



In the Matter of:

SYED M.A. HASAN,

ARB CASE NO. 00-080

COMPLAINANT,

ALJ CASE NO. 2000-ERA-6

v.

DATE: January 30, 2001

BURNS & ROE ENTERPRISES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

Appearances:

For the Complainant:

Syed M.A. Hasan, *Pro se*, Madison, Alabama

For the Respondent:

Thomas A. Roberts, Esq.; Kevin L. O’Dea, Esq.; Michael Horner, Esq., *McGlinchey Stafford, New Orleans, Louisiana*

FINAL DECISION AND ORDER

INTRODUCTION

This case arises under the employee protection provisions of the Energy Reorganization Act (“ERA”), 42 U.S.C.A. §5851 (1992). 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.

Complainant Syed Hasan is a civil/structural engineer who worked for Respondent Burns and Roe Enterprises, Inc. (“B&R”) from 1974 to 1979. According to Hasan, he raised safety concerns during his employment with B&R and resigned shortly thereafter when his supervisor instructed him to follow existing procedures.^{2/}

^{1/} This appeal has been assigned to a panel of two Board members, as authorized by Secretary’s Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

^{2/} The supervisor is no longer employed by B&R and, to the best of B&R’s knowledge and information, may be deceased. ALJX-1 at 7. B&R’s attorney was unable to locate any employee who could remember (continued...)

Twenty years later, Hasan discovered that B&R was advertising for civil/structural engineers and decided to seek reemployment. Hasan forwarded his resume and cover letter to B&R on May 28, July 9, September 1, and November 2, 1999. In addition, on November 6, 1999,^{3/} Hasan wrote to B&R essentially announcing that he has a history of whistleblowing.^{4/}

After B&R decided not to hire him, Hasan filed an ERA whistleblower complaint with the Occupational Safety and Health Administration (“OSHA”), the agency within the Labor Department responsible for investigating such whistleblower allegations. Hasan alleged that B&R’s real reason for not employing him is because he is a whistleblower. When OSHA found no merit to his claim, Hasan objected to that determination and the matter was referred to an ALJ for disposition, as provided by 29 C.F.R. §24.4(d)(3) (2000).

The ALJ allowed the parties an opportunity to engage in discovery. Once the discovery process was complete, B&R filed a motion for summary judgment accompanied by an affidavit from Morton Rothstein, the B&R official who made the decision not to hire Hasan. B&R also asked the ALJ to impose sanctions under Rule 11 of the Federal Rules of Civil Procedure (“FRCP”) and require Hasan to pay attorney fees and costs incurred by B&R in defending a meritless complaint. Hasan responded by, among other things, filing a motion for default judgment. After considering all of the information submitted by both parties, the ALJ issued a Recommended Decision and Order on September 1, 2000 (“RD&O”), denying Hasan’s motion for default judgment, granting B&R’s motion for summary judgment, denying B&R’s motion for sanctions under FRCP Rule 11, and dismissing the complaint. Hasan filed this appeal.

JURISDICTION

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

^{2/}(...continued)
Hasan. *Id.* at 6.

^{3/} B&R received the letter on November 10, 1999.

^{4/} As the Administrative Law Judge (“ALJ”) noted below, Hasan has filed the following whistleblower complaints with the Department of Labor: *Hasan v. Commonwealth Edison Company and Estes Group, Inc.*, Case No. 2000-ERA-1, ARB Case No. 00-028 (Dec. 29, 2000); *Hasan v. System Energy Resources, Inc.*, Case No. 89-ERA-36 (Sec’y Dec. and Order, September 23, 1992); *Hasan v. Nuclear Power Services, Inc.*, Case No. 86-ERA-24 (Sec’y Dec. and Order, June 26, 1991); *Hasan v. Nuclear Power Services Inc.*, Case No. 86-ERA-36 (ALJ Dec. July 27, 1989); *Hasan v. Bechtel Power Corporation*, Case No. 93-ERA-40 (Sec’y Dec. and Order February 13, 1995); *Hasan v. Bechtel Power Corporation*, Case No. 93-ERA-22 (ALJ Dec. December 8, 1994); *Hasan v. Bechtel Power Corporation*, Case No. 94-ERA-21 (Sec’y Final Order Approving Settlement, March 16, 1995); *Hasan v. Bechtel Power Corporation*, Case No. 93-ERA-40 (ALJ Dec. Approving Settlement, December 9, 1994); *Hasan v. Intergraph Corp.*, Case No. 96-ERA-17, ARB Case No. 97-016 (Aug. 6, 1977); *Hasan v. Sargent & Lundy*, Case No. 96-ERA-27 (ALJ Dec. November 4, 1996).

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). 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.*, ALJ Case No. 95-WPC-1, ARB Case No. 97-069, slip op. at 7 (Apr. 28, 2000). However, the Board has held that ALJs have wide discretion to limit the scope of discovery and will be reversed only when such evidentiary rulings are arbitrary or an abuse of discretion. See *Robinson v. Martin Marietta Services, Inc.*, ALJ Case No. 94-TSC-0007; ARB Case No. 96-075, slip op. at 4 (Sept. 23, 1996).

DISCUSSION

Hasan, appearing *pro se*, raises two major issues in this appeal: (A) that the ALJ improperly limited the scope of discovery, and (B) that the ALJ erred when granting B&R's motion for summary judgment. For the reasons discussed below, we reject both of Hasan's arguments.

A. Whether the ALJ erred in limiting the scope of discovery.

Hasan asserts that the ALJ improperly limited the scope of discovery by not requiring B&R to produce a list containing the name, qualifications and experience of every civil/structural engineer it employs, regardless of location. We disagree.

Under the Secretary's Rules of Practice and Procedure, a party may obtain discovery only for "relevant" information and an ALJ may, upon motion of a party, "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including [a ruling that] . . . [c]ertain matters not relevant may not be inquired into or that the scope of discovery be limited to certain matters." 29 C.F.R. §§18.14(a) and 18.15(a) (2000). The Secretary's Rules also state "[t]he Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 C.F.R. §18.1(a).

The Secretary's Rules governing the scope of discovery are substantially the same as those of Fed. R. Civ. P. 26. In *Herbert v. Lando*, 441 U.S. 153 (1979), the Supreme Court noted that Fed. R. Civ. P. 26 gives district judges ample authority to prevent abuse of the discovery process and encouraged judges to use that authority when necessary. Specifically, the Court stated:

The Court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing litigants in civil trials But the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they "be construed to secure the just, *speedy*, and *inexpensive* determination of every action." (Emphasis added.) To this end, the requirement of Rule 26(b)(1) that the material sought in discovery be "relevant" should be firmly applied, and the district courts should not neglect their power

to restrict discovery where “justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense” Rule 26(c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.

Here, the ALJ was confronted with a broad discovery request from Hasan that B&R claimed was overly broad, unduly burdensome, and not reasonably calculated to produce relevant material. See ALJX-2, pp. 7-8. The ALJ rejected Hasan’s request stating:

No, Mr. Hasan, it’s not critical to have all the names of all structural engineers employed by Burns & Roe. I’ve limited that request to their corporate headquarters where the decisions were being made. Unless you can show me that someone else was participating in that decision not to hire you, then it would not – in my opinion, be relevant.^[5/]

ALJX-4, pp. 22-23.

Under the circumstances, we find that the ALJ acted within the scope of his authority by limiting discovery to relevant material, and that the ALJ’s ruling was neither arbitrary nor an abuse of discretion. Consequently, we leave it undisturbed.^{6/} See *Robinson, supra*.

B. Whether the ALJ erred in granting summary judgment to B&R.

Hasan also asserts that the ALJ erred in granting summary judgment to B&R, advancing several theories. Again, we disagree.

Part of Hasan’s challenge to the grant of summary judgment relates to the discovery issue just discussed. Citing *Duke v. University of Texas at El Paso*, 729 F.2d 994 (5th Cir. 1984), Hasan argues that summary judgment is inappropriate whenever the party opposing summary judgment has been denied information through discovery. In *Duke*, the plaintiff alleged that the respondent had discriminated against her based on gender and argued that the respondent’s explanations to the

^{5/} The ALJ explained to Hasan that knowledge on the part of a supervisor may be imputed to the company, but knowledge on the part of a non-supervisory employee is legally irrelevant. ALJX-1 at 67.

^{6/} In the proceedings before the ALJ, Hasan sought the names of every civil/structural engineer it employs so that he can identify those individuals who he believes were aware of his previous whistleblowing activity. ALJX-1 at 61. Hasan now asserts that he needs this information (as well as the employment history for each individual) so that he can establish that he has been a victim of disparate treatment. Hasan’s Initial Brief at p. 10. However, Hasan has not directed our attention to any instance in which he proffered a coherent argument to the ALJ regarding the issue of disparate treatment or explained how such an argument could be rationally advanced by obtaining a list of all civil/structural engineers employed by B&R. Inasmuch as Hasan has not demonstrated that he made this particular proffer to the ALJ, we cannot conclude that the ALJ erred in failing to consider it.

contrary were pretextual. The District Court denied plaintiff discovery into the practices of other university departments. The Fifth Circuit found that the plaintiff's ability to show that the respondent's explanations were pretextual was central to her discrimination claim and that, under those circumstances, failure to allow discovery university-wide constituted an abuse of discretion. However, the court in *Duke* did not decide that summary judgment is unavailable simply because the party opposing summary judgment has been denied discovery; Hasan's reliance on *Duke* is misplaced.

In addition, Hasan argues that the ALJ misapplied the standard for summary judgment. Based upon our review of the record, we conclude that the ALJ's grant of summary judgment was correct.

It is well-settled that, 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 Final Dec. and Ord., February 15, 1995, slip op. at 11, n.9, *aff'd sub nom. Carroll v. Dep't of Labor*, 78 F.3d 352 (8th Cir. 1996). To establish a *prima facie* case, a complainant must demonstrate, at a minimum, that: (1) the complainant engaged in protected conduct; (2) the employer was aware of that conduct; (3) the 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. Dec. April 25, 1983, slip op. at 7-8. See also *McCuiston v. TVA*, Case No. 89-ERA-6, Sec. Dec., November 13, 1991, slip op. at 5-6; *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983).

B&R moved for summary judgment on the grounds that Hasan had not satisfied any of the elements of a *prima facie* case. As part of its motion, B&R attached the affidavit of Morton Rothstein, chief engineer of B&R's civil/structural engineering department. According to his affidavit, Rothstein was the B&R management official who had received Hasan's resume from the company's human resources department and determined that the company was not interested in hiring him.

Significantly, Rothstein averred that his decision not to hire Hassan was made after reviewing Hasan's November 2 cover letter and resume, which – unlike Hasan's November 6 letter – did not include any indication that Hasan ever had engaged in whistleblowing activity. In his affidavit, Rothstein stated that he never saw Hasan's November 6, 1999 letter regarding his whistleblowing activities and, in fact, did not know any more about Hasan than Hasan disclosed in his earlier resume and cover letter. According to Rothstein, Hasan's resume did not interest him because: 1) Hasan did not have the professional engineer license required for a position as a senior civil/structural engineer; and 2) because B&R has not needed engineers with nuclear experience since 1986.^{7/} Thus the

^{7/} Hasan argues that B&R's advertisements do not state that a professional license is mandatory and that anyone with experience in the nuclear industry is capable of working in any other area of the power industry. Hasan's Initial Brief at 11. Although Hasan argues that the advertisements do not require a professional license, he does concede that the license is preferred. ALJX-1 at 19. However, B&R's actual
(continued...)

Rothstein affidavit was evidence that two threshold elements of the *prima facie* case had not been met, *i.e.*, that the B&R official who declined to hire Hasan did not have knowledge of Hasan's prior whistleblowing activity, and that the company's action was not made for a retaliatory purpose.

Motions for summary decision are governed by 29 C.F.R. §18.40. The standard for granting summary decision under §18.40 is essentially the same one used in Fed R. Civ. P. 56 – the rule governing summary judgment in the federal courts. Summary decision is appropriate under §18.40(d) if there is no genuine issue of material fact. A party opposing a motion for summary decision “may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing.” 29 C.F.R. §18.40(c). *See Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42, Sec'y Dec. July 17, 1995, slip op. at 4-6.

Pursuant to §18.40(d), the ALJ may issue summary judgment for either party “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court construed similar language under Fed. R. Civ. P. 56. In that case, the Court stated:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is “entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.”

Hasan points out that he submitted his own affidavit in opposition to the motion for summary judgment. According to Hasan, for the purposes of a motion for summary judgment, the ALJ was required to accept the statements in his affidavit as true. Hasan's argument is based on a mischaracterization of case law.

In ruling on a motion for summary judgment, the judge is required to draw all factual inferences in favor of, and take all factual assertions in light most favorable to, party opposing the motion. *Troy Chemical Corp. v. Teamsters Union Local No. 408*, 37 F.3d 123 (3d Cir. 1994).

²(...continued)

reasons for not hiring Hasan are germane only if Hasan can first establish the elements of a *prima facie* case. *See Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098 (10th Cir. 1998). In view of our ruling that Hasan has not established a *prima facie* case, we need not reach the question of whether B&R demonstrated that it would have taken the same unfavorable action in the absence of Hasan's protected behavior.

However, to defeat a motion for summary judgment, the non-moving party must still establish that there is a genuine issue of material fact and must do so through some means other than mere speculation or conjecture. See *Cablevision Sys. Corp. v. Town of East Hampton*, 862 F.Supp. 875 (E.D.N.Y. 1994), *aff'd*, 57 F.3d 1062 (2d Cir. 1995); *Boyer v. Board of County Comm'rs*, 922 F.Supp. 476 (D. Kan. 1996), *aff'd* 108 F.3d 1388 (10th Cir. 1997). In this case, Hasan's affidavit contained nothing more than his naked speculation regarding B&R's reasons for not hiring him, which carries no probative weight in summary judgment proceedings. As a result, the ALJ found that Hasan did not present any evidence, either direct or circumstantial, establishing B&R's knowledge of his whistleblowing activities or any nexus between his protected activities and B&R's decision not to hire him. RD&O at 7.^{8/}

There is no question that, if this case had gone to hearing, Hasan would have had the burden of proving the elements of a *prima facie* case. See *Dysert v. Sec'y of Labor*, 105 F.3d 607 (11th Cir. 1997). As noted above, the essential elements of a *prima facie* case include a showing that B&R was aware of whistleblowing activities and that his whistleblowing activities were a contributing factor in B&R's decision not to hire him. Hasan has not alleged the existence of facts sufficient to establish either element. As the Supreme Court has noted, where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matshushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). The record in this case shows that B&R was entitled to judgment as a matter of law, and this case therefore must be **DISMISSED.**^{9/}

SO ORDERED.

PAUL GREENBERG

Chair

RICHARD A. BEVERLY

Alternate Member

^{8/} Hasan takes issue with this finding arguing that B&R had to know about his whistleblowing activities because he disclosed them in his November 6, 1999 letter to the company. Hasan Initial Brief at 5. However, in his affidavit, Rothstein states that he did not see that letter prior to making his decision on whether to hire Hasan. Hasan offered nothing in rebuttal other than conjecture. Inasmuch as Rothstein was the official who decided not to hire Hasan, and considering that he made that decision without seeing Hasan's November 6th letter, we agree with the ALJ's finding on this issue.

^{9/} Hasan has raised a number of other arguments in this case. We have considered these arguments and conclude that they are without merit and do not warrant discussion.