993.[8/] According to *Samodurov*, the complainant must show: 1) that he applied and qualified for a job for which the employer was seeking applicants; 2) that, despite his qualifications, he was rejected; and 3) that after his rejection, the position remained open.

In order to satisfy the *Samodurov* test, Hasan would have to allege at least that Respondents had a job opening for which he was qualified. Hasan did not do so. Having failed to allege the existence of facts that would satisfy that threshold requirement, he cannot satisfy any of the subsequent factors in the *Samodurov* test because all of those elements are contingent on the complainant establishing the first. Hasan has also failed to satisfy element four in that he has not alleged the existence of any facts whatsoever that would raise an inference that his protected activity was likely a contributing factor in Respondents' failure to respond to Hasan's unsolicited application. Indeed, as the ALJ points out, Hasan has done nothing more than simply allege that he submitted his resume to Respondents but remains unemployed. The ALJ found this naked allegation insufficient to support a claim of discrimination and so do we.

A complainant cannot simply "file a conclusory complaint not well-grounded in fact, conduct a fishing expedition for discovery, and only then amend the complaint in order to finally set forth well-pleaded allegations." *Oreman Sales v. Matshushita Elec. Corp.*, 768 F.Supp. 1174 (E.D. La. 1991). If the complainant fails to allege a *prima facie* case, the matter is subject to immediate dismissal. *See Lovermi v. Bell South Mobility, Inc.*, 962 F.Supp. 136 (S.D. Fla. 1997). Given Hasan's failure to allege a prima

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[7/] In *Hasan I*, Respondents stipulated that Hasan engaged in protected activity and that they knew about it.

[8/] These factors were first established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a case decided under Title VII of the Civil Rights Act of 1964. The Secretary's decision in *Samodurov* determined that the *McDonnell Douglas* factors were equally applicable in ERA cases.

facie case, we concur with the ALJ that the instant complaint should be dismissed.[9/]

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member

[9/] Hasan has raised a number of other arguments in this case. The Board finds those arguments without merit.